IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee, v. James M. HALE Lieutenant Colonel (O-5) United States Air Force, Appellant.	APPELLANT'S REPLY TO FINAL BRIEF ON BEHALF OF APPELLEE USCA Dkt. No. 18-0162/AF Crim. App. Dkt. No. 39101

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

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Argument

I.

THE LOWER COURT ERRED WHEN IT FOUND JURISDICTION EXISTED OVER APPELLANT BASED ON "STAYING" WITH HIS IN-LAWS.

Facts, Law, and Analysis

In arguing in support of the lower court's determination that Appellant's conviction for attempted larceny under Specification 3 of Additional Charge II should stand, Appellee's brief relies on three significant analytical errors. First, the lower court's use of Lieutenant Colonel (Lt Col) Hale "staying" with his in-laws as an overt act and jurisdictional lynchpin is not as firmly supported by the record below as Appellee's brief suggests. Second, Appellee's brief misstates the legal standard for when an overt act amounts to a substantial step. Third, Appellee's brief conflates two of the elements of the crime of intent, namely those of specific intent and a substantial step.

The Record of "Staying"

The lower court relied on Lt Col Hale "staying" with in-laws as an overt act over which the court-martial had jurisdiction. (J.A. 10-11.) There is no dispute here that the plain meaning of the term "staying" or "stay" should guide this Court's determination. *See United States v. Fetrow*, 76 M.J. 181, 186 (C.A.A.F. 2017). But the plain and common understanding of "staying" does

not resolve the issue of jurisdiction as cleanly as Appellee's brief contends, both as a definitional matter and in how the term was employed in the record.

Underlying the common usage espoused in Appellee's brief, which essentially defines "staying" as living somewhere temporarily (Appellee's Br. at 13-14), is a notable contrast between how people commonly use the word "staying" and the temporal limitations set out in Article 2(a)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 802(a)(3) (2012). To illustrate this distinction, one could imagine asking someone taking a five-day road trip, "Where did you stay yesterday?" and the response of "I stayed in a hotel" would answer little about the thing that matters most when examining jurisdiction for inactive-duty training (IDT) status under Article 2(a)(3), UCMJ: precise hours and timing. (*See* J.A. 9-10); 10 U.S.C. § 802(a)(3).

As such, although Appellee's brief points to Lt Col Hale's own use of the word "stay" in his responses to the command-directed investigation as agreeing that he "stayed" with his in-laws at various times, those statements should be recognized for the generalized, colloquial references they are rather than a concession about what he was doing during the exact hours he was in IDT status. (Appellee's Br. at 15-16.) Indeed, if Lt Col Hale had taken his luggage to work with him each day, then returned to his in-laws' residence to sleep each evening, the common usage of "staying" cited in Appellee's brief would still contemplate Lt Col Hale saying he stayed with his in-laws, even

though there would then be zero ties between him and his in-laws while in IDT status.

The argument in Appellee's brief is further undermined by the record below concerning the purported overt act of "staying" with Lt Col Hale's in-laws. Without further explanation of the meaning of "stay" that it employed, the Air Force Court of Criminal Appeals (CCA) found, "As he had done six times previously, Appellant stayed with his in-laws during the entire period he was completing IDTs." (J.A. 10.) While the CCA expressly claimed this conclusion echoed the military judge's ruling, (J.A. 10), the military judge was far more equivocating on this point, seemingly looking outside of Lt Col Hale's duty hours to reach his ultimate conclusion:

> In this matter, [Lt Col Hale] stayed at the [in-laws'] residence throughout the period of 3 November to 20 November 2013. He kept his personal items in the room he used there. Although this, in and of itself, does not show [Lt Col Hale] was at the [in-laws'] house during his stated 'duty hours worked' on the various AF Form 40A, it was done through the course of the 23 IDT days.

(J.A. 479-80.)

There is an internal tension in the military judge's reasoning, which again matters here because the military judge's conclusion that Lt Col Hale "stayed" with his in-laws was adopted by the CCA. (J.A. 10, 479-80.) On the one hand, Lt Col Hale kept property in a room at his in-laws' house, seemingly while he was at work. (J.A. 480.) On the other hand, the military judge recognized Lt

Col Hale was not in that room when he was at work performing military duties, suggesting there was a question about whether Lt Col Hale could be both working and lodging at the same time. (*Id.*) The military judge seemed to resolve the matter by looking at the fact that Lt Col Hale did this every day regardless of duty hours, which meshed with the military judge's erroneous holding in his next paragraph that jurisdiction is not limited to IDT hours. (*Id.*)

As the above passage by the military judge illustrates, two perspectives are in play when considering the dispute about whether Lt Col Hale could be performing military duties while concurrently residing with his in-laws. (Appellee's Br. at 13 (citing Appellant's Br. at 24).) While the position in Appellee's brief rests primarily on the definition of "stay," Appellant's argument flows from the doubt expressed by the military judge that Lt Col Hale could be "staying" and working at the same time—keeping in mind the CCA ultimately adopted the military judge's position. (Appellee's Br. At 13; J.A. 10, 479-80.)

However, this Court may agree with Appellee's brief that Lt Col Hale keeping his personal belongings in his in-laws' home while performing duties in IDT status constituted "staying" and an overt act. If that is the case, then the question becomes whether the court-martial's jurisdiction was over an overt act that, in fact and law, violated the prohibition on intent set out by Congress in Article 80, UCMJ, 10 U.S.C. § 880 (2012).

Legal Standard for a Substantial Step

For nearly 400 years, "courts have struggled . . . to distinguish between acts constituting mere preparation and those constituting actual attempts." *United States v. Church*, 32 M.J. 70, 73 (C.M.A. 1991). In drawing this Court's attention to the case law grappling with this divide, Appellee's brief contends that multiple cases stand for more than they actually do.

For example, Appellee's brief points to *Church* and quotes that case for the proposition that this Court should look at what Lt Col Hale did "before, during, and after the supposed crime." (Appellee's Br. at 11, 19 (quoting *Church*, 32 M.J. at 73).) Rather than plucking this phrase from *Church*, however, it should be considered in its context.

The "before, during, and after" clause does not appear within the Court's description of the law, but rather following four paragraphs describing the facts critical to the Court's conclusion. *Church*, 32 M.J. at 71-73. The entire sentence centers on the facts specific to that case: "It is clear that appellant did everything he thought not only necessary but possible to make the enterprise successful – before, during, and after the supposed crime." *Id.* at 73. This fails to approach the legal test claimed in Appellee's brief. Moreover, unlike the case at bar, *Church* lacked any issues related to jurisdiction, whereas the issues presented in this case bear the heightened complexity of involving actions both inside and outside of the court-martial's jurisdiction. (*See*, *e.g.*, J.A. 9-11.)

Like its treatment of *Church*, Appellee's brief overextends both *United States v. Schoof*, 37 M.J. 96 (C.M.A. 1993) and *United States v. Smith*, 50 M.J. 380 (C.A.A.F. 1999). As this Court underscored in *Smith*, though *Schoof* examined the law surrounding commission of a substantial step, the Court of Military Appeal's conclusion centered on a narrow "test for determining valid guilty pleas in attempt cases." *Smith*, 50 M.J. at 383. This Court's predecessor observed in *Schoof* that "it is neither legally nor logically well-founded to say that actions that may be ambiguous [as to whether they amount to a substantial step] fall short of the line 'as a matter of law' so as to be substantially inconsistent with the guilty plea" when the appellant had been advised during the plea inquiry about going beyond mere preparation and then pointed to the act that did so. *Schoof*, 37 M.J. at 103.

Unlike *Schoof*, *Smith*, and the cited case of *United States v. Byrd*, 24 M.J. 286, 287 (C.M.A. 1987), the case at bar does not result from a guilty plea, but rather a fully litigated trial on the merits more akin to *United States v. Winckelmann,* 70 M.J. 403, 404 (C.A.A.F. 2011). In one instance during its survey of the law, Appellee's brief acknowledges the test set out by this Court in *Winckelmann,* 70 M.J. at 407 (citations omitted)—scrutinizing whether the proposed substantial step "'unequivocally demonstrat[es] that the crime will take place unless interrupted by independent circumstances'"—but then fails to return to it in any of its analysis. (Appellee's Br. at 10.)

Such inevitability was lacking in this instance, where the sole overt act relied upon by the lower court to find a substantial step was the act of "staying" with Lt Col Hale's in-laws. (J.A. 9-10.) It is worth reiterating that Lt Col Hale was allowed to stay with his in-laws; he just was not entitled to compensation for doing so. (J.A. 499-500; *see also* J.A. 400-47.) Although "staying" with his in-laws may have attended to the wrongfulness of any claim for compensation, doing so failed to show that a crime was going to take place as *Winckelmann* requires. *See Winckelmann*, 70 M.J. at 407.

Conflation of Substantial Step with Specific Intent

Though claiming a substantial step was accomplished by "staying," the analysis in Appellee's brief leading to this conclusion traces a different element of the alleged crime altogether. As Appellee's brief acknowledges, (Appellee's Br. at 9), the four elements of attempt are:

> (1) [T]hat the accused did a certain overt act; (2) that the act was done with the specific intent to commit a certain offense under the code; (3) that the act amounted to more than mere preparation; and (4) that the act apparently tended to effect the commission of the intended offense.

United States v. Payne, 73 M.J. 19, 24 (C.A.A.F. 2014) (citation omitted). Appellee's brief also recognizes, (Appellee's Br. at 9), that this Court has "interpreted th[e more-than-mere-preparation] element as requiring that the accused take a 'substantial step' toward commission of the crime." *Payne*, 73 M.J. at 24.

Rather than tackling the issue of whether a substantial step was committed head-on, Appellee's brief engages in misdirection, targeting the entirely different element of specific intent. (Appellee's Br. at 19-20.) Initially, Appellee's brief stresses its broad reading of *Church*, asking this Court to look at anything "'before, during, and after' . . . in determining whether ["staying"] was a substantial step." (*Id.* at 19 (quoting *Church*, 32 M.J. at 73).) Then Appellee's brief points to four acts—all four of which fall well outside the applicable and undisputed jurisdictional limits under Article 2(a)(3), UCMJ. (*Id.* at 17, 19-20; *see also* J.A. 340-66.)[1] Instead of returning to the third element and analyzing whether a substantial step was accomplished based on consideration of these acts, Appellee's brief argues that the four acts show Lt Col Hale "had already formed the specific intent to commit larceny. Therefore, the second element of attempted larceny is met." (Appellee's Br. at 20.)

Contrary to this line of argument, even if the acts pointed to in Appellee's brief evinced specific intent to commit larceny under the second element for attempt, that would not satisfy the third element requiring a substantial step or, in turn, the conviction. "A defendant can be convicted only if the [fact-finder] has found *each* element of the crime of conviction." *Alleyne v.*

[1] These acts will be assumed here for the sake of argument as ripe for consideration as evidence under Military Rule of Evidence (Mil. R. Evid.) 404(b), even though they were not admitted under that rule at trial. (*Compare* Appellee's Br. at 19-20, J.A. 340-66, *with*, J.A. 502.)

United States, 570 U.S. 99, 115 (2013) (emphasis added). And "the mere intent to violate a federal criminal statute is not punishable as an attempt unless it is accompanied by significant conduct." *United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2006). That latter requirement was not satisfied in this instance because "staying" with Lt Col Hale's in-laws did not show that a crime was going to take place absent interruption by independent circumstances. *See Wincklemann*, 70 M.J. at 407.

Accordingly, even if the evidence evinced jurisdiction over an overt act, the court-martial lacked jurisdiction over a substantial step that satisfied all of the elements for attempted larceny, and his conviction therefore cannot stand.

WHEREFORE, Appellant respectfully requests this Court set aside the finding of guilty for Specification 3 of Additional Charge II based on this issue, in addition to Appellant's overall prayer for relief requesting this Court set aside the findings for Charge II and its specification, Specifications 1 and 2 of Additional Charge I, and Additional Charge II and its specifications, and the sentence.

II.

THE LOWER COURT ERRED WHEN IT CONCLUDED THE MILITARY JUDGE CORRECTLY INSTRUCTED THE MEMBERS THEY COULD CONVICT APPELLANT FOR CONDUCT "ON OR ABOUT" THE DATES ALLEGED IN EACH SPECIFICATION.

Facts, Law, and Analysis

Appellee's argument begins with the flawed premise that issues of notice are the same as instructional issues. (Appellee's Br. at 27.) The opening sentences of the analysis in Appellee's brief under this issue note the propriety of charging larceny "on or about" certain dates. (*Id.*) "It is well established that charging 'on or about' a specified day is proper." (*Id.* (citing Rule for Courts-Martial 307(c)(3), Discussion).) The accepted purpose of incorporating this language into a specification is to provide an accused like Lt Col Hale notice of the date of the alleged offense and, in turn, what he was supposed to defend. *See United States v. Hunt*, 37 M.J. 344, 347-48 (C.M.A. 1993).

But the issue here is not about Lt Col Hale having sufficient notice to defend himself. The issue is about whether the members were instructed properly. Greater precision is required of a military judge's instructions where a finding outside of the permissible timeframe is barred by the court's limited jurisdiction. *See United States v. Thompson*, 59 M.J. 432, 440 (C.A.A.F. 2004); *see also Griffin v. United States*, 502 U.S. 46, 59 (1991); *United States v. Fuchs*, 218 F.3d 957, 962-63 (9th Cir. 2000). It is apples-to-oranges to contend, as Appellee's

brief does, that the military judge instructed the members properly concerning a temporal limitation merely because the same precision was not required in placing Lt Col Hale on notice through the charge sheet. (Appellee's Br. at 27.)

That is not to say that the prosecution's charging scheme is wholly irrelevant to this Court's analysis. While the military judge plainly erred when his instructions permitted the members to convict Lt Col Hale for acts "about" dates when he was subject to military jurisdiction rests, (J.A. 481-83, 485-88, 490, 492-97, 499), that error can be traced back to the government's inclusion of the same "or about" language on the charge sheet. (J.A. 36-41); *see United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017).

Appellee's brief correctly points out that the relevant dates in this case "are literally captured in black and white," (Appellee's Br. at 28), but this point tends to support Appellant's claim of prejudice resulting from the flawed instructions. As set out in Appellant's initial brief in greater detail, the dates set out in the extensive documentation in this case were indeed clear, in some instances down to the minute. (*See* Appellant's Br. at 31-33; *see also* 226-385.) But, in concert with the military judge's erroneous instructions, the prosecution's presentation concerning those documents and subsequent argument invited the members to abstain from parsing the acts set out in the documents consistent with the jurisdictional demarcations imposed by Lt Col Hale's orders.

Indeed, Appellee's brief "generally accepted" the facts surrounding the prosecution's mish-mash employment of the evidence at the outset. (Appellee's Br. at 2.) This general acceptance includes, for example, the fact that, "[o]f the three larceny specifications, only Specification 3 of Additional Charge I involved every underlying act argued by the prosecution . . . occurring during periods when Lt Col Hale was on active duty." (Appellant's Br. At 10 (citing J.A. 197-99, 304-05, 314-17, 319, 321, 323-25).) As such, Appellee's brief appears to have conceded that many of the acts the prosecution asked the members to focus on and employ as a basis for conviction fell outside precise times when Lt Col Hale was subject to UCMJ jurisdiction. (*See* Appellant's Br. at 9-11.)

Nonetheless, the arguments set out later in Appellee's brief seem to try to walk back from its concession, albeit in ways that are inconsistent within Appellee's brief and that also contradict the record below.

Under Specification 2 of Additional Charge I, Appellee's brief argues that Lt Col Hale "was still subject to the UCMJ on" October 12, 2012, when he received final payment for the voucher at issue; however, this contradicts the other portions of Appellee's brief recognizing Lt Col Hale was in IDT status that day, declining to dispute the CCA's rule that jurisdiction was limited to the hours of IDT duties, and agreeing with Appellant's brief and the CCA that those hours concluded before Lt Col Hale received the final payment. (*Compare*

Appellee's Br. at 33-34, *with* Appellee's Br. at 2, 13, Appellant's Br. at 9, 34, J.A. 12, 291, 531-32.)

Likewise, in its analysis for Specification 3 of Additional Charge II under Issue I, Appellee's brief accepts the lower court's conclusion that the prosecution failed to prove Lt Col Hale wrote the check and created the receipt presented to the members while in the four-hour blocks of IDT status, only to later contradict this admission. Specifically, Appellee's brief states, "It does not matter that the creation of the lodging receipt, writing of the check, or filing of the voucher happened during periods Appellant was not subject to the UCMJ," but later disregards its own acquiescence on this and argues the opposite when assessing the military judge's instructions. (J.A. 8-11; *compare* Appellee's Br. at 17, *with*, *id.* at 36.)

Most striking in its treatment of the record, Appellee's brief argues that "[a]ny acts outside the charged timeframes were *only* presented to the members as circumstantial evidence to infer Appellant's state of mind," namely his specific intent. (*Id.* at 30-31) (emphasis added.) But examination of trial counsel's argument about intent, which was cabined to the tail end of the argument, fails to support such a categorical assertion. (J.A. 194, 207-22.)

Before reaching that conclusion, trial counsel pointed to multiple acts that fell outside of the court-martial's jurisdiction not as evidence of "only" intent but as the *actus reus* to be considered by the members. For example,

under the Specification of Charge II, the prosecution pointed to a check Lt Col Hale wrote months removed from military duties. (J.A. 201.) Likewise, for Specification 2 of Additional Charge I, the prosecution pointed to Lt Col Hale's receipt of the final voucher payment on October 12, 2012, a date which the CCA correctly determined fell outside UCMJ jurisdiction. (J.A. 12, 196-97.) Even if trial counsel meant for these matters to be considered "only" for intent, he never voiced such that limited purpose for the record. (*See* J.A. 190-222.)

Indeed, contrary to the assertion in Appellee's brief, the military judge admitted a narrow and distinct set out evidence for purposes of "only" showing, among other things, intent. (J.A. 502.) That evidence concerned Lt Col Hale's monthly bank account balances after he wrote checks to his in-laws and alleged re-routing of those funds back to his own accounts after depositing the checks. (*Id.*)

At trial, the prosecution argued to the members that its case was neat and tidy, having already carefully scrutinized the underlying facts to align with the law governing jurisdiction. (*See* J.A. 204.) But that was far from the reality, starting with the scattershot charging scheme and ending with the prosecution inviting the members to latch onto the military judge's erroneous instruction permitting them to convict Lt Col Hale based on acts that fell outside the jurisdictional bounds set by Congress in Article 2, UCMJ.

WHEREFORE, Appellant respectfully requests this Court set aside the findings for Charge II and its specification, Specifications 1 and 2 of Additional Charge I, and Additional Charge II and its specifications, and the sentence.

III.

THE LOWER COURT ERRED IN CONCLUDING THE COURT-MARTIAL HAD JURISDICTION OVER SPECIFICATION 2 OF ADDITIONAL CHARGE I, AS MODIFIED TO AFFIRM THE LESSER INCLUDED OFFENSE OF ATTEMPTED LARCENY.

Facts, Law, and Analysis

In addition to the argument set out above under Issue I concerning the governing case law and commission of a substantial step for "staying" with Lt Col Hale's in-laws, this issue also begs the same questions in relation to the scheduled partial payments of the voucher that Lt Col Hale received while on active duty orders and merits a similar outcome. (*See* J.A. 11-12.)

Even if Appellee prevails in claiming the receipt of such payments constituted a substantial step, and even if Appellee prevails on the additional matter of whether receipt of those payments made up a triable unit of prosecution, Appellee's brief fails to appropriately reconcile the jurisdictional constraints imposed by Article 2, UCMJ, with the facts of this case and, in turn, the theory of liability properly before the members. The theory must have been presented to the members for the conviction to withstand appellate

review. *United States v. Riley*, 50 M.J. 410, 415 (C.A.A.F. 1999) (citations omitted).

The origin of this flaw in Appellee's brief can be traced to the invocation of *United States v. Kuemmerle*, 67 M.J. 141 (C.A.A.F. 2009), of which the parallel to the case at bar is overstated. (*See* Appellee's Br. at 41-42.) In *Kuemmerle*, "[t]he real question" before the Court was whether the appellant had distributed child pornography at a time when "the military had jurisdiction over the charged offense." 67 M.J. at 143. The appellant posted child pornography in 2000, "before entering active duty." *Id.* at 144-45. But this Court found jurisdiction based on events that occurred while the appellant was on active duty, emphasizing the appellant's "significant[]" stipulations of fact that he accessed his online account where the image was posted after entering active duty and "had the ability to access the profile while on active duty, including the capacity to remove the image of child pornography." *Id.*

The facts of this case are distinguishable. In *Kuemmerle*, the appellant kept the image at issue online while on active duty—in other words, he could have but failed to do something that would have prevented the charged distribution from occurring. *Id.* But here, there was nothing Lt Col Hale could do during the time he was within military jurisdiction because the scheduled partial payments occurred automatically as a result of when he set them up before he was on orders. (J.A. 11, 177-78.) Rather, the act that got the ball

rolling is what Lt Col Hale did before he was subject to the UCMJ: setting up the automatic payments. (J.A. 177-78.)

This distinction matters in this case because Appellee's brief relies on the creation of the automatic payments—an act outside of the court-martial's jurisdiction—as a basis for saying that an obtaining theory of prosecution was properly before the members. (Appellee's Br. at 44.) Instead of skewing *Kuemmerle* as Appellee's brief suggests to bootstrap conduct outside of the court-martial's jurisdiction, a faithful application of *Kuemmerle* to the facts of this case would focus on what Lt Col Hale did while subject to the UCMJ.

Applying the proper jurisdictional lens, the sole acts that occurred while the military had jurisdiction—receipt of money and "staying" with Lt Col Hale's in-laws—only support a withholding theory of larceny, which was not presented to the members. (*See* J.A. 192-94, 199, 202, 207, 209); *Riley*, 50 M.J. at 415 (citations omitted). Accordingly, in addition to the reasons set out under Issue I regarding the issue of "staying" with Lt Col Hale's in-laws, the conviction for this offense also cannot stand on the basis of receipt of the scheduled partial payments.

WHEREFORE, Appellant respectfully requests this Court set aside the finding of guilty for Specification 2 of Additional Charge I based on this issue, in addition to Appellant's overall prayer for relief requesting this Court set aside the findings for Charge II and its specification, Specifications 1 and 2 of

Additional Charge I, and Additional Charge II and its specifications, and the sentence.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on July 18, 2018, pursuant to this Court's order dated July 22, 2010, and that a copy was also electronically served on the Air Force Appellate Government Division on the same date.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitations of Rule 24(c) because:

This brief contains 4,095 words.

This brief complies with the typeface and style requirements of Rule 37.

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