16 November 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	Crim. App. No. S32330
Airman First Class (E-3) RICHARD K. PRICE, JR., USAF, *Appellant.*	)	USCA Dkt. No. 16-0611/AF

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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

ISSUE PRESENTED

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY FORCING APPELLANT TO ADMIT TO MISCONDUCT GREATER THAN WHAT WAS NECESSARY FOR A PROVIDENT PLEA.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ). This Honorable Court has jurisdiction to review this issue under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's statement of the case is generally accepted.

STATEMENT OF FACTS

Prior to his court-martial for drug use, drug possession with the intent to distribute, and drug distribution, Appellant agreed to a pretrial agreement (hereinafter "PTA") with the convening authority. (JA at 121-26.) In the PTA, Appellant agreed to plead guilty to all specifications. (JA at 121.) Appellant also acknowledged that he was waiving his right to a trial of the facts, his right to confront the witnesses against him, and his right "to avoid self-incrimination insofar as a plea of guilty will incriminate [him]." (JA at 122.)

In the PTA, Appellant also agreed to waive all waivable motions, and recognized that he could withdraw his plea at any time before sentence was announced. (JA at 122-23.) In exchange, the convening authority agreed to limit confinement to eight months if no bad conduct discharge was adjudged. (JA at 125.) In the event the court-martial adjudged a bad conduct discharge, the convening authority agreed to limit Appellant's sentence to confinement to four months. (JA at 125.)

At trial, in accordance with his agreement, Appellant pled guilty to wrongfully using cocaine and Alprazolam, otherwise known as Xanax, on divers occasions. (JA at 12.) He also pled guilty to possessing Alprazolam with the intent to distribute, to distributing cocaine and Alprazolam on divers occasions, and to distributing Codeine. (JA at 12.)

Prior to his guilty plea, the military judge advised Appellant that he was giving up "the right against self-incrimination; that is the right to say nothing at all." (JA at 13.) Appellant understood that by pleading guilty, he would no longer have this right. (JA at 14.) The military judge also informed Appellant that anything he admitted during the guilty plea inquiry may be used against him in the sentencing portion of trial. (JA at 14.)

When instructing Appellant on the specifications,[1] the military judge defined "divers" as meaning "on more than one occasion." (JA at 17, 25, 43.) Regarding Specification 1 specifically, Appellant began his guilty plea by admitting that he "used cocaine multiple times between 1 June 2014 and 10 December 14, primarily in June and July 2014." (JA at 19.) Appellant used the cocaine by rolling up a dollar bill and snorting it. (JA at 19.)

In a series of questions, the military judge clarified whether Appellant initially stated that most of his use was in June and July. (JA at 21.) Appellant confirmed, then admitted to using cocaine in October and August as well. (JA at 21.) When the military judge attempted to clarify just how many times Appellant had used during the charged timeframe, the following exchange took place:

> MJ: How many total times do you believe that you used cocaine?

[1] Prior to engaging in the guilty plea inquiry, the parties made minor modifications to Specifications 3 and 6, extending the charged timeframes. (JA. at 16.)

> DC: Sir, I don't believe that he has to answer that question in order to plead guilty for this offense.
>
> MJ: I believe that he does. How many times did you use the cocaine?
>
> [APP]: [Conferring with counsel.] Six times, Your Honor.

(JA at 21.) The military judge also asked Appellant how much cocaine he used on each occasion, to which Appellant replied "at or below one gram…." (JA at 22.)

In pleading to Specification 2, Appellant admitted that he used Alprazolam "multiple times between 1 June 2014 and 10 December 2014…." (JA at 27.) Appellant stated that he used the drug to reduce his anxiety and was self-medicating. (JA at 27.) When clarifying how many times Appellant used the drug, the following dialogue took place:

> MJ: When did you use it? Was it every month during the charged timeframe? Was there a particular period of time?
>
> DC: Your Honor, I'm sorry, I think we're going to do this a few more times but I just want to put my objection on the record. The government has charged divers use, meaning two or more times. My client has said he used it multiple times, meaning two or more times. By getting into specifics as to how often he used the court is forcing him to give up evidence in aggravation which is the government's responsibility to provide the court. I understand that there's a difference of opinion here. I'm just going to put the objection on the record.
>
> MJ: Understood, but what I asked was when did he use it specifically.

> DC: No, I understand, but part of the question though, sir, was, was it each month and so if he answered, yes, it was each month then I think we would be up to seven at least.
>
> MJ: When did you use the Alprazolam?
>
> [APP]: [Conferring with counsel.] It was between June 1st and to the beginning of November.
>
> MJ: And you said it was on more than one occasion. How many times was it?
>
> [APP]: [Conferring with counsel.] Your Honor, truthfully, I'm not sure of an exact number but I would go with saying that on a weekly basis it would be between 1 to 3 times a week.
>
> MJ: Even though you're not sure of the number, it was on more than one occasion though?
>
> [APP]: Yes, sir.

(JA at 28-29.)

After pleading guilty under Specification 3 to possessing Alprazolam with the intent to distribute it to another Airman, Appellant explained to the military judge how he also distributed cocaine to that Airman on divers occasions. (JA at 37-38, 45.) Appellant told the military judge that he "distributed cocaine to [SrA ID] at least two times between the 1st of June 2014 and 10 December 2014…." (JA at 45.) Appellant told the military judge that SrA ID paid him money for the

drug. (JA at 46.) When clarifying the number of times Appellant distributed cocaine, the following exchange occurred:

> MJ: Do you know how much you gave him on these instances?
>
> [APP]: At times it would be between 1 gram to, at most, I think like 2 grams at most, never a large amount.
>
> MJ: How many times did this occur? You're standing, objection is noted.
>
> DC: The same objection as I've placed before, thank you, Your Honor.
>
> [APP]: [Conferring with counsel.] At about six times I distributed cocaine to him. Not all times I had used the cocaine. Other times I had gone to get Xanax and he was aware of that and instead of requesting Xanax he would ask for cocaine. I did not try the cocaine at that time, and all of that's between June and July.

(JA at 47.)

When pleading to Specification 5, Appellant volunteered to the military judge that he distributed Alprazolam to SrA ID "at least three times between 1 June 2014 and 10 December 2014 …." (JA at 51.) He informed the military judge that with each exchange, SrA ID paid Appellant money. (JA at 52.) As Appellant did not specify when each of the three drug distributions occurred, the military judge had Appellant clarify. (JA at 52-53.)

In discussing his distribution of Codeine, charged under Specification 6, Appellant told the military judge that he "distributed Codeine to [SrA ID] one time

between approximately October and November 2014." (JA at 58.) Appellant told the military judge that SrA ID asked Appellant if he could have his properly proscribed Codeine cough syrup. (JA at 58.) Appellant "told [SrA ID] he could have it, and later gave it to him." (JA at 58.) The military judge asked if Appellant just gave the Codeine cough syrup to SrA ID or sold it to him. (JA at 60.) The following conversation followed:

> DC: Your Honor, I don't believe that he needs to answer that question in order to plead guilty to this offense.
>
> MJ: Was there a sale or was it that you just gave it to him?
>
> [APP]: [Conferring with counsel.] I sold the Codeine to [SrA ID].

(JA at 60.)

After questioning Appellant about each specification, the military judge advised Appellant of the maximum sentence possible based on his pleas. (JA at 62.) The military judge then confirmed that Appellant understood and voluntarily agreed to his PTA. (JA at 63-76.) This included Appellant's understanding that he could withdraw from his guilty plea at any time before sentence. (JA at 73.)

After stating under oath that he understood his PTA, Appellant acknowledged that he had the legal and moral right to plead not guilty, and to force the government to prove his guilt beyond a reasonable doubt. (JA at 77-78.) After being given a moment of reflection by the military judge, and conferring with

counsel, Appellant reinforced his intent to plead guilty. (JA at 78.) Prior to finding Appellant guilty of all specifications, the military judge advised Appellant that could request to withdraw his plea any time prior to announcement of sentence. (JA at 78-79.)

In presentencing proceedings, Appellant gave an unsworn statement. (JA at 98-102.) In it, Appellant stated that he had "been using cocaine and Xanax for the latter part of 2014." (JA at 98.) Appellant claimed that did not use cocaine often, but alluded to regularly using Alprazolam to feed his addiction. (JA at 98, 100-01.) Appellant explained how forgoing the use of Alprazolam for even a few weeks was difficult. (JA at 98-99.) Appellant also stated that he was not a drug dealer, he was just "giving [his] friend the drugs." (JA at 101.)

During sentencing argument, trial counsel argued that the military judge should sentence Appellant to the maximum sentence of 12 months of confinement, a bad conduct discharge, reduction to E-1, and forfeiture of two-thirds pay per month for 12 months. (JA at 102-03.) Trial counsel discussed how Appellant used drugs multiple times. (JA at 103.) Trial counsel also focused his argument on Appellant's drug distribution, highlighting that Appellant was a drug distributor who provided drugs to another Airman. (JA at 101.) During argument, trial counsel identified that Appellant admitted during the plea inquiry to using cocaine six times and Alprazolam up to three times per week. (JA at 103-04.)

Ultimately, the military judge sentenced Appellant to reduction to the grade of E-1, confinement for 4 months, and a bad conduct discharge. (JA at 118.) Because the military judge's sentence matched the confinement limitation agreed to by Appellant, the military judge found that the convening authority could approve the sentence as adjudged. (JA at 119.) On 21 July 2015, the convening authority approved the sentence as adjudged. (JA at 135.)

On appeal, AFCCA found that the military judge did not abuse his discretion in questioning Appellant, as his questions "were appropriate in determining whether Appellant's use and distribution of various controlled substances on 'divers' occasions was provident." (JA at 3.) AFCCA also found that the military judge had not violated Appellant's rights against self-incrimination, as Appellant waived those rights when he pled guilty. (JA at 3.) AFCCA found that the "military judge's questions were limited to the charged time frame, and as such, ensured jeopardy attached to all of Appellant's admissions." (JA at 3.) As a result, AFCCA affirmed the findings and sentence in Appellant's case. (JA at 6.)

SUMMARY OF THE ARGUMENT

Even if Appellant did not waive the granted issue by answering the military judge's questions and failing to withdraw his guilty plea, the military judge did not abuse his discretion and AFCCA did not err in denying Appellant relief. As part of his voluntary guilty plea, Appellant waived his rights against self-incrimination.

The military judge's questions directly pertained to the facts underlying the elements of the charged acts, and clarified generic and non-specific admissions.

Additionally, Appellant's newly raised issue of impartiality of the military judge is either outside the scope of the granted issue or waived. Even if this Court substantively considers this issue, no reasonable person would consider the military judge's questions as evidence of impartiality, as best demonstrated by Appellant's failure to move for disqualification at trial. Even if the military judge's questions did constitute an abuse of discretion, any error was harmless beyond a reasonable doubt.

ARGUMENT

EVEN IF APPELLANT DID NOT WAIVE THE GRANTED ISSUE, THE MILITARY JUDGE'S QUESTIONS DO NOT AMOUNT TO AN ABUSE OF DISCRETION. FURTHERMORE, AS THE MILITARY JUDGE'S QUESTIONS ELICITED THE FACTUAL BASIS FOR CHARGED CONDUCT, NO REASONABLE PERSON WOULD CONCLUDE THAT THE MILITARY JUDGE'S IMPARTIALITY MIGHT REASONABLY BE QUESTIONED. FINALLY, ANY ALLEGED ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

Standard of Review

"A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion." 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)). A military

judge abuses his discretion if he fails to obtain from the accused an adequate factual basis to support the plea. United States v. Nance, 67 M.J. 362, 365 (C.A.A.F. 2009).

Law and Analysis

In a guilty plea case, a military judge has the duty to conduct a detailed inquiry into the factual circumstances supporting an accused's pleas. United States v. Perron, 58 M.J. 78, 82 (C.A.A.F. 2003) (citing United States v. Care, 18 U.S.C.M.A. 535, 541-42 (C.M.A. 1969)). A military judge is given significant deference when undertaking that task. *See* Nance, 67 M.J. at 365 (quoting Inabinette, 66 M.J. at 322).

Appellant unconvincingly attempts to characterize the purpose of the military judge's questions in this case as the elicitation of aggravation evidence. (App. Br. at 7, 11, 13.) In actuality, the military judge's questions elicited factual circumstances directly underlying the charged offenses, and clarified Appellant's generic and non-specific admissions. Appellant has not provided this Court with, and undersigned counsel has been unable to uncover, a single case where a military judge was determined to have abused his or her discretion during a providency inquiry by eliciting too many facts and circumstances directly involving the charged offenses. Appellant's claim for relief in this case must be denied.

1) By answering the military judge's questions and not withdrawing his guilty plea, Appellant waived the granted issue.

When an appellant intentionally waives a challenge, it is extinguished and may not be raised on appeal. United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009). Recently, this Court reaffirmed this principle when it held "[w]hen an error is waived ... the result is that there is no error at all and an appellate court is without authority to reverse a conviction on that basis." United States v. Chin, 75 M.J. 220, 222 (C.A.A.F. 2016) (quoting United States v. Weathers, 186 F.3d 948, 955 (D.C. Cir. 1999)). Whereas forfeiture is a failure to assert a right in a timely fashion, waiver is "the 'intentional relinquishment or abandonment of a known right.'" Gladue, 67 M.J. at 313 (quoting United States v. Olano, 507 U.S. 725, 733 (1993) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

An appellant can waive issues that involve "many of the most fundamental protections afforded by the constitution." Gladue, 67 M.J. at 314 (quoting United States v. Mezzanatto, 513 U.S. 196, 201 (1995)). This includes issues involving an appellant's right against self-incrimination. *See* United States v. Hinojosa, 33 M.J. 353 (C.M.A. 1991) (finding a subsequent unconditional guilty plea foreclosed relief on a motion to suppress); *see also* Mil. R. Evid. 304(f)(8).

In this case, Appellant knowingly relinquished his right against self-incrimination as to the charged offenses. *See* Care, 18 U.S.C.M.A. at 538. Appellant acknowledged this waiver in his PTA and during his court-martial. (JA

at 13-14, 122.) Although he resisted or objected to the questions from the military judge now at issue, Appellant went on to answer them. (JA at 21, 28-29, 47, 60.)

Most importantly, Appellant continued with his guilty plea, and with the military judge as the sentencing authority, despite being advised that he could move to withdraw his plea at any time before sentence was announced. (JA at 78, 123.) As AFCCA observed, Appellant "could have either withdrawn his guilty plea or refused to answer the military judge's questions deemed objectionable – a tactic that would certainly increase the likelihood that the military judge would not accept his plea." (JA at 4.)

By answering the military judge's questions and failing to withdraw from his guilty plea, Appellant "knowingly abandoned" his right to remain silent and chose the military judge as his sentencing authority. As such, Appellant waived any challenge relating to the propriety of the questions asked by the military judge during the providency inquiry. This Court should find this challenge waived, deny Appellant's claim for relief, and affirm the findings and sentence in this case.

2) Even if Appellant did not waive the granted issue, the military judge did not abuse his discretion, as his questions elicited factual circumstances of charged conduct and clarified Appellant's generic and non-specific admissions.

Should this Court conclude waiver did not occur, Appellant cannot demonstrate that the military judge abused his discretion. The United States contends that because the military judge's questions elicited factual circumstances

of the charged offenses, error does not exist. Alternatively, even if this Court takes a more narrow view of a military judge's duties during a providency inquiry, the military judge still did not abuse his discretion, as his questions clarified generic and non-specific admissions made by Appellant.

Appellant is asking this Court to find that the military judge's questions during the providency inquiry, which elicited the factual basis of the charged offenses and their elements, constitute error because they compelled Appellant to admit to facts "greater than what was necessary to establish a provident plea to the charged offenses." (App. Br. at 7.) Instead of allowing military judges the discretion to develop the predicate facts of a guilty plea and to encourage an accused to speak freely, Appellant seeks to create a new legal confine to a military judge's duty during the providency inquiry. He is asking this Court to hold that a military judge must elicit the factual predicate behind an accused's pleas, but only those facts which are later to be determined barely necessary. Appellant's position contravenes the law and policy behind the military judge's responsibilities during the providency inquiry.

According to Article 45, UCMJ, 10 U.S.C. § 845, a court cannot accept a plea if an accused "makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or

if he fails or refuses to plead." In United States v. Chancelor, 36 C.M.R. 453 (C.M.A. 1966), this Court examined the legislative history of Article 45, UCMJ. This Court determined that Congress intended the implementation of certain safeguards when a court-martial accepts a plea. Id. at 455-56. These safeguards included explanation of the elements of an offense and factual admission by the accused of the acts charged. Id. This Court then recommended the services mandate an inquiry that incorporated those procedures. Id. at 456.

In Care, this Court expounded upon Chancelor, reemphasizing that when an accused pleads guilty, the court must inform him that a plea of guilty waives his right to a trial on the facts, his right to confront witnesses, and his right against self-incrimination. Care, 18 U.S.C.M.A. at 541. This Court also required that when an accused pleads guilty, he must be questioned about what "he did or did not do, and what he intended (where this is pertinent), to make clear the basis for a determination by the military trial judge or president whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty." Id. Ultimately, this Court's decision "imposed an affirmative duty on military judges, during providence inquiries, to conduct a *detailed inquiry* into the offenses charged, the accused's understanding of the elements of each offense, the accused's conduct, and the accused's willingness to plead guilty." Perron, 58 M.J. at 82 (citing Care, 18 C.M.A. at 541-42) (emphasis added).

R.C.M. 910(e) has codified the procedures directed by Care. United States v. Sweet, 42 M.J. 183, 185 (C.A.A.F. 1995). According to that Rule, a military judge cannot accept a plea without "making such inquiry of the accused as shall *satisfy the military judge* that there is a factual basis for the plea. The accused shall be questioned under oath about the offenses." R.C.M. 910(e) (emphasis added). Such an inquiry exists "[t]o guard against improvident pleas under Article 45, [UCMJ]." United States v. Jordan, 57 M.J. 236, 238 (C.A.A.F. 2002).

In United States v. Holt, 27 M.J. 57 (C.M.A. 1988), this Court considered whether admissions made in a providency inquiry could be considered in sentencing. This Court began its decision by considering the development of military providency inquiry practice. Id. at 58-59. This Court first noted that because a plea cannot be accepted unless a factual basis exists, it is important an accused "speak freely so that a factual basis will be clearly established in the record." Id.; *see also* United States v. Negron, 60 M.J. 136, 143 (C.A.A.F. 2004).

Because of the importance placed on an accused speaking freely during the providency inquiry, until 1984, the practice was to avoid placing an accused under oath. Holt, 27 M.J. at 58. In 1984, the Manual for Courts-Martial, specifically R.C.M. 910(e), was modified to require an accused pleading guilty be placed under oath. Holt 27 M.J. at 58-59. The purpose of the modification was to "reduce the likelihood of later attacks on the providence of the plea." Id. at 59 (quoting

Manual for Courts-Martial, United States, 1984, A21-53).

After identifying the sworn nature of an accused's admissions during the providency inquiry, this Court identified that an appellant waives his rights against self-incrimination, and is made aware that his statements will be used by the military judge for a finding of guilt. Holt, 27 M.J. at 59. Thus, this Court reasoned that the accused is on notice that his answers will be used against him, so the use of his sworn admissions in sentencing does not cut against any reasonable expectation of the accused. Id. This Court then quickly dispelled with any notion that use of such admissions in sentencing would "deter the free flow of information during the providence inquiry…which is important in establishing a factual basis for the guilty pleas." Id. Accordingly, this Court held that sworn admissions made during the providency inquiry can be admissible for sentencing purposes. Id. at 60.

That said, this Court identified limits, holding that "waiver of the privilege against self-incrimination which is involved in a plea of guilty is not unlimited and that, without his consent, an accused could not be questioned during the sentencing proceedings concerning a prior nonjudicial punishment." Id. at 59 (quoting United States v. Sauer, 15 M.J. 113 (C.M.A. 1983)). This Court further indicated that the military judge should not inquire into uncharged misconduct "not closely connected" to the charge offenses. Id. at 60. The accused's waiver of his right against self-incrimination would not cover such questioning, and if inquired into,

such testimony should be not be received upon defense objection or in sentencing. Id.

Ultimately, this Court recognized that "[u]nless the military judge has *ranged far afield* during the providence inquiry, the accused's sworn testimony will provide evidence 'directly relating to' the offenses to which he has pleaded guilty." Id. (emphasis added). In United States v. Irwin, 42 M.J. 479 (C.A.A.F. 1995), this Court reaffirmed Holt. In Irwin, this Court held that the appellant's answers during the providence inquiry, "did not 'range[] far afield' but, instead, were relevant as they directly described circumstances surrounding the offenses without venturing into unrelated matters…." Irwin, 42 M.J. at 482 (alterations in original).

Whereas Holt and Irwin pertained to the use in sentencing of admissions made during the providency inquiry, this Court's decision in Sauer addressed an entirely different issue – whether the military judge erred by questioning an appellant in presentencing proceedings. At trial in Sauer, the military judge questioned the appellant to satisfy the admissibility of a prior nonjudical punishment being offered by the government. Sauer, 15 M.J. at 114. This Court, citing to Estelle v. Smith, 451 U.S. 454 (1981), found that the Fifth Amendment right against self-incrimination "forbids a scenario where in an accused is coerced by a judge to provide information that will increase his sentence." Sauer, 15 M.J. at 117. Consequently, this Court found that the military judge erred in questioning

the appellant during presentencing proceedings. Id. at 114.

Similarly, in United States v. Cowles, 16 M.J. 467 (C.M.A. 1983), the military judge questioned the appellant during presentencing proceedings to establish the foundation for a prior nonjudicial punishment. Cowles, 16 M.J. at 468. Unlike in Sauer, however, the appellant in Cowles pleaded guilty. Id. at 468. In reviewing the military judge's actions, this Court recognized that a plea of guilty implicitly waives an accused's privilege against self-incrimination on matters relating to his guilt. Id. However, given the bifurcated nature of court-martial proceedings, this Court found that such waiver only applied as to findings. Id. Accordingly, as it did in Sauer, this Court determined that the appellant retained his right against self-incrimination in the presentencing phase, and found error. Id.

In further developing the principles guiding providency inquiries, this Court has reaffirmed that a military judge is tasked with verifying "whether there is an adequate basis in law and fact to support the plea…." Inabinette, 66 M.J. at 321. He or she "must elicit 'factual circumstances as revealed by the accused himself [that] objectively support that plea[.]'" Jordan, 57 M.J. at 238 (quoting United States v. Davenport, 9 M.J. 364, 367 (C.M.A. 1980)) (alterations in original). The military judge must elicit actual facts, as eliciting legal conclusions from an accused is not enough. Jordan, 57 M.J. at 238. This Court has "repeatedly advised against and cautioned judges regarding the use of conclusions and leading

questions that merely extract from an accused 'yes' and 'no' responses during the providency inquiry." Negron, 60 M.J. at 143.

The importance of establishing enough of a factual predicate for a plea cannot be overstated. A military judge's failure to ensure an accused's admissions clearly establish every element of the charged offenses will result in the plea being set-aside. United States v. Weeks, 71 M.J. 44, 46 (C.A.A.F. 2012). In fact, this Court has found guilty pleas "fatally deficient" due to "questioning that extracts little relevant factual information from an accused to establish his offense and to support the guilty plea." Negron, 60 M.J. at 143. On the other hand, undersigned counsel has not uncovered any case where a military judge was determined to have abused his or her discretion during a providency inquiry by eliciting too many facts and circumstances directly involving the charged offenses.

Appellant argues that the military judge's questions now being challenged "certainly did not serve a neutral purpose; they were not required to establish a factual or legal basis for Appellant's guilty plea, and elicited only aggravating information." (App. Br. at 13.) Despite Appellant's characterization, the questions and resulting answers provided facts and circumstances supporting the charged offenses and their elements. As Appellant was charged with "divers" use and distribution, the specifications captured each use and distribution occurring during the charged time frames. (JA at 7-9.) Similarly, the manner in which

Appellant transferred possession of Codeine, whether it be through sale or gift, establishes the factual basis explaining how possession was delivered to another.

The military judge's questions did not "range far afield" from the charged conduct, but instead were directly related to it. *See* Holt, 27 M.J. at 59; Irwin, 42 M.J. at 482. Furthermore, the military judge's questions did not concern uncharged misconduct, much less unrelated uncharged misconduct. *See* Holt, 27 M.J. at 59. Neither did the military judge's questions concern facts inapplicable to Appellant's guilt such as follow-on victim impact. *See, e.g.*, United States v. Miller, 23 M.J. 837 (C.G.C.M.R. 1987) (finding error where a military judge questioned an appellant during the providency inquiry about whether he would travel with local law enforcement to identify a drug supplier). As the questions occurred during the providency inquiry, when Appellant's waiver of his rights against self-incrimination was applicable, the decisions in Sauer and Cowles are inapposite.

In sum, the military judge's questions in this case elicited factual circumstances underlying Appellant's pleas to the charged offenses. As such, the military judge's questions, and resulting answers, fell within Appellant's waiver of his rights against self-incrimination and complied with the law and boundaries applicable to the providency inquiry. Accordingly, the military judge did not abuse his discretion, and Appellant's claim for relief must be denied.

Even taking a more narrow view of the military judge's duties during a providency inquiry, the military judge still did not abuse his discretion. As an initial note, Appellant attempts to frame this issue as a potential error of law, seemingly arguing that the military judge asked these questions for strictly sentencing purposes. (App. Br. at 9.) He supports this argument by contending that the military judge did not explain the purpose of his questions. (App. Br. at 11.) Appellant's contention is contradicted by the record.

In response to defense counsel's protest that the number of times Appellant snorted cocaine was not necessary for him to plead guilty to the offense, the military judge responded that he believed that Appellant did need to answer the question in order to plead guilty. (JA at 21.)[2] In other words, the military judge asserted on the record that he considered the question he asked necessary to establishing a factual predicate for the plea. Given the similarity in the rest of the questions Appellant now challenges, it is reasonable to assume the purpose behind those questions was the same. There is no indication otherwise, and military judges are presumed to know the law and follow it. United States v. Rapert, 75 M.J. 164, 170 (C.A.A.F. 2016) (quoting United States v. Erickson, 65 M.J. 221,

[2] Trial defense counsel stated, "Sir, I don't believe that he has to answer that question in order to plead guilty for this offense." (JA at 21.) The military judge responded, "I believe that he does. How many times did you use the cocaine?" (JA at 21.)

225 (C.A.A.F. 2007)). As the granted issue in this case indicates, the question of whether the military judge's questions during the providency inquiry were improper is reviewed for an abuse of discretion.

Addressing the challenged questions individually, even if this Court takes a more narrow view of the role of a military judge during a providency inquiry than the one advanced by the United States above, the military judge's questions still do not amount to an abuse of discretion. AFCCA correctly described Appellant's initial admissions regarding the number of times he used and distributed drugs as "generic" and "non-specific."[3] (JA at 3.) By asking the questions he did, the military judge ensured Appellant clarified his generic and non-specific statements. The military judge's question concerning Appellant's distribution of Codeine accomplished the same. The questions were necessary to elicit actual factual circumstances objectively supporting Appellant's plea to divers use and distribution, and his distribution of Codeine.

Concerning Specification 1 specifically, Appellant vaguely stated that he used cocaine "multiple times," primarily in June and July 2014. (JA at 19.) Not only is this a non-specific admission, it is an indication from Appellant that he also used outside of the June and July timeframe. The military judge following up for

[3] As Appellant did not argue at AFCCA that the military judge erred by questioning Appellant about whether he sold the Codeine cough syrup, the Court did not address it. (JA at 2-4.)

factual circumstances behind these other uses, and what Appellant specifically meant by multiple, is not error. This is no different than a military judge following up with an accused on how exactly he knew the drug he used was cocaine, despite the accused admitting "I used cocaine." *See* (JA at 19-20).

Similarly, during the inquiry into Specification 2, Appellant stated that he used Alprazolam "multiple times" during the entire charged timeframe. (JA at 27.) Once again, the military judge was required to clarify. Whether Appellant said "divers" or the equivalent statement "multiple," the military judge is expected to conduct a thorough inquiry and not just accept legal conclusions or one-word answers. *See* Jordan, 57 M.J. at 238; Negron, 60 M.J. at 143.

Further supporting the military judge's decision to clarify Appellant's use of Alprazolam are Appellant's later admissions suggesting he used Alprazolam more than two or three times. For instance, Appellant suggested that his use of Alprazolam was significant enough to lead to an addiction. (JA at 29, 95.) Appellant also discussed other use of Alprazolam when admitting to his correlating possession and distribution of that drug. (JA at 34, 49.) The military judge's questions not only clarified the who, what, where, when, how for Appellant's "divers" use of Alprazolam, it ultimately avoided any concern of Appellant setting up a matter inconsistent with his pleas.

In admitting to Specification 4, Appellant stated he distributed cocaine "at

least two times." (JA at 42.) In stating as much, Appellant vaguely admitted to more than two uses. The military judge did not abuse his discretion by further inquiring into those additional distributions to establish a factual basis. Also supporting the military judge's decision is that this line of questioning eventually led to the military judge determining how Appellant knew the substance he was distributing was cocaine on the occasions where he distributed the drug without using any himself. (JA at 45.)

Finally, in pleading to Specification 6, Appellant stated that he "gave" SrA ID Codeine cough syrup, by personally handing it to him. (JA at 58.) Once again, Appellant provided little detail to this transaction, but instead supplied a generic or non-specific admission. The resulting factual admissions gathered by the military judge's questions necessarily established the who, what, where, when, and how of Appellant's offense. Specifically, the question ascertained the factual circumstances behind how Appellant transferred possession of Codeine.

Further supporting the military judge are Appellant's previous admissions that he had sold cocaine and Alprazolam to SrA ID, not merely just "gave" it to him. (JA at 46, 52.) Appellant volunteered these previous admissions without questioning from the military judge. This first suggests that Appellant, at least in the other distribution specifications, considered the circumstances behind his drug distributions necessary for his pleas. Second, it stands to reason that the military

judge would, based on those previous admissions, explore whether Appellant had taken the same steps with the Codeine. An affirmative answer by Appellant would suggest that he engaged in a similar pattern of behavior for each distribution. This lends credence and believability to his plea to distribution of Codeine.

Ultimately, the military judge's questions in this case elicited factual circumstances of the charged offenses. Because of this, the questions fell within the bounds of Appellant's waiver of his rights against self-incrimination and any applicable legal limits to the military judge's role during such an inquiry. Therefore, error does not exist. Even if this Court takes a more narrow view of the military judge's duties during a providency inquiry, the military judge did not abuse his discretion, as his questions clarified Appellant's generic and non-specific admissions. Accordingly, Appellant's claim for relief must be denied.

3) Even if Appellant's newly raised challenge concerning the military judge's impartiality is within the scope of the granted issue and not considered waived, relief is still not warranted as no reasonable person would conclude that the military judge's impartiality might reasonably be questioned.

"An accused has a constitutional right to an impartial judge." United States v. Wright, 52 M.J. 136, 140 (C.A.A.F. 1999). A military judge must disqualify herself or himself "in any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902(a). The test for an appearance of bias, which is an objective standard, is "whether a reasonable person knowing all

the circumstances would conclude that the military judge's impartiality might reasonably be questioned." United States v. Sullivan, 74 M.J. 448, 453 (C.A.A.F. 2015) (citing Hasan v. Gross, 71 M.J. 416, 418 (C.A.A.F. 2012)). Either party may make a motion to disqualify a military judge, or a judge may raise such a motion sua sponte. R.C.M. 902(d)(1).

Despite the above, judges "are cautioned not to leave cases 'unnecessarily.'" United States v. Lynn, 54 M.J. 202, 205 (C.A.A.F. 2000) (quoting Wright, 52 M.J. at 141). Furthermore, a judge is not to disqualify him or herself "unless there are proper and reasonable grounds for doing so." United States v. Gorski, 48 M.J. 317, *19 (C.A.A.F. 1997). In fact, a judge "has as much obligation not to … [disqualify] himself when there is no reason to do so as he does to [disqualify] himself when the converse is true." United States v. Kincheloe, 14 M.J. 40, 50 n.14 (C.M.A. 1982) (alternations in original).

Of course a "military 'judge may not abandon' his 'impartial' role and 'assist' the prosecution." United States v. Loving, 41 M.J. 213, 252 (C.A.A.F. 1994) (quoting United States v. Reynolds, 24 M.J. 261, 264 (C.M.A. 1987)). However, "[t]he paramount importance of impartiality does not mean that the military judge should act as 'simply an umpire in a contest between the Government and accused.'" United States v. Quintanilla, 56 M.J. 37, 43 (C.A.A.F. 2001) (quoting United States v. Kimble, 49 C.M.R. 384, 386 (C.M.A. 1974)). The

Supreme Court has noted that "remarks, comments, or rulings of a judge do not constitute bias or partiality, 'unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.'" Id. (quoting Liteky v. United States, 510 U.S. 540, 555 (1994)).

A strong presumption exists that a judge is impartial. Id. at 44. Indeed, "a party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings." Id. A military judge's decision on disqualification is reviewed for an abuse of discretion. United States v. Sullivan, 74 M.J. 448, 453 (C.A.A.F. 2015). If the issue of disqualification is not raised until appeal, the challenge is reviewed for plain error. United States v. Martinez, 70 M.J. 154, 157 (C.A.A.F. 2011). That said, a challenge based on appearance of bias under R.C.M. 902(a) can be waived after full disclosure on the record. Quintanilla, 56 M.J. at 45.

Appellant now argues for the first time that the military judge's questions during the priovidency inquiry would result in a reasonable observer determining that the military judge was not impartial. (JA at 11.) Not only did Appellant fail to move to disqualify the military judge at trial, he failed to raise the issue of impartiality at AFCCA. *See* (JA at 2-4.) This Court granted one issue for review, whether the military judge abused his discretion during the providency inquiry. Appellant's new contention that the military judge's conduct raises a question

concerning his impartiality is outside the scope of that granted issue. Therefore, this Court should not consider it.

Even if this Court determines that Appellant's new argument is within the scope of the granted issue, it should consider the issue waived. Once again, at no point during his court-martial did Appellant move to disqualify the military judge. Because Appellant's argument of impartiality is related to the military judge's questioning during the providency inquiry, full disclosure of the underlying facts was made on the record. Despite being informed thereafter that he could withdraw his plea and litigate his case, Appellant continue to proceed in his case with the military judge as the sentencing authority. (JA at 73, 76-78, 123.) Appellant failed to challenge the military judge at trial, did not raise the issue of impartiality to AFCCA, and did not include the issue in his supplemental petition to this Court. As a result, this Court should consider this issue waived.

If this Court does not find waiver applicable, Appellant's claim should be denied as the military judge did not err, plain or otherwise, for failing to disqualify himself. A reasonable observer would consider the military judge's conduct for what it was, an attempt to substantiate a factual predicate for Appellant's pleas. This is not only supported by the context of the questioning, and how it related to actual charged acts and conduct, but by Appellant's failure to challenge the military judge at trial. *See* United States v. Burton, 52 M.J. 223, 226 (C.A.A.F.

2000) (if the defense fails to challenge a military judge for impartiality at trial, an inference is raised that "the defense believed the military judge remained impartial").

As mentioned above, even after the providency inquiry, Appellant did not withdraw his pleas, and considered the military judge an acceptable sentencing authority. Thus, no reasonable person knowing all the circumstances would conclude that the military judge's impartiality might reasonably be questioned. Accordingly, even if Appellant's new argument is within the scope of the granted issue and not considered waived, his claim of impartiality must still be rejected.

4) Even if the military judge's questions amounted to an abuse of discretion, any such error was harmless beyond a reasonable doubt.

Errors implicating constitutional protections are tested for prejudice using the "harmless beyond a reasonable doubt" standard. United States v. Evans, 75 M.J. 302, 303 (C.A.A.F. 2016). The test for whether a constitutional error is harmless beyond a reasonable doubt is "whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." United States v. Kreutzer, 61 M.J. 293, 298 (C.A.A.F. 2005) (quoting United States v. Kaiser, 58 M.J. 146, 149 (C.A.A.F. 2003)). The government bears the burden of persuasion. United States v. Killion, 75 M.J. 209, 214 (C.A.A.F. 2016) (quoting United States v. Bush, 68 M.J. 96, 102 (C.A.A.F. 2009)).

This Court can be confident, beyond a reasonable doubt, that the information elicited from the military judge's questions now being challenged did not contribute to Appellant's sentence. In other words, even without these questions and answers, the circumstances of this case show beyond a reasonable doubt that the military judge's extremely sensible sentence would have remained the same.

If the military judge had not asked these questions, Appellant still snorted cocaine through a dollar bill "multiple times" in the months of June, July, October, and August. (JA at 19, 21.) He purchased and used Alprazolam "multiple times," ultimately using it regularly enough to become addicted. (JA at 27-28, 95-96, 98.) It also must be recognized that Appellant presented his alleged addiction, and accompanying regular use of Alprazolam, as a mitigating circumstance. (JA at 100-01, 109, 111.) In other words, despite now protesting the military judge's question concerning the frequency of his use, during trial Appellant provided his own information to the military judge that his use of Alprazolam was extensive.

In addition to his use, Appellant possessed 20 to 30 pills of Alprazolam, with the intent to distribute to another Airman. (JA at 37, 39.) Appellant distributed cocaine to another Airman "at least two times." (JA at 45, 47.) He distributed Alprazolam to the same Airman "at least three times," providing 10-30 pills on each occasion. (JA at 51, 55.) Appellant freely admitted to the military judge that these acts involved a transfer of money. (JA at 46, 52.) Finally,

Appellant distributed a bottle of Codeine cough syrup that he been lawfully prescribed from the on-base clinic, just because another Airman asked him to do so. (JA at 55.)

During his argument, trial counsel only briefly mentioned the specific number of times Appellant used cocaine and Alprazolam. (JA at 103-04.) The remainder of trial counsel's argument does not reference any of the information now being challenged. Even if this Court finds error in the military judge's questions, trial counsel's brief reference to the specific number of times Appellant used cocaine and Alprazolam was so inconsequential to his sentencing argument that if those references were deleted, the remainder of every other word in his argument is still proper.

Appellant, in the Air Force for only a total of two years at the time of his trial, used and distributed drugs for six months of those two years. (JA at 7, 9, 20.) As noted by AFCCA, Appellant's justification for his drug activity was not compelling. (JA at 6.) The military judge sentenced Appellant to the same amount of confinement he had bargained for in his PTA. (JA at 115, 125.) The military judge's sentence was exceedingly reasonable given Appellant's crimes. Taking into account the above, Appellant specifying the number of times he used cocaine and Alprazolam, identifying how many occasions he distributed cocaine, and admitting that money was exchanged in the Codeine transfer, had no impact on his

sentence. Therefore, Appellant was not prejudiced, and his claim for relief must be denied.

In sum, even if Appellant did not waive the granted issue, the military judge did not abuse his discretion. The military judge's questions during the providency inquiry elicited factual circumstances of the charged offenses and their elements, and clarified non-specific admissions made by Appellant. Similarly, even if the Appellant's newly formed challenge to the military judge's impartiality is within the scope of the granted issue and not considered waived, no reasonable person would conclude that the military judge's impartiality might reasonably be questioned. Finally, even if this Court finds that the military judge abused his discretion during the providency inquiry, any such error was harmless beyond a reasonable doubt. AFCCA did not err in refusing to grant Appellant relief.

CONCLUSION

WHEREFORE, the United States respectfully requests that this Honorable Court affirm the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 16 November 2016.

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