

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,

Appellee,

v.

JAKALIEN J. COOK

Airman (E-2),
United States Air Force,
Appellant.

USCA Dkt. No. 24-0221/AF

Crim. App. Dkt. No. ACM 40333

SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

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Issues Presented

I.

WHETHER AMN COOK'S CONVICTIONS FOR TRANSPORTING ALIENS AND CONSPIRING TO TRANSPORT ALIENS ARE FACTUALLY SUFFICIENT.

II.

WHETHER THE LOWER COURT ERRONEOUSLY INTERPRETED AND APPLIED THE AMENDED FACTUAL SUFFICIENCY STANDARD UNDER ARTICLE 66(d)(1)(B), UCMJ.

III.

WHETHER AN APPELLANT CAN WAIVE THE MILITARY JUDGE'S INCORRECT MAXIMUM PUNISHMENT CALCULATION THAT TRIPLED AIRMAN COOK'S PUNITIVE EXPOSURE.

Introduction

This case presents the highly unusual prosecution of an Airman for violating and conspiring to violate 8 U.S.C. § 1324, which prohibits, among other things, transporting aliens who are in the United States unlawfully.¹ But novelty is not necessarily a good thing. The Air Force's

¹ "Aliens" is the language in the statute, thus this brief will use that term when discussing the statutory offense.

lack of familiarity with these offenses led to numerous errors, as demonstrated below.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d) (Supp. III 2019-2022).² This Honorable Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (Supp. III 2019-2022).

Statement of the Case

On February 14, 2022, at Davis-Monthan Air Force Base (AFB), Arizona, a military judge sitting as a general court-martial convicted Appellant, Airman Jakalien J. Cook, consistent with his pleas, of one specification of absence without leave (AWOL) in violation of Article 86, UCMJ, 10 U.S.C. § 886; one specification of breaching restriction in violation of Article 87b, UCMJ, 10 U.S.C. § 887b; and one specification of marijuana use in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. (R. at 172; Entry of Judgment (EOJ).) A panel of officer and enlisted

² Unless otherwise noted, all references to the UCMJ and the Rules for Courts-Martial (R.C.M.) are to the version in the *Manual for Courts-Martial, United States* (2019 ed.).

members found him guilty, contrary to his pleas, of one specification of transporting aliens who were in the United States unlawfully in violation of clause 3 of Article 134, UCMJ, 10 U.S.C. § 934; one specification of conspiracy to transport aliens in violation of Article 81, UCMJ, 10 U.S.C. § 881; and one specification of obstructing justice in violation of Article 131b, UCMJ, 10 U.S.C. § 931b. (R. at 589; EOJ.) The military judge sentenced Amn Cook to reduction to the grade of E-1, forfeiture of all pay and allowances, 27 months' confinement, and a dishonorable discharge. (R. at 638–39.) The military judge credited Amn Cook with 155 days of pretrial confinement credit. (R. at 639.) The convening authority took no action on the findings, denied requested deferments of reduction in grade and forfeitures, and approved the sentence in its entirety. (Convening Authority Decision on Action.)

On July 3, 2024, in an unpublished decision, the AFCCA affirmed the findings and sentence. *United States v. Cook*, No. ACM 40333, 2024 CCA LEXIS 276, at *80 (A.F. Ct. Crim. App. Jul. 3, 2024) (Appendix A).

Statement of Facts

QM's Money Troubles

Amn Cook lived with QM in the dorms at Davis Monthan AFB. (R. at 311.) They became close friends, continuing the friendship after QM was discharged and continued to reside in the local area. (R. at 311, 621.) QM had money troubles after his discharge: his fiancée was pregnant, he had just gotten fired from his job at Target, and he was desperate for work. (R. at 499, 509.) He posted on Snapchat that he was looking for any kind of work—“it doesn’t matter”—because the baby was coming and “I [was] like, money, money, money, I need to have this money so she didn’t struggle like I did.” (R. at 503.) An unknown person contacted QM through Snapchat and offered him “easy money” to drive people. (*Id.*) QM would receive \$500 for each person transported. (R. at 502.)

A Sunday Drive Transformed: QM Was “About to Make Some Money”

On Sunday, August 22, 2021, QM, who liked to travel, texted Amn Cook and asked if he “want[ed] to do something?” (R. at 311, 408.) They initially planned on visiting Phoenix, which is northwest of Davis Monthan AFB. (R. at 311.) Amn Cook, whose car was undergoing a diagnostic at a local Firestone to determine if he could drive it back to

Florida in anticipation of his drug-based discharge, had rented a sport utility vehicle from the Tucson Airport and extended the rental through August 23, 2022. (R. at 316, 410; Pros. Ex. 2 at 9:50–10:20; Pros. Ex. 17 at 1.)

Amn Cook and QM drove south to the town of Sierra Vista before taking QM’s fiancée back northwest of Davis Monthan AFB to Phoenix to drop her off. (R. at 311, 407, 409.) They returned to Sierra Vista later in the day, went to the mall, and then ended up in a town called Bisbee. (R. at 407.) QM then said to Amn Cook: “I’m about to make some money.” (*Id.*) Calls began coming into QM’s phone from random numbers that said, “no caller ID,” and QM began texting frequently. (*Id.*; Pros. Ex. 18 File 1 at 12:09-12:26.) Amn Cook did not receive any of these calls or texts and was mainly using his phone for music. (Pros. Ex. 2 at 7:40-7:53.)

To Amn Cook’s Surprise, Five People Appeared and Entered the Vehicle

QM and Amn Cook were driving down a dirt road somewhere south of Sierra Vista when they stopped at a stop sign. (R. at 407.) A man in gray spoke with QM, then the man opened the trunk and people entered the car, with three going into the back seat of the SUV. (*Id.*) The man

in gray, who did not enter the vehicle, yelled, “Dale, Dale, Dale,” meaning “go on.” (Pros. Ex. 18 File 1 at 8:20-9:00.) In addition to the three in the back seat, two more entered the trunk, unbeknownst to Amn Cook. (*Id.* at 9:20-9:40.) In Amn Cook’s words, “I literally just sat forward. I didn’t know what he was doing.” (R. at 407.) QM recounted that Amn Cook said, “Why the fuck is they ducking?” as they drove away. (R. at 501.) Amn Cook further explained that he had no idea what QM was planning, pointing out that he was wearing only a t-shirt, shorts, and slippers, and was just “along for the ride.” (Pros. Ex. 18 File 1 at 9:40-10:15.) Amn Cook was not aware of how much QM would make. (*Id.* at 10:40-10:50.) Amn Cook described his thought process as it was happening: He did not believe QM would “do something like that” because they were on the main roads and “still passing like border patrol troopers and things like that.” (R. at 411.)

Sergeant CM, who worked investigations for Arizona Department of Public Safety, received a tip about “[b]odies run from the desert” to a light-colored SUV. (R. at 274.) Between 2200 and 2300 hours, he located the vehicle, identified it as a rental with California license plates, and followed the SUV for approximately two miles before pulling it over

because it failed to fully stop at a stop light before turning right. (R. at 275–76, 279.) When he approached, QM was driving and Ann Cook was the passenger. (R. at 276–77.) Sergeant CM explained that the five others in the car had a “very distinctive smell” of one who has not showered for several days. (R. at 278.) Sergeant CM then called border patrol. (R. at 279.) Another responding officer noted that the immigrants wore camouflage and had carpet shoes on, which are worn over regular shoes and leave no “foot sign.” (R. at 326–27.) QM admitted to the officers that there was a firearm in the center console that he kept for protection. (R. at 335; Def. Ex. A at 27:30-28:25.)

The Government introduced evidence from various forms prepared about each of the five immigrants. Field processing forms from the Department of Homeland Security indicated only their names, birthdates, and time of apprehension. (Pros. Ex. 4.) Two of the five immigrants had an Alien File (A-File), indicating some interaction with the immigration system. (R. at 351.) One of the immigrants had an A-File indicating she was removed from the country weeks after the apprehension at issue here. (R. at 352, 355; Pros. Ex. 5.) Another

immigrant had a court hearing in 2017 and was thereafter removed to Mexico. (Pros Exs. 6, 7, 8, 9.)

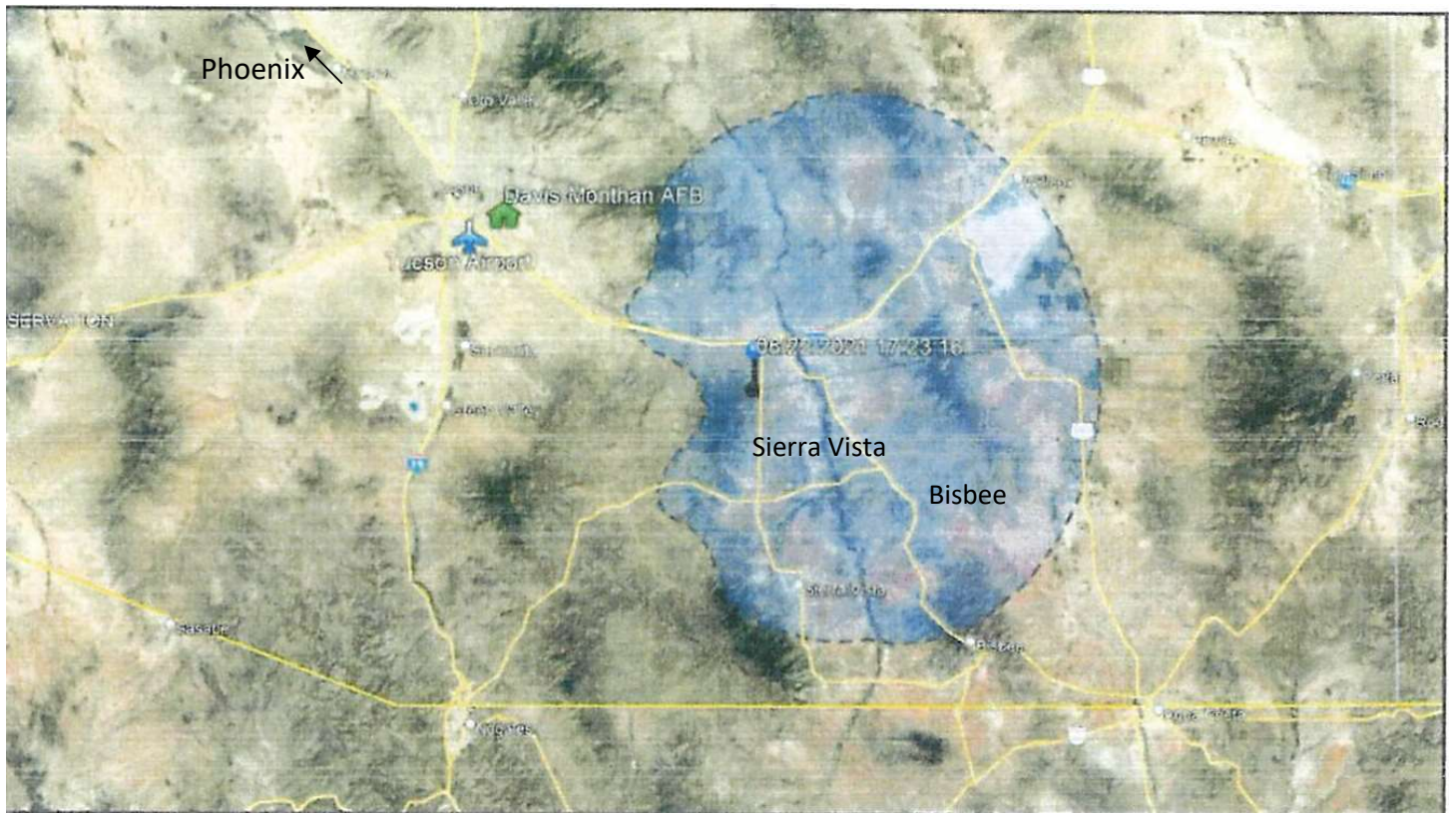
Amn Cook consented to an interview early the next morning with Homeland Security Investigations (HSI). At a key moment of the interview, an agent asks if Amn Cook knew the passengers were “here illegally.” (R. at 317.) According to the transcript, Amn Cook said, “Well, kind of, yeah, but I didn’t look in the back.” (*Id.*) However, the transcription is incorrect. Amn Cook seems to say, though hard to hear, “Once I pulled over, kind of, yeah, but I didn’t look in the back.” (Pros. Ex. 2 at 12:32-12:43.) Amn Cook submitted to another interview, this time with Security Forces, the following day on August 24, 2021. As explained above, Amn Cook denied any advance knowledge of QM’s plan.

CL, an investigator with Security Forces, stated that he could not find Amn Cook’s car at three local Firestones. (R. at 429.) He also stated that he could not perform an extraction of the data from Amn Cook’s phone because it was factory reset.³ (R. at 430.) Investigator CL

³ Amn Cook was convicted of obstruction of justice for allegedly intentionally factory resetting his phone. (EOJ.)

submitted a preservation request to T-Mobile for cell location and call history data for Amn Cook's phone. (R. at 434.)

The following image from Appellate Exhibit XXXII shows a picture of the broader area to help orient the Court, with text for "Sierra Vista," "Bisbee," and "Phoenix" added for clarity. The blue shaded area is not relevant.



At the court-martial, JR, a digital forensic expert, testified for the Government to analyze the T-Mobile data. (R. at 449, 454.) The data showed that QM called Amn Cook at approximately 1100 on August 22, 2021. (R. at 460; App. Ex. XXXII at 4; Pros Ex. 21.) The location data

showed that Amn Cook's phone was near Sierra Vista at 3:36 PM, was northwest of Davis Monthan AFB towards Phoenix at 7:14 PM, and that it was near the location of Amn Cook's arrest at 11:31 PM. (App. Ex. XXXII at 8, 10, 16, 24, 26; R. at 460–64.) Recall that QM explained that he first took his fiancée down to Sierra Vista, then back to Phoenix, and finally returned to Sierra Vista later in the day. (R. at 311, 407, 409.) The Government never asked JR to examine QM's phone or to identify any numbers that called Amn Cook (other than QM). (R. at 475–76.) JR did not recall any international numbers calling Amn Cook's phone. (R. at 475.)

A general court-martial convicted Amn Cook of, among other things, illegally transporting aliens and conspiring to illegally transport aliens. (R. at 509.)

The AFCCA affirmed the findings and sentence.

Amn Cook challenged the factual and legal sufficiency of his convictions before the AFCCA. It applied the revised factual sufficiency standard under Article 66(d), which provides that a court of criminal appeals (CCA) may provide relief where it is “clearly convinced that the finding of guilty was against the weight of the evidence.” Article

66(d)(1)(B)(iii), UCMJ, 10 U.S.C. § 866(d)(1)(B)(iii) (Supp. III 2019-2022). For the transporting and conspiracy offenses, the AFCCA analyzed legal sufficiency at length and briefly addressed factual sufficiency, finding the convictions factually and legally sufficient. Appendix A at 16–21.

Amn Cook also challenged whether the military judge erred in calculating the correct maximum punishment. Appendix A at 31–34. The military judge concluded the maximum penalty for transporting aliens and conspiracy to transport aliens was based on the number of aliens in each specification, rather than having a maximum punishment by specification. Appendix A at 32. (Thus, the maximum confinement was 25 years for both the transporting and conspiracy to transport offenses, instead of five years each.) The AFCCA found the issue waived because trial defense counsel agreed to the maximum punishment. Appendix A at 33.

Summary of the Argument and Reasons to Grant Review

Where civilian officials declined to prosecute, the Air Force endeavored to convict Amn Cook of a relative novelty in military courts: transporting aliens and conspiring to transport aliens. Amn Cook now stands convicted of multiple offenses with a dubious factual foundation.

For transporting aliens, the court-martial convicted him using elements from one federal circuit court of appeal that differ significantly from other circuits on the crucial question in the case: intent. In essence, this creates a split between how the elements apply in the military compared with other circuits. *See* C.A.A.F. R. 21(b)(5)(C). And the evidence provided fails to show Amn Cook’s intent; instead, it shows he was merely an innocent bystander. Similarly, for conspiracy to transport aliens, the evidence fails to show that Amn Cook entered an agreement at all, or that any agreement encompassed *each* element of the target offense of transporting aliens.

This Court should grant review under its new factual sufficiency power to ensure that the conviction is sound in a case involving unfamiliar offenses and elements. While this Court could grant as an unbriefed trailer to *United States v. Csiti*, __ M.J. ___, (C.A.A.F. Sep. 11, 2024), this case presents unique issues worthy of briefing for this Court’s ultimate resolution. As for the substantive issue, currently the field knows little more than one sentence in *United States v. Harvey*, __ M.J. ___, 2024 CAAF LEXIS 502, at *8 (C.A.A.F. Sep. 6, 2024), where this Court explained that it will “review a CCA’s [weighing of deference to the

factfinder] only for an abuse of discretion.” (This Court’s factual sufficiency powers were not the subject of the case.) While this Court held that a CCA no longer applies de novo review during factual sufficiency, it is unclear if this Court applies abuse of discretion only to the weighing of discretion, or throughout its review. Indeed, Article 67, UCMJ, does not speak to deference to the CCA. This case, along with *Csiti*, can help answer these questions.

This case also can help provide clarity on the standard of review under the revised factual sufficiency standard. This Court provided important guidance in *Harvey*. *Id.* at *6–13. But the AFCCA’s analysis stands in tension with *Harvey*. Videotaped interviews of Ann Cook and QM were perhaps *the* central evidence in the trial, and yet the AFCCA did not note any difference in its level of deference to the factfinder. Yet this Court in *Harvey* noted that “other evidence”—such as videos—are not treated the same as testimony when it comes to CCA deference to the factfinder. *Id.* at *8. Because it is unclear whether the AFCCA understood the range of its discretion on this issue, this Court cannot be certain it properly applied the new Article 66, UCMJ, factual sufficiency review.

More generally, the AFCCA chiefly performed a legal sufficiency review, and then almost summarily declared the offenses factually sufficient. It did not grapple with different elements in different circuits and whether this would affect the sufficiency. If this is the AFCCA's mode of performing factual sufficiency, is there anything meaningful left of this important power? Congress's changes did not gut the CCAs power; if Congress wanted to remove factual sufficiency review, it could easily have done so.

Finally, this Court should grant review to clarify whether a party may waive the correct maximum punishment for an offense. The AFCCA held that trial defense counsel waived this important issue by agreeing to the maximum punishment, but this went against a long history of reviewing such claims for plain error both at this Court and at the AFCCA. C.A.A.F. R. 21(b)(5)(B)(i), (b)(5)(B)(iv). And reviewing for plain error makes sense because waiver can leave an appellant subject to a sentence in excess of the maximum punishment, which is impermissible under this Court's precedent and in federal court. As a consequence, Amn Cook faced a maximum punishment that was three times what it

should have been, and consequently received a sentence far in excess of what is typical for the same offense prosecuted in federal court.

Argument

I.

AMN COOK'S CONVICTIONS FOR TRANSPORTING ALIENS AND CONSPIRING TO TRANSPORT ALIENS ARE FACTUALLY INSUFFICIENT.

Standard of Review

This Court has not set forth the standard of review for factual sufficiency for Article 67, UCMJ, 10 U.S.C. § 867 (Supp. III 2019-2022). Amn Cook asserts this Court should conduct a factual sufficiency review using the de novo standard of review. *Cf. United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citing *United States v. Cole*, 31 M.J. 270, 272 (CMA 1990)). However, if the standard of review is abuse of discretion, this occurs when: (1) a ruling is predicated on “findings of fact that are not supported by the evidence of record”; (2) incorrect legal principles are used; (3) correct legal principles are applied “to the facts in a way that is clearly unreasonable”; or (4) there is a failure “to consider important facts.” *See United States v. Rudometkin*, 82 M.J. 396, 401

(C.A.A.F. 2022) (internal citations omitted) (explaining the standards for abuse of discretion for military judges).

Law and Analysis

1. This Court now has the power to review for factual sufficiency.

Congress has given this Court the power to review for factual sufficiency. Pursuant to Article 67(c)(1)(C), UCMJ, this Court may act with respect to “the findings set forth in the entry of judgment, as affirmed, dismissed, set aside, or modified by” a CCA “*as incorrect in fact* under section 866(d)(1)(B).” Article 67(c)(1)(C), UCMJ, 10 U.S.C. § 867(c)(1)(C) (Supp. III 2019-2022) (emphasis added). Section 542(c) of the William M. (Mac) Thornberry National Defense Authorization Act (NDAA) for Fiscal Year 2021 is specifically titled “REVIEW BY UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES OF FACTUAL SUFFICIENCY RULINGS.” Pub. L. 116-283, § 542(c), 134 Stat. 3388, 3612–13 (2021). Previously, this Court could only act with respect to the findings as affirmed or set aside as incorrect in law by a CCA. Article 67(c)(1), UCMJ, 10 U.S.C. § 867(c)(1) (2018). This Court may now act to correct any findings that may be incorrect in fact for alleged offenses committed after January 1, 2021. *See* Pub. L. 116-283, § 542(c), 134 Stat.

3388, 3612–13 (2021); *but see* Article 67(c)(4), UCMJ, 10 U.S.C. § 867(c)(4) (Supp. III 2019-2022) (limiting this Court to “action only with respect to matters of law”). Because Ann Cook’s offenses occurred on or after June 8, 2021, this Court can, and should, review for factual sufficiency. (EOJ.) With the grant in *Csiti*, this Court has recognized the need for clarity on the scope of its powers here.

This case can also provide clarity on the standard of review under the revised factual sufficiency standard. Even if Congress gave this Court new power, the contours are unclear. This Court’s statement in *Harvey* that it will review a CCA’s deference to the factfinder for an abuse of discretion does not answer all the questions on how, broadly speaking, this Court’s factual sufficiency review will work. 2024 CAAF LEXIS 502, at *8. Although clarification of the standard provides reason enough to grant review, applying either standard of review to the evidence here would support finding the conviction factually insufficient.

2. Amn Cook's conviction for transporting aliens is factually insufficient.

a. The military judge instructed the members with language from the United States Court of Appeals for the Ninth Circuit, which has an elevated standard compared with other circuits.

The Government, through the vehicle of clause 3 of Article 134, UCMJ, charged Amn Cook with violating 8 U.S.C. § 1324 by transporting aliens who were unlawfully in the United States either knowing their status, or with reckless disregard for their legal status. (Charge Sheet.)

The statute provides penalties for:

Any person who . . . knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law

8 U.S.C. § 1324(a)(1)(A)(ii) (2018). The military judge described the elements of the offense as follows:

1. That on or about 22 August 2021, within the State of Arizona, the accused knowingly transported or moved [the five immigrants] to help them remain in the United States illegally;
2. That the individuals transported or moved were aliens;
3. That the individuals transported or moved were not lawfully in the United States;

4. That the accused knew or acted in reckless disregard of the fact that the individuals transported or moved were not lawfully in the United States; and

5. That the charged federal statute, 8 U.S.C. § 1324, is an offense not capital.

(R. at 541.) But other federal circuit courts frame the elements differently, such as this example from the Third Circuit:

To sustain a conviction under this section, the government must prove that (1) the defendant transported or attempted to transport an alien within the United States, (2) the alien was in the United States illegally, (3) the defendant knew of or recklessly disregarded the fact that the alien was in the United States illegally, and (4) the defendant acted willfully in furtherance of the alien's violation of the law.

United States v. Silveus, 542 F.3d 993, 1002 (3rd Cir. 2008). While the instructions cabined what the members considered, a de novo factual sufficiency review can look at the elements as framed in other circuits, not merely the elevated standard in the Ninth Circuit. Even if reviewed for abuse of discretion, the AFCCA abused its discretion in using incorrect legal principles, failing to engage with the issue in a meaningful way.

b. *The evidence is insufficient to prove that Amn Cook “acted willfully in furtherance of” the immigrants’ unlawful status.*

The members were never confronted with the element—drawn from the language of the statute itself—that the transportation must occur “in furtherance of” the aliens’ unlawful presence in the United States. 8 U.S.C. § 1324(a)(1)(A)(ii). This “in furtherance of” language is absent from the entire record of trial. Instead, the military judge merged it into the first element of the offense, which required knowing transportation “to help [the immigrants] remain in the United States illegally.” (R. at 541.) How did this happen? It appears the trial counsel took model jury instructions from the Ninth Circuit and everyone went along with it. (App. Ex. XLVII.) But this misses an important doctrinal split among the circuit courts about the interpretation of § 1324(a)(1)(A)(ii).

In *United States v. Davidson*, the district court laid out the disagreements among the circuits about the meaning of the “in furtherance of” language. 1:07-CR-204 (LEK), 2010 U.S. Dist. LEXIS 17239 (N.D.N.Y. Feb. 19, 2010) (Appendix B.). It explained that the Eighth and Ninth Circuits employ a “direct or substantial relationship” test that looks at the overall impact of the transportation. *Id.* at *24–25 (citing *United States v. Moreno*, 561 F.2d. 1321, 1323 (9th Cir. 1977));

United States v. Velasquez-Cruz, 929 F.2d 420 (8th Cir. 1991)). The Sixth Circuit employs an intent-based approach that requires a “specific intent of supporting the alien’s illegal presence.” *United States v. 1982 Ford Pick-Up*, 873 F.2d 947, 951 (6th Cir. 1989). The Fifth Circuit employs a hybrid of the two but held the intent element indispensable. *See United States v. Merkt*, 764 F.2d 266, 271–72 (5th Cir. 1985). The Seventh Circuit looks broadly at facts and circumstances, *United States v. Parmelee*, 42 F.3d 387, 391 (7th Cir. 1994), while the Tenth Circuit similarly looks at any relevant evidence in assessing the element. *United States v. Barajas-Chavez*, 162 F.3d 1285, 1289 (10th Cir. 1999).⁴ In applying these tests, the circuits differ on whether the principal question is the accused’s intent or “merely the effect” of the travel. *Davidson*, 2010 U.S. Dist. LEXIS 17239, at *26.

When assessing sufficiency, this Court should not accept the Eighth and Ninth Circuit’s approach, embodied in the instructions here, that

⁴ *See also United States v. Khalil*, 857 F.3d 137, 139–40 (2nd Cir. 2017) (reciting, but not approving or disapproving, the district court’s instruction that “[i]n order to establish this element, the government must prove that the defendant knowingly and intentionally transported the alien in furtherance of the alien’s unlawful presence in the United States”).

looks only at the effect of the transportation. Stated differently, the military prosecuted an unfamiliar offense involving an unfamiliar body of law and chose the least favorable interpretation of the law to apply to Ann Cook's case.

Instead, this Court should view the element as requiring proof that Ann Cook intended to further the immigrants' unlawful status. *See Merkt*, 764 F.2d at 272. "In other words, the government must prove that the defendant specifically intended by means of the transportation to advance or assist the alien's violation of law, not merely that the effect of the transportation was to allow the alien to remain in the United States." *United States v. Moreno-Duque*, 718 F. Supp. 254, 259 (D. Ver. 1989). But that is precisely how the military judge framed the issue: "helping them remain in the United States illegally." (R. at 541.) Because the words "in furtherance of" were absent from the entire trial, the factfinder was never required to make the requisite finding of Ann Cook's purpose in transporting the immigrants, if any. This Court can look at the evidence and see it cannot meet the statutory requirements under 8 U.S.C. § 1324. And determining the elements of an offense requires no deference to the CCA.

To be clear, this is not a challenge to the instructions; the Defense waived that issue. But the Defense cannot waive the substantive elements of an offense. The evidence that Amn Cook acted “in furtherance of” the aliens’ unlawful status is factually insufficient. This is true even if reviewed for an abuse of discretion, as the CCA failed to address whether the elements of the offense were correctly stated and thus used incorrect legal principles.

c. The Government failed to prove Amn Cook’s purpose.

The evidence fails to convincingly demonstrate Amn Cook’s purpose, if any, for the transportation. QM’s purpose—unstated at the time—cannot substitute for Amn Cook’s. If he did not share in QM’s purpose of furthering the immigrants’ unlawful status, the conviction is factually insufficient.

The difficulty of proving Amn Cook’s state of mind is immaterial. The Fifth Circuit, when addressing the failure of instructions to address the “in furtherance of” element, explained that the Government’s burden remains high to prove intentional action. *Merkt*, 764 F.2d at 272. “The government’s problems of proof do not warrant an instruction that

removes one of the essential elements of the offense from the jury's consideration." *Id.*

The Government had to admit in its closing argument that circumstantial evidence provided much of its case. (R. at 551.) It layered assumption upon assumption to argue Amn Cook's guilt. But this Court can look through the fog and recognize the evidence itself fails.

The Government martialed potent evidence against a person they were not prosecuting—QM. The evidence established that QM was desperate for money, reached out to make money any way he could via Snapchat, got in contact with an unknown person to make "easy money" by transporting people for \$500 per person, and was driving at the key moment. (R. at 499, 502–03, 509.) He approached Amn Cook to go traveling around the area on August 22, 2021. (R. at 311, 408.) The Government at trial made much of Amn Cook renting the car after QM contacted him on August 22, but this ignores that Amn Cook had already rented the car the day before. (R. at 552; Pros. Ex. 17 at 1.) No evidence shows Amn Cook had a role in planning or executing the unlawful transportation.

It was only when QM said, “I’m about to make some money,” that Amn Cook had any idea that something was afoot. (R. at 407.) QM began vigorously texting. (R. at 411.) Despite the Government obtaining all of the location and phone use data from Amn Cook, it could not establish that *any* contact relevant to picking up the immigrants occurred through Amn Cook.⁵ Amn Cook’s interviews demonstrate his lack of intent: he “didn’t know what [QM] was doing” (R. at 407); when the immigrants entered the car, Amn Cook said, “Why the fuck is they ducking?” (R. at 501); he did not believe QM would do anything like that because they were “still passing . . . border patrol troopers and things like that” (R. at 411); and he arrived for a supposedly dangerous smuggling operation wearing shorts and slide-off sandals. (Pros. Ex. 18 File 1 at 9:40-10:15.)

Even the Government’s purportedly damning statement from Amn Cook—his response of “yeah, kind of” when asked if he knew the immigrants were there illegally—cuts the other way on this point. (R. at 317.) The actual statement is “Once I pulled over, kind of, yeah.” (Pros. Ex. 2 at 12:32-12:43.) This means is that Amn Cook, who was not driving,

⁵ It is unclear why the Government did not seek similar records from QM’s cellphone company or why QM did not testify at trial.

had zero indication of what was happening until the moment immigrants entered the SUV. The evidence fails to show that Amn Cook was aware of any payment scheme, where the immigrants were going, what their status was, or any other indicators that he willfully transported the immigrants “in furtherance of” their unlawful status.

An innocent bystander lacks the intent to transport an immigrant “in furtherance of” their unlawful presence. *United States v. Esparza*, 876 F.2d 1390 (9th Cir. 1989) provides an example. In *Esparza*, border patrol agents stopped a convoy including a moving van and a Dodge van; in the moving van were 48 aliens unlawfully in the United States. *Id.* at 1391. A border patrol agent testified it was common to have separate “lead” and “load” vehicles traveling together. *Id.* The Dodge van appeared to have guided the moving van onto a freeway. *Id.* Esparza was a front-seat passenger in the Dodge. *Id.* The driver of the moving van testified that he was travelling with the driver of the Dodge. *Id.* Blankets typically used in moving furniture were found in the Dodge. *Id.* The Government charged Esparza with both conspiracy and transporting illegal aliens, similar to the charges against Amn Cook here. *Id.* at 1391.

Esparza also had a prior conviction for transporting illegal aliens. *Id.* at 1393.

The Ninth Circuit found both the conspiracy and the transporting aliens convictions *legally* insufficient. *Id.* With regard to the transportation conviction, the court found the Government presented no evidence that Esparza participated in transporting, that he knew illegal aliens were in the moving van, or “acted willfully in furtherance of the violation of any law.” *Id.*

Despite the obvious distinction that Esparza could not see the aliens while Amn Cook could, these cases contain strong parallels. The Government’s case, aside from circumstantial evidence of dubious import, relied on Amn Cook’s presence in the SUV. He was there, the argument goes, therefore he must have been a willing participant. But conviction on this charge requires more. “No matter how difficult it may be to establish the defendant’s state of mind, the government must prove this portion of its case.” *Merkt*, 762 F.2d at 272. The evidence failed to show Amn Cook’s advance role in planning or affirmative steps to assist QM once QM hatched his plot. There was not even much time between the pickup and their apprehension—the responding agent left a traffic

stop, quickly located the SUV, and pulled it over within two miles. (R. at 274–76.) In *Esparza*, a swarm of circumstantial evidence—including prior conviction for the exact same thing—could not overcome the paucity of evidence about Esparza’s willful participation in the offenses. So too here.

If reviewing for abuse of discretion, the AFCCA’s applied incorrect principles of law in failing to adequately assess whether Amn Cook had the requisite intent. Additionally, the AFCCA abused its discretion because it failed to consider the important fact of the erroneous transcript. Appendix A at 19.

d. Amn Cook neither knew nor acted in reckless disregard of their immigration status.

As to knowledge, after-the-fact documentation of the immigrants’ status offers little assistance in establishing Amn Cook’s state of mind. From his perspective, the SUV stopped on the side of the road and five random people got into the vehicle. No evidence establishes that he received any information from them confirming their status. While certainly an inference was possible based on the location and circumstances, the Government relies on weak evidence that Amn Cook, in fact, drew that inference. When asked if he knew the people were in

the country illegally, the transcript suggests he said, “Yeah, kind of.” (R. at 317.) But what he actually said was “when I pulled over, yeah, kind of.” (Pros. Ex. 2 at 12:32-12:43.) This suggests he had no suspicions or knowledge until the moment they pulled over.

The timeframe is important here. It is not as though they were transporting people from the southern border to Chicago, with various stops along the way or opportunity to process what was occurring. Instead, there seems to be only a short period between the time when QM picked up the immigrants and the time they were stopped. The primary argument is that Amn Cook did not willfully act in furtherance of unlawful presence in the United States. Moreover, regarding a reckless disregard of their immigration status, the dynamic nature of the situation and short window to process makes it questionable that he even had time to do anything about the situation, had he chosen to do so. The evidence does not establish Amn Cook knew their immigration status nor acted in reckless disregard of their immigration status.

3. Amn Cook’s conviction for conspiracy to transport aliens is factually insufficient.

As charged, a conspiracy under Article 81, UCMJ, required the Government to prove: (1) that Amn Cook entered into an agreement with

QM and unknown co-conspirators to transport by passenger vehicle five people within the United States, knowing or in reckless disregard that they were aliens present in violation of the law; and (2) that “while the agreement continued to exist” and while Amn Cook “remained a party to the agreement,” Amn Cook or QM performed one or more overt acts in furtherance of the conspiracy. *MCM*, pt. IV, ¶5.b.(1); R. at 542. The overt acts included that they “(a) secured a rental vehicle; (b) drove the vehicle near the US-Mexico border; and (c) transported the aforementioned aliens in violation of law.” Charge Sheet; R. at 542. While the agreement need not take on any specific form, the agreement must exist at the time or before the charged overt act. *MCM*, pt. IV, ¶5.c.(4). The Government must prove beyond a reasonable doubt that the agreement encompassed every element of the offense. *Military Judges’ Benchbook*, Dept. of the Army Pamphlet 27-9 at 1019 (Feb. 29, 2020).

Here, the Government failed to present sufficient proof either that the agreement occurred, or that if an agreement existed, it encompassed every element of the charged offense. On the first point, the Government relied chiefly on supposition and assumption to prove an agreement exists. Granted, the conduct of the parties *may* show an agreement.

MCM, pt. IV, ¶ 5.c.(2). But the Government’s efforts here fell short. The evidence from QM and Amn Cook’s interviews does not reflect any agreement: both make clear that Amn Cook was not part of the QM’s plan. Instead, the Government stretched the limited proof at its disposal to create the impression of agreement. This is not enough.

One of the Government’s efforts was to suggest a phone call between QM and Amn Cook on August 22, 2023 indicated an agreement because they rented the car approximately 90 minutes later. (R. at 552.) But this gets the dates wrong—Amn Cook had *already* rented the car the day before this phone call. (Pros. Ex. 17 at 1.) While QM was present when Amn Cook extended the rental, this is unsurprising for two friends who were “like brothers.” (R. at 510.) What followed, at least in argument, was a good summation of the Government’s case: looking backwards in time from the moment of arrest and aligning the pieces to suggest there must have been an agreement. (R. at 553–60.)

The contrary evidence powerfully rebuts the Government’s speculative reliance on flimsy circumstantial evidence. In both QM and Amn Cook’s statements, there is no indication that Amn Cook knew, *in advance*, what would happen on that desert road. Indeed, what the

Government treated as damning evidence—that Amn Cook said “yeah, kind of” when asked if he knew they were illegal—falls apart when the correct transcription is used. (R. at 317, 559.) Amn Cook said, “[W]hen I pulled over, yeah, kind of.” (Pros. Ex. 2 at 12:32-12:43.) What this means is that up until the moment the car was pulled over, he was not aware of QM’s plan. There was no agreement. Amn Cook sitting in the car shocked at what was happening does not constitute an agreement, either.

The paucity of evidence on the agreement highlights the second point. Even if there was some type of agreement, the agreement must encompass each element of the target offense. *Benchbook*, at 1019. At the moment the agreement was formed, Amn Cook would have had to agree to participate in the willful transportation of aliens in furtherance of their unlawful status. The evidence simply does not show such a specific agreement. To reach the contrary conclusion relies on the complete disbelief of QM and Amn Cook’s evidence presented at trial. “But disbelief alone cannot prove either his knowledge of the conspiracy or his participation in it.” *United States v. Cloughessy*, 572 F.2d 190, 191 (9th Cir. 1977). In *Cloughessy*, the appellant drove a casual acquaintance

and another person to a location where the two men negotiated the sale of heroin to undercover agents. *Id.* at 190–91. While the two men were at the negotiation, the appellant followed another undercover agent. *Id.* at 191. On these facts, the Ninth Circuit held his conduct, which “may give rise to some suspicion that he knew something was up,” was insufficient and reversed. *Id.* “Mere casual association with conspiring people is not enough.” *Id.* (citations omitted).

The Government relied on assumptions heaped upon circumstantial evidence to convict Amn Cook of conspiracy. But the failure to demonstrate agreement is fatal to the case. Without the agreement, there is little more than guilt by association, which is impermissible. *United States v. Melchor-Lopez*, 627 F.2d 886, 891 (9th Cir. 1980). Even if Amn Cook did not object once the immigrants entered the SUV, “the existence of an opportunity to join a conspiracy, or simple knowledge, approval of, or acquiescence in the object or purpose of the conspiracy, without an intention and agreement to accomplish a specific illegal objective, is not sufficient to make one a conspirator.” *Id.* (citations omitted). Amn Cook was present, but he did not conspire. Even if considered through the lens of an abuse of discretion, the AFCCA ran

afoul of these tenets when it applied the elements of conspiracy to the facts here in a clearly unreasonable fashion, diminishing the importance of an agreement. His conviction for conspiracy is against the weight of the evidence, and this Court should grant review and hold the conviction factually insufficient.

4. Conclusion

This Court now has the power to review for factual sufficiency, and this is a case that calls for it. It involved a novel charging scheme in the Air Force and uncertainty about the elements of the offense. The Government's case, resting as it did on flimsy circumstantial evidence, failed to prove that Amn Cook willfully acted in furtherance of unlawful immigration status. Or that he knew they were aliens. Or that he knew they were there unlawfully. Or that he acted in reckless disregard of their unlawful status. The conspiracy conviction is also factually insufficient: the Government failed to show either an agreement occurred or, if an agreement occurred, whether that agreement encompassed every element of the offense.

The AFCCA spent most of its analysis on legal sufficiency, then provided a paragraph to analyze the more complex task of factual

sufficiency. It did not engage with the circuit split or several other key arguments undermining factual sufficiency. And it seemed fixated on facts related to a gun possession specification that the military judge dismissed under R.C.M. 917. Appendix A at 2 n.4, 16–20. Amn Cook asks this Honorable Court to perform the analysis that the AFCCA did not. Whether reviewed for abuse of discretion or *de novo*, this Court should grant review and, using its new factual sufficiency power, hold the evidence factually insufficient to support the convictions.

WHEREFORE, Amn Cook respectfully requests this Honorable grant his petition for grant of review.

II.

THE LOWER COURT ERRONEOUSLY INTERPRETED AND APPLIED THE AMENDED FACTUAL SUFFICIENCY STANDARD UNDER ARTICLE 66(d)(1)(B), UCMJ.

Standard of Review

This Court reviews questions of statutory construction *de novo*. *United States v. Kohlbeck*, 78 M.J. 326, 330–31 (C.A.A.F. 2019) (citing *United States v. Atchak*, 75 M.J. 193, 195 (C.A.A.F. 2016)).

Law and Analysis

Congress recently amended the factual sufficiency review standard in Article 66(d)(1)(B), UCMJ. 10 U.S.C. § 866(d)(1)(B) (Supp. III 2019-2022). But the changes do not hollow out a CCA's factual sufficiency review. The prior version of Article 66(d), UCMJ, empowered the CCAs to approve findings that are "correct in law and fact and . . . on the basis of the entire record, should be approved." Article 66(d), UCMJ, 10 U.S.C. § 866(d) (2018). As explained above, the AFCCA's analysis stands in tension with *Harvey*. In a case where the court-martial hinged on video evidence, it is critical that the CCA, when performing its factual sufficiency review, understand that it need not show deference to "other evidence" besides witness testimony. Article 66(d)(1)(B)(ii)(I), UCMJ (Supp. III 2019-2022). Videotaped interviews of Ann Cook and QM were perhaps *the* central evidence in the trial, and yet the AFCCA did not note any difference in its level of deference to the factfinder. But as this Court noted in *Harvey*, "when the CCA can assess documents, videos, and other objective evidence just as well as the court-martial, the CCA might determine that the appropriate deference required is low." *Id.* at *8. Because it is unclear whether the AFCCA understood the range of its

discretion on this issue, this Court cannot be certain it properly applied the new Article 66, UCMJ, factual sufficiency review.

As it did in *Csiti*, this Court can grant review and, if the other issues do not resolve the case, remand the case in light of *Harvey* for the AFCCA to apply the correct standards under Article 66, UCMJ. *See United States v. Nerad*, 69 M.J. 138, 147–48 (C.A.A.F. 2010) (remanding where it was unclear whether the CCA’s review was consistent with a “correct view of the law”).

WHEREFORE, Amn Cook respectfully requests this Honorable Court grant his petition for grant of review.

III.

THE MAXIMUM PUNISHMENT CALCULATION WAS PLAIN ERROR, LEADING TO A TRIPLING OF AIRMAN COOK’S PUNITIVE EXPOSURE.

Additional Facts

When discussing maximum confinement for offenses, the trial counsel stated that the maximum punishment for Specification 1 of Charge IV (transporting aliens) was 25 years, or five years per immigrant. (R. at 597.) Although not specifically discussed, presumably the same calculation occurred for conspiracy to transport aliens offense.

(R. at 597–98.) In total, they calculated the maximum confinement as 57 years and two months. (R. at 598.) Defense counsel concurred. (*Id.*)

Standard of Review

“The maximum punishment authorized for an offense is a question of law, which [this Court reviews] de novo.” *United States v. Beaty*, 70 M.J. 39, 41 (C.A.A.F. 2011) (citing *United States v. Ronghi*, 60 M.J. 83, 84–85 (C.A.A.F. 2004); *United States v. Ingham*, 42 M.J. 218, 229–30 (C.A.A.F. 1995)). In the absence of an objection by trial defense counsel, a military judge’s determination of the maximum punishment is reviewed for plain error. *See United States v. St. Blanc*, 70 M.J. 424, 430 (C.A.A.F. 2012). To prevail under plain error analysis, an appellant must show (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right. *United States v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008) (quotations and citations omitted).

Law and Analysis

The following table summarizes the maximum confinement applied at the court-martial.

Charge and Specification	Article	Maximum Confinement
Charge I, Specification	86 (AWOL)	1 month
Charge II, Specification	87b (Breach of Restriction)	1 month
Charge III, Specification	112a (Marijuana Use)	2 years
Charge IV, Specification 1	134 (Transporting Aliens)	25 years
Additional Charge I, Specification	81 (Conspiracy to Transport Aliens)	25 years
Additional Charge II, Specification	131b (Obstructing Justice)	5 years
Total		57 years, 2 months

R. at 597–98; *MCM*, pt. IV, ¶¶ 5.d.(1), 10.d.(2)(a), 13.d.(3), 50.d.(1)(b), 83.d.; R.C.M. 1003(c)(1)(B)(ii).

Under the statute, the maximum punishment for transporting aliens is five years “for each alien.” 8 U.S.C. § 1324(a)(1)(B), (a)(1)(B)(ii). Conspiracy’s maximum confinement is defined by the underlying offense, thus would also be five years. *MCM*, pt. IV, ¶ 5.d.(1). The military judge and parties multiplied five aliens by the maximum punishment and reached 25 years per specification. But this misconceives how these offenses are charged.

The Government could have charged the transportation of each alien separately. Had it done so, the maximum punishment would have

been 50 years for the 8 U.S.C. § 1324 offenses. But it did not. This is little different than the Government charging divers occasions in a single specification.

Three federal and one military case demonstrate that the military judge erred here. In *United States v. Salazar-Villarreal*, 872 F.2d 121, 121–22 (5th Cir. 1989), the appellant transported 24 aliens in the vehicle, and he was indicted on four counts of transporting aliens. But he pleaded guilty to a single count of transporting illegal *aliens* within the United States. *Id.* The Fifth Circuit stated that the maximum punishment was five years’ confinement. *Id.* at 122. Second, in *United States v. Hilario-Hilario*, 529 F.3d 65, 69 (1st Cir. 2008), an 8 U.S.C. § 1324 case involving bringing aliens into the United States (rather than transporting), the indictment alleged that the defendants “placed in jeopardy the lives of the aliens, approximately eighty-seven (87) aliens.” At issue was whether the maximum punishment was five years (because he acted as an aider and abettor) or ten years (as principal). *Id.* at 75. Third, in *United States v. Ramirez-De Rosas*, 873 F.2d 1177, 1178 (9th Cir. 1989), the defendant pleaded guilty to illegal transportation of aliens when he engaged in a high-speed chase with four aliens in a van. The court stated

that “[t]he maximum sentence provided for by statute is incarceration for five years (60 months). 8 U.S.C. § 1324(a).” *Id.*

One aspect of federal sentencing absent here is the guidelines. They provide further insight into charging. Federal courts take into account the total number of aliens involved in the offense and apply a sentence enhancement for large numbers of aliens. *See United States v. Williams*, 610 F.3d 271, 292–93 (5th Cir. 2010) (reviewing a case where the district court imposed a sentence enhancement because the appellant transported over 100 aliens for financial gain, resulting the statutory maximum sentence of 10 years’ confinement). Federal sentencing guidelines would have protected Amn Cook from the military judge’s miscalculation.

Although rarely prosecuted in the military, one case does address the analogous punishment. In *United States v. Spykerman*, the Navy-Marine Corps Court of Criminal Appeals addressed the maximum punishment as follows: “Specifically, he was charged with two specifications of conspiring to transport aliens for financial gain and one specification of the substantive offense of transporting aliens for financial gain. Had he been indicted by a grand jury and subsequently convicted

in civilian federal court, each offense would carry a maximum term of imprisonment of 10 years.” 81 M.J. 709, 732 (N-M. Ct. Crim. App. 2021) (emphasis added) (citing 8 U.S.C. § 1324(a)(1)(B)(i)). Even though the specification on transporting involved multiple aliens, the maximum punishment would only be for a single specification.⁶

The maximum punishment should have been as follows:

Charge and Specification	Article	Maximum Confinement
Charge I, Specification	86 (AWOL)	1 month
Charge II, Specification	87b (Breach of Restriction)	1 month
Charge III, Specification	112a (Marijuana Use)	2 years
Charge IV, Specification 1	134 (Transporting Aliens)	5 years
Additional Charge I, Specification	81 (Conspiracy to Transport Aliens)	5 years
Additional Charge II, Specification	131b (Obstructing Justice)	5 years
Total		17 years, 2 months

The military judge committed plain and obvious error in the miscalculation. That these offenses are unfamiliar does not excuse the

⁶ The punishment is 10 years per count, rather than 5 years, because it was for financial gain, which doubles the penalty. 8 U.S.C. § 1324 (a)(1)(B)(i).

error. The military judge issued by far the strongest sentences for the 8 U.S.C. § 1324 offenses—24 months out of a total sentence of 26 months’ confinement. When he did so, he misconceived the statutory maximum to Amn Cook’s prejudice.

Before the AFCCA, Amn Cook raised numerous sentences from civilian and military courts to show Amn Cook’s sentence was inappropriately severe. Appendix A at 38–39. The AFCCA declined to compare them and found the sentence not inappropriately severe. *Id.* at 39. This missed the opportunity to correct an excessive sentence and could have erased the impact of the military judge’s error. But as it stands, the error in maximum punishment left the military judge with the mistaken impression that Amn Cook was subject to three times the confinement overall, and five times the proper confinement for the two offenses that received the greatest sentence: 24 months for transporting aliens and 24 months for conspiracy to transport aliens, served concurrently. (EOJ.)

Most troubling is that the AFCCA did not even review this issue, instead finding that it was waived. In doing so, it cited cases applying waiver generally, but nothing specific to this context. Appendix A at 33

(citing *United States v. Davis*, 79 M.J. 329, 333 (C.A.A.F. 2020); *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009)). But this is inconsistent with this Court's decision in *St. Blanc*, 70 M.J. at 430, where this Court reviewed an incorrect maximum punishment calculation for plain error. It is inconsistent with how the AFCCA has previously treated the issue. *United States v. Raasch*, No. ACM 35717, 2005 CCA LEXIS 342, at *8–9 (A.F. Ct. Crim. App. Oct. 14, 2005) (Appendix C) (reviewing for plain error when trial defense counsel failed to object to the military judge's maximum sentence calculation). And it is inconsistent with how federal courts treat the issue. *Rosales-Mireles v. United States*, 585 U.S. 129, 139 (2018) (stating plain error is the standard for reviewing incorrect guidelines calculations). The AFCCA here erred in failing to review this issue. This Court can clarify the waiver standard for incorrect maximum punishment calculations for the field.

WHEREFORE, Ann Cook respectfully requests this Honorable Court grant his petition for grant of review.

Respectfully submitted,



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Appendix A

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

No. ACM 40333

UNITED STATES

Appellee

v.

Jakalien J. COOK

Airman (E-2), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 3 July 2024

Military Judge: Christopher D. James (Article 30a); Colin P. Eichenberger.

Sentence: Sentence adjudged 18 February 2022 by GCM convened at Davis-Monthan Air Force Base, Arizona. Sentence entered by military judge on 20 April 2022: Dishonorable discharge, confinement for 27 months, forfeiture of all pay and allowances, and reduction to E-1.

For Appellant: Major Matthew L. Blyth, USAF; Major Heather M. Bruha, USAF.

For Appellee: Colonel Zachary T. Eytalis, USAF; Lieutenant Colonel Thomas J. Alford, USAF; Lieutenant Colonel James P. Ferrell, USAF; Major Olivia B. Hoff, USAF; Mary Ellen Payne, Esquire.

Before RICHARDSON, DOUGLAS, and WARREN *Appellate Military Judges*.

Judge WARREN delivered the opinion of the court, in which Senior Judge RICHARDSON and Judge DOUGLAS joined.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4

WARREN, Judge:

Appellant faced eight specifications at a general court-martial and entered mixed pleas to these offenses. Appellant pleaded guilty to one specification of absence without leave (AWOL), in violation of Article 86, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 886; one specification of breach of restriction, in violation of Article 87b, UCMJ, 10 U.S.C. § 887b; and one specification of wrongful use of a controlled substance (marijuana) on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.¹ The military judge found these pleas provident and entered findings of guilty.

As to the remaining specifications, a general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of illegally transporting aliens² within the United States, in violation of clause 3 of Article 134, UCMJ, 10 U.S.C. § 934 (incorporating the non-capital offense of 8 U.S.C. § 1324); one specification of conspiring to illegally transport aliens within the United States, in violation of Article 81, UCMJ, 10 U.S.C. § 881;³ and one specification of obstructing justice, in violation of Article 131b, UCMJ, 10 U.S.C. § 931b.⁴ The military judge sentenced Appellant to a dishonorable discharge, confinement for 27 months, forfeiture of all pay and allowances, and reduction in rank to the grade of E-1. The convening authority took no action on the findings and approved the sentence in its entirety.

Appellant asserts 14 issues on appeal, summarized as follows: (1) whether Appellant’s conviction for transporting aliens unlawfully in the United States is factually insufficient; (2) whether Appellant’s conspiracy specification fails to state an offense because it does not allege conspiracy to commit an offense under the UCMJ; (3) whether Appellant’s conviction for conspiracy to transport aliens in the United States is factually insufficient; (4) whether the military judge abused his discretion in denying a defense motion to dismiss based on the Government’s deportation of witnesses to the alleged offenses before trial; (5) whether omission of the Government’s closing argument slides—

¹ Unless otherwise noted, all references in this opinion to the UCMJ, Military Rules of Evidence (Mil. R. Evid.), and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

² “Aliens” is a term utilized in 8 U.S.C. § 1324. See 8 U.S.C. § 1101 (a)(3) (“The term “alien” means any person not a citizen or national of the United States.”).

³ The specifications of illegally transporting aliens and conspiring to illegally transporting aliens incorporate the non-capital offense of 8 U.S.C. § 1324.

⁴ After the Government rested its case-in-chief, the military judge raised and granted *sua sponte* an R.C.M. 917 motion for findings of not guilty on the two remaining specifications under Article 134, UCMJ, incorporating the non-capital offense of 18 U.S.C. § 922(g) for illegal possession of a firearm and ammunition by a drug abuser.

with embedded videos in evidence and played to the members—necessitates remand for correction; (6) whether the military judge abused his discretion when he allowed the Government to introduce the criminal history of one of the aliens as aggravation evidence at sentencing; (7) whether the military judge and parties incorrectly calculated the maximum punishment (as to the transporting and conspiracy to transport aliens offenses), thereby impermissibly “tripling” Appellant’s total punitive exposure; (8) whether Appellant’s sentence is inappropriately severe; (9) whether Appellant’s sentence to confinement for the specifications of Charge I and Charge II (AWOL and breaking restriction) exceeded the maximum punishment for each offense; (10) whether relief is required because the convening authority failed to provide reasoning for denying Appellant’s requests for deferment of reduction in rank and forfeitures; (11) whether Appellant is entitled to *Moreno*, or alternatively, *Tardif* relief because of the 200-day delay between announcement of the sentence and docketing with this court;⁵ (12) whether Appellant was denied a constitutional right to a unanimous verdict; (13) whether Appellant’s conviction for obstruction of justice is factually and legally sufficient; and (14) whether Appellant’s convictions for transporting aliens and conspiracy to transport aliens are legally sufficient.⁶ Finally, we identified one additional issue requiring analysis: (15) whether Appellant is entitled to *Moreno* relief because more than 18 months elapsed from the docketing of Appellant’s case to the issuance of our decision.

We have carefully considered issues (10), (12), and (13) and find Appellant is not entitled to relief. *See United States v. Guinn*, 81 M.J. 195, 204 (C.A.A.F. 2021) (citing *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987)). We find Appellant is entitled to relief for issue (9) and order appropriate action in our decretal paragraph. As to Appellant’s remaining issues and our additional issue, we find no error that materially prejudices a substantial right of Appellant and affirm the findings and the sentence.

I. BACKGROUND

Appellant was apprehended by law enforcement for suspected illegal transportation of five Mexican nationals near the Arizona-Mexico border on 22 August 2021. At that time, Appellant, who was stationed at Davis-Monthan Air Force Base (AFB), Arizona, was pending administrative separation from the

⁵ “*Moreno*” and “*Tardif*” refer to *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006) and *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002).

⁶ Appellant personally raises issues (13) and (14) pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Air Force after only two years of his six-year enlistment owing to his prior wrongful marijuana use.⁷

Appellant's involvement in transporting and conspiring to transport five Mexican nationals came about after his close friend, QM, a former Airman discharged in June 2021, replied to a Snapchat message from an unknown person on 14 August 2021 offering "easy money" for transporting Mexican nationals upon entering the United States. While only QM received and responded to this Snapchat message, phone records presented at trial indicated QM called Appellant on Sunday, 22 August 2021, at approximately 1100. By 1230, Appellant had arranged to extend a one-day rental contract for a white Jeep Cherokee SUV, which Appellant and QM had picked up the day before at the Tucson International Airport, Arizona, located near Davis-Monthan AFB.

Thereafter, at approximately 2230 on 22 August 2021, Sergeant CM of the Arizona Department of Public Safety (DPS) apprehended Appellant and QM in Appellant's rental vehicle along with five Mexican nationals near Hereford, Arizona, less than 10 miles from the border, but over 90 miles from Appellant's duty station. The five Mexican nationals were dressed in camouflage and wearing "carpet shoes" that obscured their footprints.⁸ These Mexican nationals were strangers to Appellant and QM, who had picked them up after an unknown caller from a Mexican area code contacted QM via WhatsApp at least eight times that evening.

After the group was pulled over and detained by Sergeant CM, there was an interval of approximately 30 minutes before agents from U.S. Customs and Border Protection (USCBP) responded to the scene. Appellant and QM each "factory reset" their phones sometime between the time of the vehicle stop and their respective interviews by USCBP agents. This erased all call logs, voicemail, and text messages from their phones. This act formed the basis for Appellant's conviction of obstruction of justice, in violation of Article 131b, UCMJ.

USCBP agents ultimately released Appellant and QM at approximately 0700 on 23 August 2021, after notifying Air Force officials that Appellant had been arrested and detained on suspicion of illegally transporting aliens. As a

⁷ Appellant received nonjudicial punishment on 24 June 2021 for multiple marijuana uses between 15 April 2021 and 7 June 2021. Appellant engaged in approximately six additional marijuana uses between on or about 8 June 2021 and on or about 21 September 2021, for which Appellant was convicted, consistent with his pleas, of violation of Article 112a, UCMJ, 10 U.S.C. § 912a, at this court-martial.

⁸ A border patrol agent testified at trial these are made of "carpet" material, and undocumented noncitizens often wear them over their existing shoes so as to not leave footprints.

result of his arrest and detention, Appellant was unable to report for duty as scheduled on 23 August 2021, thus forming the basis for his conviction of absence, without authority, from his place of duty, in violation of Article 86, UCMJ.

Finally, after reporting back to base on 23 August 2021 and being interviewed by investigators from the Security Forces Office of Investigations (SFOI), Appellant's commander restricted him to base on 24 August 2021. Appellant broke this restriction the same evening, resulting in the conviction for violation of Article 87b, UCMJ.

II. DISCUSSION

A. Failure to State an Offense—Conspiracy

Appellant argues, for the first time on appeal, that the specification in Additional Charge I alleging conspiracy to transport aliens fails to state an offense because (1) the offense as described in the charge sheet does not explicitly identify Article 134, UCMJ, as the predicate offense; and (2) even if it did, 8 U.S.C. § 1324 is not an “offense under this chapter” within the meaning of Article 81, UCMJ, even if incorporated via Article 134, UCMJ. For the reasons set forth below, we are unpersuaded.

1. Additional Background

At trial, the parties agreed during discussion of the findings instructions that the predicate offense for the conspiracy charge was Article 134, UCMJ, incorporating 8 U.S.C. § 1324 under clause 3 as a “crime or offense not capital.” Without objection by trial defense counsel, the military judge took judicial notice 8 U.S.C. § 1324 is a “crime or offense not capital” and provided the members with a findings instruction to this effect. Appellant did not challenge Additional Charge I and its specification at trial for failure to state an offense.

2. Law

Whether a specification fails to state an offense is a question of law which this court reviews de novo. *United States v. Turner*, 79 M.J. 401, 404 (C.A.A.F. 2020) (citation omitted).

“A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication; however, specifications under Article 134[, UCMJ,] must expressly allege the terminal element[,],” such as being prejudicial to good order and discipline, service discrediting, or a crime or offense not capital. Rule for Courts-Martial (R.C.M.) 307(c)(3). This requirement is meant to “give the accused notice” of the charges he must defend and “protect him against double jeopardy.” *United*

States v. Dear, 40 M.J. 196, 197 (C.M.A. 1994) (citing R.C.M. 307(c)(3) (1984)) (additional citation omitted). “[I]n order to state the elements of an inchoate offense under Articles 80 and 81, UCMJ, a specification is not required to expressly allege each element of the predicate offense.” *United States v. Norwood*, 71 M.J. 204, 205, (C.A.A.F. 2012) (footnote omitted). “However, sufficient specificity is required so that an accused is aware of the nature of the underlying target or predicate offense — particularly in the context of an underlying Article 134, UCMJ, offense.” *Id.* at 207.

A specification is viewed with “maximum liberality” when attacked for the first time on appeal. *Turner*, 79 M.J. at 403 (citation omitted). In other words, challenges after trial “will be viewed with greater tolerance and . . . liberally construed in favor of validity.” *Id.* at 405 (alteration, internal quotation marks and footnote omitted). A reviewing court may consider the entire record of trial in deciding whether a specification as alleged necessarily implied all the essential elements. *See United States v. Hamilton*, 82 M.J. 530, 534 (A. Ct. Crim. App. 2022) (“[W]e are not only confined to the text of the specification, we next look to the record to see if the specification’s wording . . . necessarily implied [the elements of the offense and] therefore gave appellant sufficient notice of the offense he must defend himself against.”).

Article 81(a), UCMJ, provides: “Any person subject to this chapter who conspires with any other person to *commit an offense under this chapter*⁹ shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.” (Emphasis added).

Article 134, UCMJ, provides, in the pertinent part:

Though not specifically mentioned in this chapter, . . . crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

8 U.S.C. § 1324(a)(1)(A)(ii) punishes one who:

knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law.

“As a general rule, crimes and offenses not capital, as defined by Federal statutes, may be properly tried as offenses under clause (3) of Article 134.”

⁹ Chapter 47, 10 United States Code: the UCMJ.

United States v. Perkins, 47 C.M.R. 259, 263 (A.F.C.M.R. 1973). “[A]n offense charged under the third clause of Article 134 is just as much ‘an offense under’ the [UCMJ] as is an offense alleged under the first two clauses of that Article or under any other punitive article.” *United States v. Craig*, 19 M.J. 166, 169 (C.M.A. 1985) (affirming Article 80, UCMJ, attempt conviction for underlying Article 134, UCMJ, clause 3 offense); *see also United States v. Ashworth*, NMCCA 201500028, 2015 CCA LEXIS 373, at *11 (N.M. Ct. Crim. App. 3 Sep. 2015) (unpub. op.) (affirming Article 82, UCMJ, 10 U.S.C. § 882, solicitation conviction with underlying offense of distribution of child pornography proscribed in 18 U.S.C. § 2252 assimilated into Article 134, UCMJ, clause 3 offense).

Statutory interpretation is a question of law we review de novo. *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017) (citation omitted). “Unless the text of a statute is ambiguous, ‘the plain language . . . will control unless it leads to an absurd result.’” *United States v. Schell*, 72 M.J. 339, 343 (C.A.A.F. 2013) (quoting *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012)) (additional citation omitted). “Whether the statutory language is ambiguous is determined ‘by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.’” *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

3. Analysis

Appellant contends it is “questionable” whether an accused may be convicted of conspiracy to violate Article 134, UCMJ, based on an assimilated offense outside the UCMJ. We hold, however, that the language of Article 81, UCMJ, that permits criminalizing a conspiracy to commit any offense “under this chapter” includes offenses under clause 3 of Article 134, UCMJ. Both our predecessor court and our superior court have concluded the term “crimes and offenses not capital” includes all non-capital federal criminal statutes. *See Perkins*, 47 C.M.R. at 263; *see also Craig*, 19 M.J. at 169 (“This interpretation of the relationship between Articles 80 and 134 does not violate the canon of statutory construction that penal statutes should be construed strictly because it merely gives effect to the clear meaning of the language of the [UCMJ].”). Moreover, Congress recently reaffirmed its intent to give Article 134, UCMJ, broad scope and boundaries, which undermines Appellant’s policy argument that such a construction provides too wide a berth of prosecutorial discretion. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5451, 130 Stat. 2000, 2958 (2016) (expanding the reach of clause 3 of Article 134, UCMJ, by explicitly providing extraterritorial jurisdiction for all “crimes and offenses not capital” incorporated under this clause).

Here, viewing the specification at issue with “maximum liberality” we find it alleges a UCMJ violation by implication. *See Turner*, 79 M.J. at 402. That is, even though the conspiracy specification referenced only 8 U.S.C. § 1324 and did not explicitly identify clause 3 of Article 134 as the predicate offense, the language used is sufficient to effectively plead the conspiracy specification under the facts of this case. It put Appellant on actual notice of the predicate offense. The parties below clearly understood the underlying offense of the conspiracy charge was under clause 3 of Article 134, incorporating the non-capital offense of 8 U.S.C. § 1324. The purpose of charging is to provide adequate notice of the nature of the offense to be defended at trial and to prevent double jeopardy for the charged specification after trial. *Dear*, 40 M.J. at 197. The language of this specification does both by implication, when viewed in the context of the entire charge sheet, including Specification 1 of Charge IV, which alleged a violation under clause 3 of Article 134, expressly incorporating transportation of aliens in violation of 8 U.S.C. § 1324 as the crime or offense not capital. Appellant is not persuasive in arguing that he lacked notice of the conspiratorial conduct he needed to defend against when he was also charged with a substantive offense involving the same conduct (transporting aliens), and he does not profess any confusion as to the misconduct alleged in that charge.

B. Legal and Factual Sufficiency of Appellant’s Transporting Aliens and Conspiracy to Transport Aliens

Appellant challenges the legal and factual sufficiency of his convictions for transporting aliens in the United States, in violation of Article 134, UCMJ, and conspiracy to commit the same, in violation of Article 81, UCMJ. As to Appellant’s factual sufficiency challenge to those convictions, this case calls upon us to apply the new standard of review set forth by Congress in the 2021 amendments to Article 66(d), UCMJ, 10 U.S.C. § 866(d). *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (FY21 NDAA), Pub. L. 116-283, § 542(b), 134 Stat. 3611, 3661–62 (1 Jan. 2021).

1. Additional Background

Appellant and his civilian co-conspirator, QM, had served together in the Security Forces Squadron at Davis-Monthan AFB prior to QM’s separation from active duty. QM described their relationship as “brothers.”

In August 2021, QM was unemployed and desperate for money to provide for his fiancée and the first child they were expecting. On approximately 14 August 2021, QM received a Snapchat message from an unknown correspondent in response to QM posting a story about how he needed “money, money, money.” This correspondent offered QM a chance to make \$500.00 per person transporting undocumented aliens within the United States. QM agreed.

Appellant rented a SUV on 21 August 2021, initially for one day. QM called Appellant at approximately 1100 on Sunday, 22 August 2021, the day of the charged misconduct. Approximately one hour and twenty minutes later, Appellant and QM were at the Tucson International Airport together extending that rental for an additional day, although each owned his own vehicle. Appellant paid for and was listed as the primary driver for this rented vehicle.

Later that afternoon, Appellant and QM drove south from Tucson to Sierra Vista, Arizona, purportedly for sightseeing, and then north to Phoenix to drop off QM's fiancée. Appellant and QM then traveled back to Sierra Vista while taking turns driving during this half-day-long journey. On the way, QM's iPhone repeatedly rang showing a WhatsApp number with a foreign "53" area code visible on the Apple CarPlay display.

Appellant and QM reached Sierra Vista at approximately 2230 hours, with QM now driving the vehicle. At some point, they turned off the main highway and traveled on a dirt road near Hereford, Arizona, less than ten miles from the Mexico border. They stopped their vehicle and a man dressed in gray clothing spoke with QM briefly. Then the man in gray opened the trunk of Appellant's rental SUV and five people entered—three into the back seat and two into the rear hatch area. Appellant and QM did not know any of them. The man in gray did not enter the vehicle, but yelled, "Dale, dale, dale," meaning "go on" in Spanish.

As they drove away, Appellant noticed their five passengers apparently ducking as Appellant's rental vehicle passed a marked Arizona DPS squad car, with Appellant purportedly exclaiming: "[W]hy the f[**]k is they ducking?!" QM continued to drive the rental vehicle about two miles before Sergeant CM apprehended Appellant, QM, and the five passengers. Sergeant CM found Appellant in the passenger seat and a Glock-45 pistol registered to Appellant stored in the console with a 33-round magazine with 15 rounds of ammunition loaded. Sergeant CM observed the five other passengers dressed in camouflage, wearing "carpet shoes," with a strong "dirty, sweaty, musty" odor, and feigning sleep. None of them spoke English.

Sergeant CM contacted USCBP for assistance for suspected alien smuggling. Sergeant CM observed Appellant and QM with their mobile phones as he called for assistance. Homeland Security agents later arrived and questioned QM and Appellant in the early morning hours of 23 August 2021. By then, their phones had been "factory reset," wiping away their call logs, text messages, and voice mail.

QM initially insisted to Homeland Security that he was merely exploring when driving slowly on a dirt road near midnight in a remote area near the Mexican border. He claimed he drove slowly to avoid potholes and chose not to

use his GPS to get home. QM also claimed he did not expect to find people but gave them a ride because it was dark.

QM's explanation changed after the interviewing agents indicated they did not believe him and were deciding whether to charge him criminally. QM then admitted he desperately needed money, so he responded to the Snapchat message offering payment for "picking up some Mexicans and driving them." While QM admitted his own misconduct, he tried to shield Appellant from blame. QM insisted the gun found in the vehicle did not belong to either of them and Appellant did not know in advance that they would pick up "Mexicans" to transport.

Homeland Security agents also interviewed Appellant. He denied any prior knowledge of a plan to pick up the "Mexicans." He claimed he rented the vehicle just to go sightseeing with QM and his girlfriend. At first, Appellant told the agents his own vehicle was "broken." He later admitted his vehicle was not broken, but claimed it had been at a Firestone repair store for about a week for diagnosis before a planned trip to Florida, but he could not get to it for unspecified reasons. Appellant also denied owning the gun found in the rental vehicle, claiming it belonged to someone named "Taylor."

After discovering that Appellant and QM had factory reset their phones, and therefore had no contact information for the person who had contacted QM via WhatsApp, Homeland Security released Appellant and QM at approximately 0700 on 23 August 2021. Appellant returned to Davis-Monthan AFB, where investigators from the SFOI interviewed him later that day. Appellant reasserted his claim he rented the vehicle for sightseeing while his own vehicle was "broken" and "in the shop." Appellant continued to insist the gun was not his. Appellant did not provide an address or street reference for the Firestone shop and muttered softly "just Firestone" when the interviewing agents specifically asked Appellant for the address of the specific Firestone location. Contrary to his previous version of events, Appellant now claimed he sold his Glock-45 pistol to a person named "Lloyd" in March 2020 and had executed a bill of sale for the transaction.

Follow-on investigation by SFOI refuted many of Appellant's statements. SFOI canvassed the three closest Firestone locations to Davis-Monthan AFB but found no evidence Appellant's vehicle had received services there at the timeframes Appellant claimed. Investigators also obtained a Bureau of Alcohol, Tobacco and Firearms Form 4473 showing Appellant purchased the Glock-45 on 19 January 2021, making his claimed sale to "Lloyd" in March 2020 chronologically impossible. SFOI also searched Appellant's room but did not find a bill of sale to "Lloyd" or anyone else. SFOI did, however, find a Glock-45 gun case with a sticker matching the serial number of the pistol seized from the rental SUV.

The Government introduced various forms as evidence at trial pertaining to the five Mexican nationals. Two had an Alien File (A-File), indicating prior interaction with the immigration system. Ms. TMV's A-File indicated she was removed from the country on 5 September 2021. Mr. ONA's A-File showed he was previously removed in September 2017.

2. Law

a. Legal Sufficiency

We review issues of legal sufficiency de novo. *United States v. Harrington*, 83 M.J. 408, 414 (C.A.A.F. 2023) (citing *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019)). “The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (citation omitted). “[T]he term ‘reasonable doubt’ does not mean that the evidence must be free from any conflict” *King*, 78 M.J. at 221 (citation omitted). The test for legal sufficiency “gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1973)). “[I]n resolving questions of legal sufficiency, [an appellate court is] bound to draw every reasonable inference from the evidence of record in favor of the prosecution.” *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). Thus, “[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction.” *King*, 78 M.J. at 221 (alteration in original) (citation omitted). “[T]he [G]overnment is free to meet its burden of proof with circumstantial evidence.” *Id.* (citation omitted).

b. Factual Sufficiency

Historically, the Courts of Criminal Appeals (CCAs) have also conducted a de novo review of the factual sufficiency of the evidence. *See United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). The long-standing test for factual sufficiency, rooted in the prior versions of Articles 66, UCMJ, 10 U.S.C. § 866, required the CCAs to “take ‘a fresh, impartial look at the evidence,’ applying ‘neither a presumption of innocence nor a presumption of guilt’ to ‘make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.’” *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (alteration in original) (quoting *Washington*, 57 M.J. at 399) (applying the version of Article 66(c), UCMJ, in effect prior to 1 January 2019), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018); *see also United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct.

Crim. App. 2021) (citing *Wheeler* and applying the same factual sufficiency test in the context of Article 66(d), UCMJ, effective 1 January 2019).

However, the National Defense Authorization Act for Fiscal Year 2021 amended Article 66, UCMJ, to modify our factual sufficiency review as follows:

(B) FACTUAL SUFFICIENCY REVIEW.

(i) In an appeal of a finding of guilty under subsection (b), the Court may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.

(ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—

(I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and

(II) appropriate deference to findings of fact entered into the record by the military judge.

(iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

FY21 NDAA, Pub. L. No. 116-283, § 542, 134 Stat. at 3611; 10 U.S.C. § 866(d)(1)(B) (*Manual for Courts-Martial, United States* (2024 ed.) (2024 *MCM*)). The new factual sufficiency standard applies to courts-martial in which every finding of guilty in the entry of judgment is for an offense occurring on or after 1 January 2021. FY21 NDAA, Pub. L. No. 116-283, § 542(e)(2), 134 Stat. 3611, at 3661–62. This court recently analyzed this new statutory standard for factual sufficiency in *United States v. Csiti*, No. ACM 40386, 2024 CCA LEXIS 160 (A.F. Ct. Crim. App. 29 Apr. 2024) (unpub. op.).¹⁰ As will be

¹⁰ We are aware that two of our sister courts issued published opinions addressing the new standard. See *United States v. Coe*, 84 M.J. 537, 542–43 (A. Ct. Crim. App. 2024) (en banc); *United States v. Scott*, 83 M.J. 778, 779–80 (A. Ct. Crim. App. 2023), *rev'd on other grounds*, ___ M.J. ___, No. 24-0063/AR, 2024 CAAF LEXIS 68 (C.A.A.F. 1 Feb. 2024); *United States v. Harvey*, 83 M.J. 685, 690–94 (N.M. Ct. Crim. App. 2023), *rev. granted*, ___ M.J. ___, No. 23-0239/NA, 2024 CAAF LEXIS 13 (C.A.A.F. 10 Jan. 2024). These CCAs each held the new statute made it more difficult than previously for an appellant to secure relief on appeal for factual insufficiency. See *Coe*, 84 M.J. at 542 (“[W]e emphasize that our role in a factual sufficiency review is *not* to substitute

further explained in the law and analysis sections, *infra*, we continue to adhere to the *Csiti* framework in analyzing and applying the new factual sufficiency standard. See *Csiti*, unpub. op. at *17–23.

In analyzing the new factual sufficiency standard under Article 66(d)(1), UCMJ (2024 *MCM*), we begin with the principles of statutory interpretation. “In the absence of a statutory definition, the plain language of a statute will control unless it is ambiguous or leads to an absurd result.” *United States v. Cabuhat*, 83 M.J. 755, 765 (A.F. Ct. Crim. App. 2023) (en banc) (citing *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007)). Inquiry into the plainness or ambiguity of a statute’s meaning “must cease if the statutory language is unambiguous and ‘the statutory scheme is coherent and consistent.’” *Robinson*, 519 U.S. at 340 (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989)); see also *Cabuhat*, 83 M.J. at 766 (quoting *Robinson*). By contrast, when the text is ambiguous, reviewing courts may apply the statutory canons of construction to resolve those ambiguities. See *Cabuhat*, 83 M.J. at 765–66 (citing *Robinson*, 519 U.S. at 341). In construing amended legislation, three canons of construction are particularly applicable. First, we “assume that Congress is aware of existing law when it passes legislation.” *United States v. McDonald*, 78 M.J. 376, 380 (quoting *Miles v. Apex Marine Corps*, 498 U.S. 19, 32 (1990)). Second, “[w]hen Congress acts to amend a statute, [courts] presume it intends its amendment to have real and substantial effect.” *United States v. Matthews*, 68 M.J. 29, 37 (C.A.A.F. 2009) (quoting *Stone v. Immigration and Naturalization Service*, 514 U.S. 386, 397 (1995)). Third, the “surplusage canon” provides, “if possible, every word and every provision is to be given effect and that no word should be ignored or needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.” *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017).

c. Transporting Aliens

At Appellant’s court-martial, the Government had to prove beyond a reasonable doubt that Appellant violated the Federal Assimilated Crimes Act, an offense not capital, by transporting illegal aliens in violation of Article 134, UCMJ. See *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), ¶ 91.c.(4)(a)(1)(iii). As instructed by the military judge, the Government was required to prove beyond a reasonable doubt the elements of 8 U.S.C. § 1324 by establishing: (1) on or about 22 August 2021, within the State of Arizona, Appellant knowingly transported or moved five named individuals to help

ourselves for the factfinder and decide what verdict we would have rendered.”); *Scott*, 83 M.J. at 780; *Harvey*, 83 M.J. at 693.

them remain in the United States illegally; (2) the individuals transported or moved were aliens; (3) the individuals transported or moved were not lawfully in the United States; (4) Appellant knew or acted in reckless disregard of the fact the individuals transported or moved were not lawfully in the United States; and (5) the charged federal statute, 8 U.S.C. § 1324, is an offense not capital. 8 U.S.C. § 1324(a)(1)(A)(ii).^{11,12}

Proof that an alien is not lawfully in the United States may include circumstantial evidence, including any suspicious manner of travel upon their entry into the United States. *See United States v. Munoz*, 412 F.3d 1043, 1049 (9th Cir. 2005) (citation omitted) (holding that the aliens' actions in paying to be smuggled across the border and hiding in a secret compartment in a vehicle attempting to cross the border supported inferences that the aliens were unlawfully in the United States); *see also United States v. Rivera*, NMCCA 200201611, 2005 CCA LEXIS 42, at *7 (N.M. Ct. Crim. App. 9 Feb. 2005) (unpub. op.) (finding "overwhelming evidence" where three aliens (1) were traveling across an international border concealed in a closed trunk, (2) did not have entry documentation when interviewed and searched, (3) did not respond to questions or directions in English, and (4) were subsequently deported).

d. Conspiracy to Transport Aliens

As charged, to obtain a conviction for conspiracy to transport aliens, the Government had to prove beyond a reasonable doubt: (1) Appellant entered into an agreement with one or more persons to commit an offense under the UCMJ, to wit: clause 3 of Article 134, incorporating 8 U.S.C. § 1324; and (2) while the agreement continued to exist, and while Appellant remained a party to the agreement, Appellant or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy, to wit: securing a rental vehicle, driving the vehicle to the United States-Mexico

¹¹ The military judge, without objection from the parties, essentially adopted the pattern jury instructions used by the United States Court of Appeals for the Ninth Circuit when advising the court members as to the substantive elements of the transporting-alien offense. *See* MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT, ¶ 9.2 (2010 ed.) (Last updated Dec. 2019).

¹² Insofar as this is a Title 8, United States Code, federal offense, we consult persuasive caselaw from the federal circuit courts to interpret what is sufficient evidence to meet these elements. The parties cite to caselaw from several federal circuits. We are not bound by such interpretations. *See United States v. Blanchard*, 48 M.J. 306, 310 (C.A.A.F. 1998) (holding the military judge did not err "by failing to strictly follow selected federal decisions in making his authenticity determination" (citation omitted)). However, insofar as the offense occurred within the Ninth Circuit, we look to the Ninth Circuit caselaw as the most persuasive in construing the evidentiary requirements of 8 U.S.C. § 1324.

border, and transporting five Mexican nationals in violation of law. *See* 10 U.S.C. § 881(a); *MCM*, pt. IV, ¶ 5.b.(1).

Proof of an “agreement” creating a conspiracy “need not be in any particular form or manifested in any formal words. It is sufficient if the minds of the parties arrive at a common understanding to accomplish the object[s] of the conspiracy, and this may be shown by the conduct of the parties.” *MCM*, pt. IV, ¶ 5.c.(2). Further, “[a]n overt act by one conspirator becomes the act of all without any new agreement specifically directed to that act and each conspirator is equally guilty even though each does not participate in, or have knowledge of, all of the details of the execution of the conspiracy.” *MCM*, pt. IV, ¶ 5.c.(4)(c). It is possible that one may withdraw from a conspiracy without criminal liability, but only if that person “abandons or withdraws from the agreement to commit the offense *before the commission of an overt act by any conspirator[.]*” *MCM*, pt. IV, ¶ 5.c.(6) (emphasis added).

3. Analysis

Appellant challenges both the factual and legal sufficiency of his conviction for transporting aliens asserting that: (1) “the trial did not address whether [Appellant] ‘acted willfully in furtherance of’ the individuals’ unlawful status;” (2) “the Government failed to prove [Appellant’s] purpose in participating in the pickup and transportation of the aliens;” (3) “the Government failed to establish that the five individuals were aliens in the United States unlawfully;” and (4) the evidence did not prove Appellant knew or acted in reckless disregard of their immigration status.

Appellant also challenges the factual and legal sufficiency of his conspiracy conviction for transporting aliens by asserting: (1) the Government failed to present sufficient proof that the conspiratorial agreement occurred; and (2) the Government failed to prove that any agreement between QM and Appellant encompassed every element of the underlying charged offense (*i.e.*, transporting aliens).¹³

We pause first to clarify the correct analytical lens for Appellant’s first listed factual sufficiency challenge. Appellant alleges the military judge’s instructions that the transportation must “help [the immigrants] remain [in] the United States illegally” led to the conviction being factually insufficient because the instructions did not specifically use the statutory phrase “in

¹⁴ The Government concedes these allegations satisfy Appellant’s burden under the new factual sufficiency standard to raise a specific deficiency on appeal. *See* Article 66(d)(1)(B), UCMJ, 10 U.S.C. § 866(d)(1)(B) (2024 *MCM*). Accordingly, we now analyze these specific alleged deficiencies, while reviewing the actual testimony and evidence in the record under the new “appropriate deference” standard.

furtherance of” from 8 U.S.C. § 1324.¹⁴ Notwithstanding Appellant’s novel endeavor to frame instructional error as “factual sufficiency,” this particular challenge to his transporting aliens conviction requires reframing as a legal sufficiency challenge as it centers on allegations of instructional error which Appellant waived at trial. Appellant agreed to the findings instructions on the elements of these offenses without objection and has acknowledged such on appeal. Therefore, he has waived his right to challenge these instructions. *See United States v. Davis*, 79 M.J. 329, 333 (C.A.A.F. 2020); *see also United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (“[W]aiver, ‘the intentional relinquishment or abandonment of a known right,’ differs from forfeiture, ‘the failure to make the timely assertion of a right.’” (Baker, J., concurring in the result) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993))). Furthermore, consistent with the analysis below, we conclude the evidence at trial was legally sufficient to demonstrate Appellant’s participation in transporting the five aliens in his rental SUV was “in furtherance of” their illegal presence within the United States.

With that, we now address the legal sufficiency of each offense in turn. We will then analyze the new Article 66(d)(1)(B), UCMJ, factual sufficiency standard and apply it to Appellant’s transporting aliens and conspiracy convictions. For the reasons set forth below, after having fully reviewed all evidence admitted during trial, we hold that Appellant’s convictions were both legally and factually sufficient.

a. Legal Sufficiency: Transporting Aliens

Drawing all reasonable inferences in favor of the Government for the evidence presented at trial, the Government provided more than sufficient proof for each of the four charged elements, *supra*, for the transporting aliens offense to meet the “very low threshold” for legal sufficiency. *King*, 78 M.J. at 221. The evidence admitted provides five bases for proving Appellant knowingly participated in the transportation of the five Mexican aliens unlawfully in the United States: (1) QM’s admissions to USCBP that QM responded to the Snapchat message agreeing to transport Mexicans to make “easy money;” (2) Appellant’s extension of the SUV rental agreement used to transport the aliens that same day; (3) the presence of Appellant’s handgun in the center console (for what Appellant asserted was a mere sightseeing trip); (4) Appellant’s consciousness of guilt manifest in his obstruction of justice in factory resetting his phone; and (5) strong circumstantial evidence the Mexican nationals were in fact

¹⁴ Appellant’s brief asserts: “[B]ecause the words ‘in furtherance of’ were absent from the entire trial, the factfinder was never required to make the requisite finding of [Appellant]’s purpose in transporting the immigrants, if any.”

unlawfully in the United States given their surreptitious method of travel and mode of dress.

First, QM's videotaped admissions to USCBP agents were presented to the trier of fact below and establish his initial false statements followed by his ultimate admission of guilt, to wit: (a) QM initially told investigators, "[W]e were just sightseeing;" however, (b) QM, in the same interview, admitted he responded to the Snapchat message for money. While QM also claimed that Appellant had neither knowledge of the plan nor of the gun found in the vehicle rented in Appellant's name—a rational trier of fact could be unpersuaded by these assertions (*see also* further analysis concerning similar claims by Appellant, *infra*).

Before turning to address Appellant's statements to law enforcement, we pause to consider one of Appellant's key contentions in this brief: QM also told law enforcement Appellant uttered in surprise "[W]hy the f[**]k is they [the five aliens] ducking?" after the Mexican nationals entered the SUV. However, this statement does not detract from the legal sufficiency of the evidence because, drawing, as we must, all reasonable inferences in favor of the Government, we conclude a rational trier of fact could reasonably either discount or consider in a different light than QM's claim given QM's close relationship with Appellant at the time. This, combined with QM's own confessed lies to investigators just moments before in the same interview, significantly undermines the credibility of QM's uncorroborated assertion that Appellant uttered those words. Moreover, the evidence at trial also supports an inference by a rational trier of fact that any such comment by Appellant actually represents circumstantial evidence of his concern about getting caught (*i.e.*, "ducking" while inside the SUV is an incriminating, furtive gesture).

Second, we address Appellant's explanations in his interviews with USCBP and SFOI as to the timing and reason he rented the SUV used to transport the Mexican nationals. These videotaped interviews were presented to the trier of fact at trial. However, other trial evidence contradicted Appellant's assertions in these interviews. In convicting Appellant, a rational trier of fact below could have concluded Appellant's self-serving denials as to the plan to pick up and transport the Mexican nationals were dubious. As to the timing of Appellant's decision to extend the rental car contract, phone records introduced at trial indicate QM called Appellant at 1130 on the date of the incident, and that Appellant extended the car rental one hour later. This fact can rationally be viewed as more coordinated than coincidental considering Appellant's handgun was also in the rental vehicle. Bringing a handgun for protection would seem unusual and unnecessary were this all just a "joyride" and Appellant was merely in the "wrong place at the wrong time" as trial defense counsel suggested to the court members. As to Appellant's explanations for the purpose of

the car rental, he initially explained that he needed a rental car for a sightseeing trip with QM because his own car was at Firestone—purportedly undergoing a ten-day “diagnostic check;” law enforcement recovered no evidence to corroborate Appellant’s claim.

Third, more specifically as to the significance of the presence of the gun found in the center console of the SUV, both QM and Appellant denied that it was Appellant’s, and Appellant went so far as to assert he had previously sold it. A rational trier of fact could weigh these denials and claims against the contradictory proof the serial number matched a gun registered to Appellant, matched the gun case found in Appellant’s dorm room, and law enforcement did not recover a bill of sale from Appellant’s dorm room after a full search of the premises. More telling still, the original bill of sale ATF form for Appellant’s purchase of his Glock-45 on 19 January 2021 *post-dated* the time Appellant asserted he “sold” the same gun to the unknown “Lloyd” in 2020. Viewed in this light, a rational trier of fact could have concluded Appellant’s claims were demonstrably false, and having done so, considered those false claims as consciousness of guilt as to the underlying transporting aliens offense.

Fourth, Appellant and QM’s post-arrest activities also manifest a significant consciousness of guilt, providing circumstantial evidence of prior planning and coordination. QM and Appellant factory reset their phones between the time Sergeant CM initially detained them and USCBP agents questioned them. Expert testimony contradicted Appellant’s claim that he inadvertently factory reset his phone by innocently mis-entering his personal identification number (PIN) ten consecutive times. The court members at trial were free to rely upon these underlying facts for dual purposes: to find Appellant obstructed justice in deleting the contents of his phone in anticipation of a law enforcement investigation against him and as consciousness of guilt pertaining to Appellant’s involvement in the plan to, and actual illegal transportation of, the Mexican aliens. *See United States v. Quezada*, 82 M.J. 54, 58 (C.A.A.F. 2021) (appellant’s false statements during a law enforcement interview were admissible to prove both the charged Article 107, UCMJ, false official statement, and as consciousness of guilt he committed the separately charged Article 120, UCMJ, sexual assault offense).

Fifth, the Government presented significant circumstantial evidence sufficient to demonstrate the five aliens were unlawfully in the United States. *See King*, 78 M.J. at 221 (citations omitted) (holding “the [G]overnment is free to meet its burden of proof with circumstantial evidence”); *Rivera*, 2005 CCA LEXIS 42, at *7 (finding “overwhelming evidence” for reasons explained *supra*). QM and Appellant’s rental vehicle picked up five strangers in the Arizona desert less than ten miles from the Mexico border while driving off road and in response to turn-by-turn directions from an unknown caller with a foreign area

code that continuously texted QM during the moments preceding their apprehension by USCBP. Sergeant CM testified these passengers had a distinctive foul, musty smell of people traveling through the desert. None of them spoke English and all of them received instructions in Spanish from a man in the gray shirt who ushered them into Appellant's rental SUV. The aliens wore camouflage and carpet shoes which, according to the USCBP agent's testimony, are commonly donned by people who want to obscure their footprints and avoid tracking and detection. While the court members at trial were only presented with direct evidence that one of the Mexican nationals was subsequently deported (Ms. TMV on 5 September 2021), they also had evidence that another (Mr. ONA) had been previously deported. A rational trier of fact could have relied on this circumstantial evidence to conclude the other three aliens were likewise in the country unlawfully.

Finally, one other point bears mentioning in terms of Appellant's actual knowledge of the "unlawful status" of the Mexican nationals in this case. When USCBP agents asked Appellant if he knew if the people who boarded his rental car were unlawfully in the United States, Appellant admitted: "Well, kind of, yeah, but I didn't look in the back." Additionally, Appellant personally observed all the events listed above with the exception of the deportations. From these circumstances, a rational trier of fact had ample basis to conclude Appellant actual knew or recklessly disregarded the Mexican nationals' unlawful status.

Therefore, viewing the evidence in the light most favorable to the Government, and drawing all reasonable inferences therefrom, a rational trier of fact could have found the elements of illegally transporting aliens as proven beyond a reasonable doubt.

b. Legal Sufficiency: Conspiracy to Transport Aliens

Appellant asserts his conviction for the conspiracy to transport aliens is legally and factually insufficient on two grounds: (1) the Government failed to present sufficient proof that an agreement occurred; and (2) the Government failed to prove that any agreement between QM and Appellant encompassed every element of the underlying charged offense (*i.e.*, transporting aliens). Appellant's arguments may essentially be distilled down to this: there was no *direct evidence* of an agreement between him and QM. This claim is unavailing, however, because there was ample *circumstantial evidence* from the course of conduct of Appellant and QM to demonstrate an agreement.

The Government provided sufficient proof of each element of Appellant's conspiracy. The evidence admitted against Appellant demonstrating he entered into a conspiratorial agreement with QM to illegally transport Mexican nationals starts with their communications prior to renting the SUV. The

substance of those communications is lost because Appellant factory reset his phone before his interview by USCBP agents; however, available phone records show prior coordination between QM and Appellant—a mere hour and twenty minutes prior to acting in concert to extend the SUV rental used to transport the five Mexican nationals.

Further, Appellant’s admissions during his SFOI interview demonstrate their agreement encompassed every element of the offense, including their plan to pick up and transport aliens unlawfully entering the United States. A careful reading of Appellant’s professed “surprise” to SFOI investigators that QM picked up the five Mexican aliens shows Appellant’s actual prior knowledge of the scheme. In response to SFOI’s question of why Appellant did not start to ask questions after he and QM were roaming the Arizona desert within a few miles of the Mexico border, Appellant responded: “[W]e were still passing like border patrol troopers and things like that, so didn’t think he was going to do it.” That language indicates Appellant was alert to the presence of border patrol *prior* to picking up the Mexican nationals and only *surprised* when QM still decided to do so. Appellant’s candor (perhaps unwitting) further supports that Appellant’s one-day extension of the SUV and the appearance of Appellant’s gun in the vehicle were not a coincidence—they were part of an agreement between Appellant and QM to transport illegal aliens for money.

Therefore, viewing the evidence in the light most favorable to the Government, and drawing all reasonable inferences therefrom, a rational trier of fact could have found the elements of conspiracy proven beyond a reasonable doubt.

c. Factual Sufficiency: Analyzing the “New” Standard

We follow this court’s analysis in *Csiti* in construing the three key components of the new Article 66(d)(1)(B), UCMJ, factual sufficiency review: (1) appellant’s “specific showing of a deficiency of proof;” (2) the court affording “appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence” when we “weigh the evidence and determine controverted questions of fact;” and (3) whether the court is “clearly convinced that the finding of guilty was against the weight of the evidence.” Unpub. op. at *17–23 (citations omitted). As in *Csiti*, after reviewing all the evidence we are not clearly convinced that the weight of the evidence does not support the conviction beyond a reasonable doubt.¹⁵

¹⁵ We *do not* agree with Appellant that the phrase “clearly convinced” is mere surplusage with no substantive impact on our standard of review. Such an interpretation would be contrary to the accepted canons of statutory construction. See *Sager*, 76 M.J. at 161 (“[I]f possible, every word and every provision is to be given effect and that no

d. Factual Sufficiency: Applying the “new” standard

We now apply the new factual sufficiency review standard to Appellant’s assertions that his convictions for both transporting and conspiring to transport aliens within the United States are factually insufficient. Consistent with the evidentiary support for the convictions detailed above, and cognizant that the Government may prove its case by circumstantial evidence, and giving appropriate deference to the fact that the court-martial members saw and heard the testimony and other evidence, we are not clearly convinced the findings of guilty were against the weight of the evidence. Accordingly, we find the convictions factually sufficient.

C. Motion to Dismiss for Government’s Deportation of the Five Aliens

U.S. Immigration and Customs Enforcement removed the five “aliens” referenced above from the country prior to trial. Appellant filed a motion to dismiss the charges because this government action rendered the aliens unavailable to testify on his behalf. The military judge denied Appellant’s motion and Appellant now appeals.

Appellant suggests the military judge erred in finding no due process violation and failing to analyze this matter as a “lost evidence issue” under R.C.M. 703(e), a provision concerning physical evidence rather than witness testimony. We find the military judge did not err.

1. Additional Background

USCBP conducted video-recorded interviews with Appellant and QM and unrecorded interviews with the five Mexican nationals. The patrol agent-in-

word should be ignored or needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.”); *Matthews*, 68 M.J. at 37 (quoting *Stone*, 514 U.S. at 397) (“When Congress acts to amend a statute, [courts] presume it intends its amendment to have real and substantial effect.”). For now, suffice it to say that the recent statutory amendments to the new Article 66, UCMJ, added what was never present before—an explicit quantum of persuasion embedded within the explicit text of the statute itself, namely: “clearly convinced.” Accordingly, we generally concur with the United States Army Court of Criminal Appeals that “the new burden of persuasion with its required deference makes it more difficult for one to prevail on appeal[.]” See *Scott*, 83 M.J. at 780.

Even were we to adopt Appellant’s interpretation of the new Article 66(d)(1)(B), UCMJ, standard, we ourselves are convinced beyond a reasonable doubt that Appellant is guilty of these offenses after having thoroughly reviewed all the evidence and testimony from the record of trial.

charge ultimately declined to prosecute Appellant on 23 August 2021.¹⁶ Based upon factual proffers provided by the parties during motions practice, the military judge entered a finding of fact that, *circa* August 2021, USCBP had authority to decline to prosecute suspected smugglers of aliens, and if so, to remove the aliens from the United States summarily. This policy existed to ameliorate the then-significant public health concerns arising from the possible spread of COVID-19 in detention facilities. Consistent with this policy, USCBP removed the five Mexican nationals from the United States.¹⁷ Neither trial counsel nor trial defense counsel interviewed them before or after their removal.

USCBP did, however, notify the Air Force of Appellant's apprehension. The Air Force then independently investigated this incident. Charges were preferred against Appellant in November 2021, and referred to a general court-martial in December 2021. On 19 and 24 January 2022, trial defense counsel filed separate motions related to the Government's removal of the aliens. One motion sought to compel production of the aliens as trial witnesses and to exclude the aliens' statements during custodial interviews with USCBP as hearsay. The other motion sought to dismiss the relevant charges if the Government failed to produce these witnesses, who the Prosecution could not compel to testify.

The military judge held an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session prior to trial. The military judge then granted the first motion in part, excluding the aliens' statements to USCBP as testimonial hearsay.¹⁸ The military judge denied the second motion to dismiss, however, finding: (1) no due process violation or bad faith for the Government's removal of the witnesses, and (2) no relief warranted under R.C.M. 703 for "lost evidence" because Appellant failed to demonstrate the unavailable witnesses could provide favorable testimony of central importance to an issue essential for a fair trial.

¹⁶ The decision not to prosecute was not fully documented in the record, but a USCBP agent who interviewed QM told him: "What we are interested in, [inaudible], we are interested in the people that hired you, the people who contacted you, the people that told you where to go, that kind of thing. That is what we are interested in."

¹⁷ Prosecution Exhibit 5 indicates Ms. TMV was deported on 5 September 2021. During motions practice, the parties stipulated that the other four Mexican nationals had also been deported prior to trial.

¹⁸ The Mexican nationals were not produced as witnesses and their statements to USCBP that they were traveling to the United States without prior authorization were not admitted.

2. Law

a. Standard of Review

This court reviews a military judge’s rulings on production of witnesses and related motions to dismiss for abuse of discretion. *United States v. McElhaney*, 54 M.J. 120, 126 (C.A.A.F. 2000). This is a deferential standard requiring “more than a mere difference of opinion” between the trial and appellate court. *United States v. Warda*, 84 M.J. 83, 90 (C.A.A.F. 2023) (citation omitted). A military judge only abuses his discretion if his “findings of fact are clearly erroneous, the court’s decision is influenced by an erroneous view of the law, or the military judge’s decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law.” *Id.* (citations omitted).

b. Fifth and Sixth Amendments

A criminal defendant’s requests for production of witnesses favorable to his defense implicates both his Fifth Amendment¹⁹ Due Process and Sixth Amendment²⁰ Compulsory Process rights. The seminal case on point is *United States v. Valenzuela-Bernal*, where the United States Supreme Court held:

the responsibility of the Executive Branch faithfully to execute the immigration policy adopted by Congress justifies the prompt deportation of illegal-alien witnesses upon the Executive’s good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution. The mere fact that the Government deports such witnesses is not sufficient to establish a violation of the Compulsory Process Clause of the Sixth Amendment or Due Process Clause of the Fifth Amendment. A violation . . . requires some showing that the evidence lost would be both material and favorable to the defense.

458 U.S. 858, 872–73 (1982).

The prevailing view among the federal circuits is *Valenzuela-Bernal* requires an appellant to meet a two-prong test to merit constitutional relief. See *United States v. Damra*, 621 F.3d 474, 485–490 (6th Cir. 2010); *United States v. Medina-Villa*, 567 F.3d 507, 517–518 (9th Cir. 2009); *United States v. Chaparro-Alcantara*, 226 F.3d 616, 623–624 (7th Cir. 2000); *United States v. Iribere-Perez*, 129 F.3d 1167, 1173 (10th Cir. 1997). First, the appellant must show the

¹⁹ U.S. CONST. amend. V.

²⁰ U.S. CONST. amend. VI.

Government acted in bad faith. Second, the appellant must show the witness would have provided testimony material and favorable to his defense.

Bad faith exists if the Government either: (1) acted with an intent “to gain an unfair tactical advantage” in removing the aliens, or (2) departed from “normal” agency practice in such removal. *United States v. Pena-Gutierrez*, 222 F.3d 1080, 1085 (9th Cir. 2000) (citation omitted).

When a prospective witness has been removed from the United States, the defense’s burden for demonstrating materiality of the witness’s testimony is “relaxed.” *Valenzuela-Bernal*, 458 U.S. at 867. “The term ‘favorable’ as used in both Supreme Court and military precedent is synonymous with ‘vital.’” *United States v. Smith*, 68 M.J. 445, 448 (C.A.A.F. 2010) (citing *United States v. Banker*, 60 M.J. 216, 218 (C.A.A.F. 2004) (quoting *Valenzuela-Bernal*, 458 U.S. at 867)). An appellant, however, does carry a factual burden to establish both materiality and favorability, to wit, he must make “at least make some plausible showing of how [the deported witness’s] testimony would have been both material and favorable to his defense.” *Id.* In making this showing, “the defendant’s unsupported word alone is not sufficient . . . where the defendant maintains only that the potential witness ‘could explain’ or ‘might have testified’ in some favorable fashion.” *Damra*, 621 F.3d at 490 (citing *Iribe-Perez*, 129 F.3d at 1173).

c. R.C.M. 703

Generally, “[t]he prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, . . . including the benefit of compulsory process.” R.C.M. 703(a). There are separate and different rules for resolving pretrial matters concerning unavailable witnesses, R.C.M. 703(b)(3), and unavailable physical evidence, R.C.M. 703(e)(2). No party is entitled to the production of an unavailable witness. R.C.M. 703(b)(3). A military judge shall, however, grant a continuance or abate the proceedings if: (1) “the testimony of a witness who is unavailable is of such central importance to an issue that it is essential to a fair trial,” (2) “there is no adequate substitute for such testimony,” and (3) the requesting party did not cause the witness’s unavailability. *Id.* A military judge may also continue or abate the proceedings under similar circumstances involving unavailable physical evidence. R.C.M. 703(e)(2). An accused cannot demonstrate the necessity of a requested witness when it is only a “theoretical possibility” the witness’s testimony would actually benefit the defense case. *United States v. Relves*, 41 M.J. 388, 394 (C.A.A.F. 1995).

3. Analysis

a. Fifth and Sixth Amendments

At the outset, we note Appellant does not challenge the military judge's findings of fact pertinent to the motion, but only his legal reasoning. Likewise, we see no "clearly erroneous" findings of fact by the military judge.

We find the federal precedent persuasive and elect to follow the prevailing view that the Supreme Court's analysis in *Venezuela-Bernal* sets up a two-prong test which Appellant must meet to establish a constitutional violation. Appellant cannot meet the first prong of this test, however, as the facts demonstrate no "bad faith" or departure from regular procedure in the summary removal of the five Mexican nationals at issue in this case. Appellant does not contest the military judge's conclusion as a matter of fact that the summary removal policy was in effect and was standard agency practice at the time of Appellant's case.

Because Appellant cannot meet this first prong of the *Venezuela-Bernal* test, his request for constitutional relief fails. In resolving this constitutional issue, we find it unnecessary to analyze whether these witnesses would have provided material and favorable testimony at trial. We do, however, address the absence of favorability below in our analysis of Appellant's claim under R.C.M. 703.

b. R.C.M. 703

The applicable reference point for evaluating possible remedies for "unavailable" necessary witnesses is R.C.M. 703(b)(3). We note the military judge's ruling did not mention R.C.M. 703(b)(3), but only a related provision, R.C.M. 703(b)(1). Even so, his analysis embraced some of the components of R.C.M. 703(b)(3), particularly the lack of demonstrated favorability of the Mexican nationals if called as defense witnesses. We find no legal error because the military judge's conclusions were ultimately correct and we are empowered to affirm a military judge's rulings below when he reached the right result, albeit for a different reason. *See United States v. Bess*, 80 M.J. 1, 11–12 (C.A.A.F. 2020) (citations omitted).

Here, the evidence was not "of central importance to an issue essential for a fair trial" because there is no indication any testimony would have been favorable for the Defense. Appellant offers only speculation as to the prospective testimony of the five Mexican nationals.²¹ That simply is not enough. *See*

²¹ Without citation to any supporting facts, Appellant's brief asserts:

Relves, 41 M.J. at 394. There was no indication any of the five Mexican nationals could understand anything purportedly uttered between Appellant and QM during their brief ride prior to their detention by USCBP. Nor was there any indication that lighting in the car was sufficient during the brief ride for the passengers to observe, much less draw impressions of Appellant’s demeanor, as Appellant now speculates. Instead, the only evidence presented to the military judge was not favorable to Appellant’s case: the alien passengers admitted to being Mexican nationals without prior authorization to enter the United States.

In the end, we agree with the military judge’s conclusion that “the evidence tends to show that [the requested witness] production . . . would be *detrimental* to the Defense case because it would help the Government prove the illegal alien status of the [Appellant’s] passengers . . .” (Emphasis added). Accordingly, we find the military judge did not abuse his discretion in denying the motion to dismiss. See *McElhaney*, 54 M.J. at 128 (holding no abuse of discretion for denial of defense witness production request because “the agent’s testimony would have been counter-productive for the defense”).

D. Omission of Government’s Closing Argument Slides from the Record of Trial

1. Additional Background

The record of trial includes a complete audio recording and verbatim transcript of trial counsel’s closing argument at findings. However, the Government’s closing argument PowerPoint slides, marked as Appellate Exhibit XL, were not included.²² These slides contained portions of video and audio clips separately admitted as Prosecution Exhibit 18 (the video recorded interview of Appellant by SFOI) and Defense Exhibit A (the video recorded interview of QM by USCBP). Defense counsel lodged no objection to the Government’s slides. The only portions marked “inaudible” in the closing argument transcript dealt with portions of Defense Exhibit A and Prosecution Exhibit 18 that were

On the facts here, there are a number of things that the immigrants *could* have discussed: who was in charge, who was sending messages, how [Appellant] reacted when they came into the car, whether [Appellant] was assisting or passive, or anything else they were told that would indicate [Appellant] had a role QM’s plan. . . . [S]uch testimony *could* have proven critical.

(Emphasis added).

²² An exhibit marked as “Appellate Exhibit XL” is included in the record of trial, but it consists of a video recording that appears to be a duplicate of Defense Exhibit A, the videotaped interview of QM.

likewise labeled “inaudible” in the verbatim trial transcripts capturing when those exhibits were played during the parties’ cases-in-chief.

2. Law

Proper completion of post-trial processing is a question of law this court reviews de novo.” *United States v. Valentin-Andino*, 83 M.J. 537, 540 (A.F. Ct. Crim. App. 2023) (citation omitted). “Because they are matters of law, we review interpretations of statutes and Rules for Courts-Martial de novo.” *Id.* (citation omitted).

An appellant has a right to a full and fair review of his conviction under Article 66, UCMJ. *United States v. Walters*, 58 M.J. 391, 397 (C.A.A.F. 2003). To this end, Article 54, UCMJ, 10 U.S.C. § 854, requires, “[i]n accordance with regulations prescribed by the President, a complete record of proceedings and testimony shall be prepared in any case of a sentence of death, dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than six months.”

Article 1, UCMJ, 10 U.S.C. § 801(14), defines the term “record” as: “(A) an official written transcript, written summary, or other writing relating to the proceedings; or (B) an official audiotape, videotape, or similar material from which sound, or sound and visual images, depicting the proceedings may be reproduced.” A record of trial should include “[e]xhibits, or, if permitted by the military judge, copies, photographs, or descriptions of any exhibits that were received in evidence and any appellate exhibits.” R.C.M. 1112(b)(5).

An incomplete record of trial only entitles an appellant to relief if he was prejudiced. *See United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999) (citation omitted). In this context, prejudice focuses on the reviewing court’s ability to perform its statutory duty to conduct a full and thorough review of the case. *United States v. Henry*, 53 M.J. 108, 111 n.* (C.A.A.F. 2000). “A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut[.]” *Id.* at 111 (citations omitted). By contrast, “[i]nsubstantial omissions . . . do not raise a presumption of prejudice or affect that record’s characterization as a complete one.” *Id.* So the threshold question is whether the item is substantial, either qualitatively or quantitatively. *United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014) (citing *United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982) (additional citation omitted)). Omissions from the record are qualitatively substantial if the substance of the omitted material “related directly to the sufficiency of the Government’s evidence on the merits.” *Id.* (citation omitted). Omissions are quantitatively substantial if “the totality of omissions . . . becomes so unimportant and so un-influential when viewed in the light of the whole record, that it approaches nothingness.” *Id.* (citing *United States v. Nelson*, 3 C.M.A. 482, 487 (C.M.A.

1953)). While a substantial omission raises a presumption of prejudice, it can be rebutted by the Government. *United States v. Harrow*, 62 M.J. 649, 654–55 (A.F. Ct. Crim. App. 2006) (citation omitted).

3. Analysis

First, the entirety of trial counsel’s closing argument (during which he utilized the PowerPoint slides) was transcribed substantially verbatim. Appellant raises no assignment of error as to the substance of trial counsel’s closing argument, meaning the absence of these slides has no discernable impact on our ability to conduct a full and thorough appellate review in Appellant’s case. Further, trial defense counsel did not object contemporaneously to any portions of trial counsel’s argument, meaning even if he did challenge the substantive argument on appeal, it would be reviewable only for plain error.

Second, the “inaudible” portions of video and audio clips from Prosecution Exhibit 18 and Defense Exhibit A were separately admitted into evidence with the same imperfections, and without objection. Ultimately, we are unpersuaded by Appellant’s argument: “[C]ounsel must know what evidence the trial counsel showed the members to assess whether the argument asked the members to draw inferences not flowing from the evidence[.]” In effect, appellate defense counsel already *do know* what was presented— excerpts from the recordings from Prosecution Exhibit 18 and Defense Exhibit A that are already included in the record of trial.

Third, the lack of an objection tends to render the slides’ omission as “insubstantial” because it has no measurable impact on our ability to perform a full and fair appellate review for Appellant’s case, particularly in light of the presence of the underlying video recordings already admitted and reviewable as separate exhibits within the record of trial. *See Henry*, 53 M.J. at 111.

Appellant has not established that he is entitled to any relief. Under the circumstances, we conclude that trial counsel’s closing argument PowerPoint slides were an insubstantial omission from the record of trial. Even assuming, *arguendo*, the missing PowerPoint slides constitute a “substantial omission” from the record of trial, the Government has rebutted any presumption of prejudice.

E. Unlawful Immigrant Criminal History as Sentencing Aggravation Evidence

Appellant argues the military judge abused his discretion in admitting the criminal history of one of the Mexican nationals, Mr. ONA,²³ as aggravation evidence under R.C.M. 1001(b)(4) during the presentencing proceedings. For the reasons set forth below, assuming without deciding that this was improper aggravation evidence, we find no prejudice because the Government has demonstrated this evidence did not substantially influence the adjudged sentence.

1. Additional Background

The military judge admitted Mr. ONA's criminal history at the presentencing proceedings over trial defense counsel's objection. This history was admitted as Prosecution Exhibit 28, consisting of a two-page Form I-213, *Record of Deportable Alien*, showing Mr. ONA had three prior convictions in the United States between 2003 and 2017 for drunk driving offenses each resulting in a term of confinement of 30 days or more. The military judge, in support of his ruling, articulated his Mil. R. Evid. 403 balancing analysis orally on the record:

The court does find this to be evidence in aggravation of the crime as it directly relates to or results from the crime specifically. It is evidence that appears to show that one of the individuals the [Appellant] was transporting had a criminal history[;] that is directly related to or resulting from his . . . crime of transporting that illegal alien. The court has conducted an Mil. R. Evid. 403 balancing test and finds that probative value is not substantially outweighed by any danger of unfair prejudice in this case. The court will put this document and the testimony in the proper context, recognizing that severity or lack thereof of criminal behavior and how long ago it occurred [o]n this date on this particular form. However, this court will give this evidence and testimony the weight it deserves. It is admissible as aggravation evidence.

At the close of sentencing arguments, the military judge, *sua sponte*, provided additional affirmation of his knowledge of the limited use of aggravation evidence in informing an appropriate sentence by explaining, "This court

²³ The court notes that the charge sheet reflects this Mexican national's name as Mr. ONA, but Prosecution Exhibit 28, described *infra*, and Prosecution Exhibits 7–9, show this Mexican national's name as Mr. ONA. It appears the charge sheet has a scrivener's error. For purposes of this opinion, the court will refer to him as Mr. ONA. Appellate raises no issue regarding this error.

understands its duty to sentence the accused only for the crimes of which he has been convicted to the extent . . . trial counsel’s argument discussed his prior history of misconduct or any uncharged offenses.”

2. Law

A military judge’s decision to admit evidence at sentencing is reviewed for abuse of discretion. *United States v. Carter*, 74 M.J. 204, 206 (C.A.A.F. 2015) (citation omitted). Military judges abuse their discretion when their “factual findings are clearly erroneous, view of the law is erroneous, or decision is outside of the range of reasonable choices.” *United States v. Hutchins*, 78 M.J. 437, 444 (C.A.A.F. 2019) (citations omitted).

The Government may present evidence during sentencing of “any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty.” R.C.M. 1001(b)(4). Evidence qualifying under R.C.M. 1001(b)(4) must also pass muster under Mil. R. Evid. 403. *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007). A military judge may exclude evidence if its probative value is substantially outweighed by such considerations as its tendency to result in unfair prejudice, confuse the issues, or mislead the trier of fact. Mil. R. Evid. 403. A military judge has “wide discretion” in applying Mil. R. Evid. 403 and we exercise “great restraint” in reviewing such applications when the military judge has articulated his reasoning on the record. *United States v. Humpherys*, 57 M.J. 83, 91 (C.A.A.F. 2002) (citations omitted).

For preserved objections, if an alleged error occurs in the admission of sentencing matters, the test for prejudice is “whether the error substantially influenced the adjudged sentence.” *United States v. Sanders*, 67 M.J. 344, 346 (C.A.A.F. 2009) (citation omitted). To make this determination, reviewing appellate courts weigh four factors: “(1) the strength of the Government’s case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question.” *United States v. Edwards*, 82 M.J. 239, 247 (C.A.A.F. 2022) (citations omitted).

3. Analysis

In this judge-alone sentencing case, we elect to resolve this assignment of error based upon the absence of prejudice. We consider each of the four factors articulated in *Edwards* in turn.

First, the Government’s sentencing case was moderately strong. The Government’s sentencing case relied on the severity of the most significant convicted misconduct, *i.e.*, transporting aliens and conspiring to do so, and Appellant’s prior history of misconduct (including nonjudicial punishment for prior marijuana use, followed by a vacation action for additional misconduct), which evidenced Appellant’s diminished rehabilitative potential to date.

Second, and by contrast, the strength of the defense sentencing case was modest. It consisted of heartfelt testimony from Appellant’s mother and father about their love for and pride in their son, along with five character statements from family and friends attesting to Appellant’s love and care for his family and friends. All of this, while commendable, does not significantly mitigate the weight of misconduct Appellant committed.

Third, considering the materiality and quality of the evidence in question, we conclude the evidence had limited “materiality” in terms of potential impact on the adjudged sentence. The military judge’s qualifying caveat about putting “this document and testimony in the proper context” based on remoteness in time and relative lack of severity would accord this evidence scant weight in the final sentencing determination.²⁴ Moreover, the parties paid this evidence little attention in their sentencing arguments,²⁵ further reducing the likelihood the military judge placed undue focus or reliance on the evidence in deliberating on an appropriate sentence.

Moreover, the sentence for the transportation and conspiracy charges to which the disputed aggravation evidence was relevant demonstrates the absence of any “substantial influence” on the adjudged sentence. Here, the military judge imposed 24 months of confinement running concurrently, although trial counsel had requested 36 months and the parties agreed 25 years was the maximum punishment for each offense. In sum, the Government has demonstrated any error in admitting Mr. ONA’s criminal history did not “substantially influence” the adjudged sentence.

F. Maximum Punishment for Transporting Aliens and Conspiracy to Transport Aliens

1. Additional Background

At trial, the military judge, trial counsel, and trial defense counsel relied on the plain language of 8 U.S.C. § 1324(a)(1)(B)(ii) in agreeing Appellant’s aggregate maximum punishment for each specification was 25 years—5 for

²⁴ We agree with Appellant’s characterization that Prosecution Exhibit 28 provided only “skeletal details” of Mr. ONA’s criminal history. There is no mention of the underlying facts for each incident or whether injuries to persons or property occurred. This absence of additional detail reduced the likelihood of prejudice by significantly minimizing the materiality of this evidence. Appellant’s brief concedes as much in saying: “[S]tanding alone, [this evidence] would not be enough to move the needle on prejudice.”

²⁵ Trial counsel dedicated only 7 of the 95 transcribed lines of his sentencing argument to discussion of the aggravation evidence. Trial defense counsel only obliquely commented on it in 3 of the 99 transcribed lines of his/her sentencing argument.

each alien listed therein.²⁶ For the first time on appeal, Appellant claims the maximum punishment for each specification should be five years.

2. Law

8 U.S.C. § 1324(a)(1)(B)(ii) provides that an offender is subject to as much as five years in prison “for each alien in respect to whom such a violation occurs.”

a. Standard of Review

“The maximum punishment authorized for an offense is a question of law, which [this court reviews] de novo.” *United States v. Beaty*, 70 M.J. 39, 41 (C.A.A.F. 2011) (citations omitted). We review a military judge’s sentencing determination for abuse of discretion. *Id.* (citation omitted). “[W]here a military judge’s decision was influenced by an erroneous view of the law, that decision constitutes an abuse of discretion.” *Id.* (citation omitted).

b. Waiver

Failure to lodge an objection may result in waiver or forfeiture of the issue. *See United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017). This “is a question of law [courts] review de novo.” *Id.* (citation omitted). “Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.” *Davis*, 79 M.J. at 331 (quoting *Gladue*, 67 M.J. at 313; *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) (citations omitted)).

Appellate courts generally review forfeited issues for plain error, but “a valid waiver leaves no error to correct on appeal.” *Ahern*, 76 M.J. at 197 (citation omitted). In other words, if the appellant waived the objection, the appellant is precluded from raising the issue before either the CCA or the United States Court of Appeals for the Armed Forces (CAAF). *United States v. Chin*, 75 M.J. 220, 223 (C.A.A.F. 2016) (citing *Gladue*, 77 M.J. at 313–14). However, under the prior version of Article 66(d), UCMJ,²⁷ CCAs had an affirmative obligation to examine the entire record to determine whether “to leave an [appellant’s] waiver intact or to correct the error,” with our superior court premising that waiver-piercing authority in the previous statute on the statutory phrase “should be approved.” *See id.*

²⁶ The issue was explicitly discussed during presentencing proceedings and trial defense counsel’s precise words in response to trial counsel’s articulation of the maximum punishment calculations for these offenses was: “We concur, Your Honor.”

²⁷ As discussed *supra* at Part II.B.2.b, the amended version of Article 66(d), UCMJ, applicable to Appellant’s case applies in cases where all convicted misconduct occurred on or after 1 January 2021.

3. Analysis

The parties agree the military judge’s maximum punishment calculation should be evaluated for plain error. We disagree, however, because trial defense counsel’s affirmative concurrence with the calculation at trial waived this issue. This was not an oversight, but “an intentional relinquishment of a known right.” *See Davis*, 79 M.J. at 331; *Campos*, 67 M.J. at 332 (citations omitted).

Even assuming arguendo that our waiver-piercing authority as to waived errors impacting sentencing survived after the FY21 NDAA amendments to Article 66(d), UCMJ (*cf. United States v. Coley*, ARMY 20220231, 2024 CCA LEXIS 127, *9 (A. Ct. Crim. App. 13 Mar. 2024) (unpub. op.) (holding 2021 amendments to Article 66(d), UCMJ, abrogated the CCA’s ability to pierce waiver as to errors associated with findings) (citations omitted)),²⁸ we would decline to pierce the waiver in this case where we tend to think the maximum punishment was ultimately calculated correctly at trial. *See United States v. Blanks*, No. ACM 38891, 2017 CCA LEXIS 186, at *22 n.11 (A.F. Ct. Crim. App. 17 Mar. 2017) (unpub. op.) (holding “we will only ignore waiver in the most deserving cases”).

At the very least, piercing waiver would be unnecessary because Appellant suffered no prejudice requiring a remand for resentencing even if the maximum punishment was incorrectly calculated for these offenses. Here the military judge ultimately sentenced Appellant to 24 months’ confinement for each offense, running concurrently—less than one half of the possible confinement even if Appellant’s view of the maximum punishment under 8 U.S.C. § 1324 is correct. Accordingly, even if we were inclined to pierce the waiver in this case,

²⁸ In *Chin*, the CAAF predicated the CCA’s waiver-piercing authority on the phrase “should be approved” in the prior version of Article 66(c), UCMJ. 75 M.J. at 223. The CAAF explained that during its Article 66, UCMJ, review, “the CCA is commanded by *statute* to review the entire record and approve only that which ‘should be approved.’” *Id.*

As noted *supra* at Part II.B.2.b, while the 2021 amendments to Article 66, UCMJ, removed this language as to *findings* (*see* 116 Pub. L. 283, § 542(b)(1)), they left it intact as to *sentencing* (at least until the effective date of the new Article 66(e), UCMJ, which applies to convicted crimes committed on or after 27 December 2023. *See* 117 Pub. L. 81, § 539E(f) (also FY22 NDAA). Accordingly, for purposes of this case, this court appears to still have waiver-piercing authority as to waived errors impacting the *sentence*. This is so because, under the FY21 NDAA amended version of Article 66(d)(1), UCMJ, that applies to Appellant’s case, we “may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, *should be approved*.” *See* 116 Pub. L. 283, §542(b)(1) (emphasis added).

we could have confidently reassessed the sentence and concluded the military judge would have sentenced Appellant to the same term of confinement even under Appellant’s suggested maximum punishment calculation. After all, the military judge was sentencing Appellant for the *same set of operative facts*—it was only the available maximum punishments which had changed. *Cf. United States v. Winckelmann*, 73 M.J. 11, 16 (C.A.A.F. 2013) (noting consideration of “[w]hether the nature of the remaining offenses capture the gravamen of criminal conduct included within the original offenses, and . . . whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant” as a positive factor favoring sentence reassessment by a court of criminal appeals).

G. Maximum Punishment for Absence Without Leave (AWOL) and Breaking Restriction Convictions

Appellant alleges the military judge imposed more than the maximum permissible confinement for his absence without leave (AWOL) conviction—Charge I and its specification—and his breaking restriction conviction—Charge II and its specification. For the reasons set forth below, we agree and grant relief in our decretal paragraph.

1. Additional Background

During the providency inquiry for Appellant’s guilty pleas to each of the specifications of Charges I, Charge II, and Charge III (wrongful use of marijuana), the military judge correctly articulated the maximum punishments for each of these offenses, including one month confinement for each of the specifications of Charges I and II, and two years for the specification of Charge III. The military judge imposed separate terms of confinement for each of these convicted specifications. While he correctly announced the maximum one-month confinement terms for each of the specifications of Charges I and II during the providency inquiry, the military judge ultimately erroneously sentenced Appellant to two months’ confinement for the specification of Charge I and three months’ confinement for the specification of Charge II. Meanwhile, the military judge announced a sentence of three months’ confinement for the specification of Charge III and designated those three terms of confinement run concurrently, and consecutive to terms of confinement for the remaining convicted offenses. Trial defense counsel did not object to the announced sentence either at trial or any time during post-trial processing, culminating with the entry of judgment.²⁹ Now on appeal, Appellant requests we affirm no more

²⁹ Appellant does not claim on appeal that the errors at trial in failing to object to the terms of confinement for Charges I and II involved ineffective assistance of counsel.

than one month's confinement, respectively, for each of the specifications of Charges I and II. The Government argues that the erroneously high sentences did not "materially prejudice" Appellant because these sentences ran concurrently with the specification of Charge III, and thus had no impact on the total effective length of confinement adjudged.

2. Law

We review the lawfulness of a sentence *de novo*. See *United States McElhaney*, 83 M.J. 164, 166 (C.A.A.F. 2023).

Congress authorized maximum punishments "as a court-martial may direct" for both Articles 86 and 87b, UCMJ. Exercising power under Article 56, UCMJ, 10 U.S.C. § 856, to set maximum punishments for offenses, the President set a term of one month as the maximum confinement for AWOL lasting less than three days (Article 86, UCMJ) and for breaking restriction (Article 87b, UCMJ). *MCM*, pt. IV, ¶¶ 10.d.(2)(A); 13.d.(3).

When acting as the sentencing authority, a military judge must specify a term of confinement for each offense. Article 56(c)(2), UCMJ, 10 U.S.C. § 856(c)(2). "The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense." Article 56(a), UCMJ, 10 U.S.C. § 856(a).

In reviewing the legality of sentences imposed at courts-martial, we may affirm only "the sentence or such part or amount of the sentence as [we] find[] correct in law and fact," and we may act only "with respect to the findings and sentence as entered into the record." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1); see also *United States v. Bennett*, No. ACM S32722, 2023 CCA LEXIS 293, at *14 (A.F. Ct. Crim. App. 14 Jul. 2023) ("[W]e cannot approve a sentence that is not correct in law.").

3. Analysis

The military judge committed clear and obvious error in announcing his sentence as to each of the specifications of Charges I and II. The record demonstrates the military judge was aware of the correct maximum punishments, but announced segmented sentences above those maximums for each of the specifications of Charges I and II.

While the military judge's error was clear, there was no impact to the total effective length of Appellant's sentence to confinement because the military judge designated the confinement for each of the specifications of Charges I–III to run concurrently. Because the military judge also imposed three months'

Our sentence modification sufficiently addresses the error and we need not *sua sponte* address these other possible issues.

confinement for the specification of Charge III (wrongful use of marijuana), the erroneous sentences for each of the specifications of Charges I and II were subsumed with the concurrent sentencing for the specification of Charge III.

Nonetheless, we must correct the error because we are obligated to approve only those “findings and sentence that are correct in law and fact.” *See United States v. Flores*, __ M.J. __, No. 23-0198/AF, 2024 CAAF LEXIS 162, at *1 (C.A.A.F. 14 Mar. 2024) (holding that CCAs are required to review each segment of confinement adjudged in a judge-alone sentencing case for appropriateness). Accordingly, we take action in our decretal paragraph to reduce the confinement periods for each of the specifications of Charges I and II, in alignment with the actual permissible maximum punishments available. We analogize this to essentially a “sentence reassessment” where we are confident that but for the error the military judge would have imposed a particular quantum of punishment. *See Winckelmann*, 73 M.J. at 12. Here, we are confident the military judge would have adjudged the entirety of the maximum confinement available for each of the specifications of Charges I and II. Accordingly, we “reassess” the terms of confinement for each of the specifications of Charges I and II to one month each, which we reflect in our decretal paragraph.

H. Sentence Appropriateness

Appellant challenges the appropriateness of the sentences for his transporting aliens and conspiracy convictions. He alleges the 24-month concurrent sentence he received for these offenses is excessive when compared to the federal sentencing guidelines applicable in civilian courts. He also offers sentences imposed in certain military and non-military cases involving similar conduct for comparison. Hewing to our independent obligation under Article 66(d), UCMJ, to conduct sentence appropriateness review *in toto*, we consider not only the appropriateness of Appellant’s sentences for the specific offenses he challenges, but also his entire sentence. For the reasons set forth below, we find Appellant’s sentence is not inappropriately severe.

1. Law

a. Sentence Appropriateness Generally

We review issues of sentence appropriateness *de novo*. *See McAlhaney*, 83 M.J. at 166 (citation omitted). Our authority “reflects the unique history and attributes of the military justice system [and] includes . . . considerations of uniformity and evenhandedness of sentencing decisions.” *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (citations omitted). We may affirm only as much of the sentence as we find correct in law and fact. Article 66(d), UCMJ. In review of judge-alone sentencing, we “must consider the appropriateness of each segment of a segmented sentence and the appropriateness of the sentence as a whole.” *See Flores*, 2024 CAAF LEXIS 162, at *1.

“We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant’s record of service, and all matters contained in the record of trial.” *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (en banc) (per curiam) (alteration in original) (citation omitted). Although appellate courts are empowered to “do justice[] with reference to some legal standard,” we are not authorized to grant mercy. *United States v. Guinn*, 81 M.J. 195, 203 (C.A.A.F. 2021) (quoting *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010)).

b. Sentence Comparison

CCAs are “not required . . . to engage in sentence comparison with specific [other] cases ‘except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.’” *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999) (quoting *United States v. Ballard*, 20 M.J. 282, 288 (C.M.A. 1985)) (additional citation omitted). Cases are “closely related” when, for example, they involve “co-actors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared.” *Id.* “[A]n appellant bears the burden of demonstrating that any cited cases are ‘closely related’ . . .” *Id.*

The test for whether sentences are “highly disparate” is “not limited to a narrow comparison of the relative numerical values of the sentences at issue, but also may include consideration of the disparity in relation to the potential maximum punishment.” *Id.* at 289. “If the appellant meets that burden, or if the court raises the issue on its own motion, then the Government must show that there is a rational basis for the disparity.” *Id.* at 288.

A CCA is not required to compare an appellant’s case to non-closely related cases. *United States v. Wacha*, 55 M.J. 266, 267 (C.A.A.F. 2001). “The appropriateness of a sentence generally should be determined without reference or comparison to sentences in other cases.” *United States v. LeBlanc*, 74 M.J. 650, 659 (A.F. Ct. Crim. App. 2015) (en banc) (citing *Ballard*, 20 M.J. at 283).

In *United States v. Lacy*, the CAAF described a CCA’s “sentence review function” as “highly discretionary.” 50 M.J. at 288. CAAF observed the interplay between individualized sentencing and uniformity:

Congress has furthered the goal of uniformity in sentencing in a system that values individualized punishment by relying on the judges of the Courts of Criminal Appeals to “utilize the experience distilled from years of practice in military law to determine whether, in light of the facts surrounding [the] accused’s delict, his sentence was appropriate. In short, it was hoped to attain

relative uniformity rather than an arithmetically averaged sentence.”

Id. (alteration in original) (quoting *United States v. Olinger*, 12 M.J. 458, 461 (C.M.A. 1982)).

“Sentence comparison does not require sentence equation.” *United States v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001). “[T]he military system must be prepared to accept some disparity in the sentencing of codefendants, provided each military accused is sentenced as an individual.” *Id.* at 261–62 (citations omitted). “[C]harging decisions by commanders in consultation with their trial counsel, as well as referral decisions by convening authorities after advice from their [s]taff [j]udge [a]dvocates, can certainly lead to differences in sentencing.” *Id.* at 261.

2. Analysis

We are not persuaded any of the cases Appellant cites in his briefs are “closely related.” Appellant was not a co-actor with any of the defendants cited in those cases; there was no “direct nexus” between Appellant’s crimes and theirs; and the mere fact the same type of misconduct was committed (*i.e.*, illegal transportation of aliens) does not render the cases closely related. Furthermore, our caselaw contemplates case comparisons to other servicemembers, *not* civilians. See *Ballard*, 20 M.J. at 284–85. Article 66, UCMJ, sentence appropriateness review is focused upon uniform and evenhandedness of sentencing within the unique disciplinary environment of the military, not civilian society at large. See, *e.g.*, *id.* at 285 n.4 (“Even if appellant could demonstrate the drug sentences are more severe in the military, as a whole, than in civilian jurisdictions, we are satisfied that such differences can be readily justified by an urgent necessity in the military that is simply not present in the civilian community.” (citations omitted)).

Even if we were to depart from precedent and consider civilian cases as “closely related,” we are unpersuaded the federal sentencing guidelines applicable in civilian courts are helpful measures of evenhandedness of sentences in courts-martial. See *United States v. Kroetz*, No. ACM 40301, 2023 CCA LEXIS 450, at *21 (A.F. Ct. Crim. App. 27 Oct. 2023) (unpub. op.) (“We presume that the military judge would not improperly apply federal sentencing guidelines when determining [an]ppellant’s sentence in a military court-martial.”); see also *United States v. Garner*, 39 M.J. 721, 727 (N.M.C.M.R. 1993) (holding “the Federal Sentencing Guidelines do not apply to trial by courts-martial”).

Similarly, we are unpersuaded Appellant’s sentence of 24 months’ confinement for transporting and conspiring to transport five Mexican nationals is “highly disparate” when compared to the military cases he offers. First, all of

those involved defendants who pleaded guilty, a substantial factor in mitigation that Appellant’s case lacks.³⁰ Secondly, Appellant’s case contains additional aggravating factors, including the presence of a firearm and obstruction of justice.

In the end, having considered all the evidence in the record, and the interest in uniformity and evenhandedness of sentencing decisions generally, we are convinced Appellant’s specific confinement sentences for the transporting and conspiring to transport aliens offenses, and his overall sentence (as corrected in our decretal paragraph) were appropriate.

I. Post-Trial Delay: From Sentencing to Docketing and Docketing to Decision

Appellant requests relief for delay in docketing his case with this court following the entry of judgment for his court-martial because 200 days elapsed from sentencing to docketing, vice the 150 days allotted under our precedent in *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020). We ourselves identified an additional issue of post-trial delay from the docketing of the case with this court to the issuance of our decision because more than 18 months have elapsed triggering review for “facially unreasonable delay” under our superior court’s precedent in *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006)). After evaluating the facts and circumstances and applying the applicable legal standards surrounding these two periods of delay, we conclude no relief is warranted.

1. Additional Background

Appellant was sentenced on 18 February 2022 and submitted his clemency matters on 7 March 2022. The convening authority issued his decision on action memorandum on 21 March 2022. The military judge signed the entry of judgment on 20 April 2022.

The court reporter began preparation of the verbatim transcript on 14 March 2022. Transcription and assembly of the record continued until final certification on 28 July 2022. During this time, the court reporter transcribed

³⁰ To be clear, to say that Appellant lacks this mitigating factor is different from asserting that this court deems greater punishment appropriate for an accused who merely exercises his right to plead not guilty—we do not. *See United States v. Johnson*, 1 M.J. 213, 215 (C.M.A. 1975) (holding a not-guilty plea, standing alone, does not conversely carry with it a negative implication capable of aggravating a sentence). Rather, we are acknowledging the fact that, unlike the comparison cases, Appellant is unable to rely upon a guilty plea as a mitigating factor potentially representing the “first step towards rehabilitation” which our caselaw recognizes. *See United States v. Nelson*, 51 M.J. 399, 400 (C.A.A.F. 1999) (citation omitted); *Johnson*, 1 M.J. at 215.

portions of the audio recordings for trial days 1, 2, 4, and 5, and transmitted them to counsel on a rolling basis between 2 May 2022 and 21 June 2022 for review and submission of any edits. The court reporter also transcribed an unrelated board of inquiry and three other general courts-martial between 22 March 2022 and 16 June 2022.

In the meantime, the servicing legal office contracted with a private company for additional trial transcription for the remaining portions of the trial audio for trial day 3. This company completed its transcription on 10 July 2022. Trial counsel provided their final transcript edits on 20 July 2022, and trial defense counsel provided their final edits on 28 July 2022. The court reporter certified the entire trial transcript on 28 July 2022. The record of trial (ROT) consists of 11 volumes, including 639 pages of transcripts, 28 prosecution exhibits, 10 defense exhibits, and 48 appellate exhibits. The servicing legal office mailed copies of the certified ROT to Appellant, trial defense counsel, and the general court-martial convening authority's legal office on 15 August 2022. This court received and docketed this case on 6 September 2022, 200 days after Appellant's court-martial was adjourned.

Thereafter, appellate defense counsel requested and was granted (over the express objection of the Government) 11 enlargements of time (EOT) to file Appellant's assignments of error brief. Appellant's first appellate counsel withdrew (with Appellant's knowledge and consent) during the course of this appeal on 28 September 2023. Thereafter Appellant's new appellate counsel filed Appellant's assignments of error on 31 October 2023, 421 days after the case was docketed with this court. It was at this time that Appellant first invoked this right to speedy post-trial processing, some 13 months after docketing of his case with this court. The Government filed its answer brief on 18 December 2023, after this court granted it one 30-day EOT. The Defense filed Appellant's reply brief on 5 January 2024.

2. Law

"[C]onvicted servicemembers have a due process right to timely review and appeal of [their] courts-martial convictions." *Moreno*, 63 M.J. at 135 (citations omitted). We review de novo whether an appellant has been deprived of his due process right to speedy post-trial and appellate review, and whether any constitutional error is harmless beyond a reasonable doubt. *United States v. Arriaga*, 70 M.J. 51, 57 (C.A.A.F. 2011) (citing *Moreno*, 63 M.J. at 135).

Moreno identified three types of prejudice arising from post-trial processing delay: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of a convicted person's grounds for appeal and ability to present a defense at a rehearing. *Moreno*, 63 M.J. at 138–39 (citations omitted). In *Livak*, this court established an aggregated sentence-to-docketing 150-day threshold for

facially unreasonable delay in cases, like Appellant’s, that were referred to trial on or after 1 January 2019. *Livak*, 80 M.J. at 633. A presumption of unreasonable delay also arises when appellate review is not completed and a decision is not rendered within 18 months of the case being docketed. *Moreno*, 63 M.J. at 142.

If there is a presumptive or an otherwise facially unreasonable delay, we examine the matter under the four non-exclusive factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): “(1) the length of the delay; (2) the reasons for the delay; (3) the appellant’s assertion of the right to timely review and appeal; and (4) prejudice.” *Moreno*, 63 M.J. at 135 (citing *Barker*, 407 U.S. at 530). “We analyze each factor and make a determination as to whether that factor favors the Government or [Appellant].” *Id.* at 136 (citation omitted). Then, we balance our analysis of the factors to determine whether a due process violation occurred. *Id.* (citing *Barker*, 407 U.S. at 533).

“No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding.” *Id.* (citing *Barker*, 407 U.S. at 533). However, where an appellant has not shown prejudice from the delay, there is no due process violation unless the delay is so egregious as to “adversely affect the public’s perception of the fairness and integrity of the military justice system.” *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006).

Even in the absence of a due process violation resulting from excessive post-trial delay, “a Court of Criminal Appeals has authority under Article 66[, UCMJ,] to grant relief for excessive post-trial delay without a showing of ‘actual prejudice’ within the meaning of Article 59(a)[, UCMJ], if it deems relief appropriate under the circumstances.” *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002) (citation omitted). The essential inquiry under *Tardif* is whether, given the post-trial delay, the sentence “remains appropriate[] in light of all circumstances.” *Toohey*, 63 M.J. at 362 (citing *United States v. Bodkins*, 60 M.J. 322, 324 (C.A.A.F. 2004) (per curiam)).

We provided a further analytical framework for that analysis in *United States v. Gay*, where we set forth six factors to consider before granting “sentence appropriateness” relief under *Tardif* and *Toohey*, even in the absence of a due process violation:

1. How long did the delay exceed the standards set forth in [*Moreno*]?
2. What reasons, if any, has the [G]overnment set forth for the delay? Is there any evidence of bad faith or gross indifference to the overall post-trial processing of this case?

3. Keeping in mind that our goal under *Tardif* is not to analyze for prejudice, is there nonetheless some evidence of harm (either to the appellant or institutionally) caused by the delay?
4. Has the delay lessened the disciplinary effect of any particular aspect of the sentence, and is relief consistent with the dual goals of justice and good order and discipline?
5. Is there any evidence of institutional neglect concerning timely post-trial processing, either across the service or at a particular installation?
6. Given the passage of time, can this court provide meaningful relief in this particular situation?

74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016). In our consideration of the above factors, “no single factor [is] dispositive, and a given case may reveal other appropriate considerations for this court in deciding whether post-trial delay has rendered an appellant’s sentence inappropriate.” *Id.* (footnote omitted).

3. Analysis

In this case, two periods of delay were facially unreasonable under *Livak* and *Moreno*: the delay between sentencing and docketing with this court and between docketing and the issuance of this court’s opinion. Accordingly, we consider each period of delay in light of the *Barker* factors.

a. Post-trial Delay from Sentencing to Docketing

i) Length of delay

The 200 days that elapsed between sentencing and docketing exceeded *Livak*’s 150-day threshold for facially unreasonable post-trial delay by one-third. We find this factor favors Appellant.

ii) Reasons for delay

The court reporter was actively working four other cases while transcribing Appellant’s case. The servicing legal office also took affirmative steps to expedite the completion of the trial transcript, securing additional trial transcription services from an outside company. The 150 days it ultimately took to transcribe the record was perhaps slower than might be anticipated for a 639-page transcript, but there is no evidence of any “deliberate attempt to delay the [appeal] in order to hamper the defense.” *See Barker*, 407 U.S. at 531. As such, we find this delay does not represent intentionally dilatory action by the Government. Given that crowded dockets and busy legal offices are simply a fact of life in the modern military justice practice, we find this factor only slightly favors Appellant.

iii) Request for speedy post-trial processing

Appellant did not invoke his right to speedy post-trial processing during the 200 days between sentencing and the docketing of his case with this court. We find this weighs against Appellant.³¹

iv) Prejudice

We will conduct a consolidated prejudice analysis for both periods of post-trial delay. See subsection II.I.3.b.iv, *infra*.

b. Post-trial Delay from Docketing to Decision

i) Length of delay

Just under 22 months elapsed from the docketing of Appellant’s case with this court until the issuance of our decision. This exceeded the *Moreno* requirement by approximately four months. This factor slightly favors Appellant; the vast majority of the delay here was specifically requested by Appellant. See *United States v. Washington*, No. ACM 39761, 2021 CCA LEXIS 379, *109 (A.F. Ct. Crim. App. 30 Jul. 2021) (unpub. op.) (holding that 23 months from case docketing to issuance of the court’s opinion was “not excessively long” in a five assignment of error case resulting in three separate opinions from the panel).

ii) Reasons for delay

While the length of the delay may be facially unreasonable, the primary reason was this court’s latitude in granting Appellant’s requested EOTs. While this court does not begrudge appellate defense counsel for requesting EOTs when necessary to ensure zealous representation of Appellant and fulsome briefing of the issues, the fact that 421 days of delay are attributable to the Defense—compared to only 48 days for the Government to file its brief and then about 195 days for this court to prepare and issue its opinion—demonstrates reasonableness on the part of the Government and this court in the processing of Appellant’s case once it arrived here. See *Moreno*, 63 M.J. at 138 (holding a period of six months for a CCA to issue its decision after the appellant’s case was joined was “not an unreasonable time for review by the [CCA]”).

iii) Request for speedy post-trial processing

Appellant never requested speedy appellate review of his case prior to the filing of his assignment of errors some 421 days after docketing with this court. Given the apparent absence of urgency in Appellant’s eleventh hour speedy

³¹ See *Moreno*, 65 M.J. at 138 (reasoning that only if Appellant actually “asserted his speedy trial right, [is he] ‘entitled to strong evidentiary weight’” in his favor (quoting *Barker*, 407 U.S. at 528)).

post-trial processing rights invocation, this factor weighs neither for nor against Appellant. *See* subsection II.I.3.a.iii, *supra*.

iv) Prejudice

We do not find Appellant suffered prejudice to any of the three interests the CAAF identified in *Moreno*. In this case, Appellant has not received any relief that would have reduced the amount of time he spent in confinement, so there is no oppressive incarceration. *See Moreno*, 63 M.J. at 139. Similarly, where Appellant’s substantive appeal does not result in a rehearing, his ability to present a defense at a rehearing is not impaired. *See id.* at 140. Moreover, we cannot perceive, and Appellant does not articulate, how the substantive grounds for his appeal have been impaired.

c. Conclusion to Post-trial Delay Claims

Having weighed the applicable factors, we find that neither the 200-day delay between sentencing and docketing with this court nor the approximately 22 months between docketing and this court’s decision were a violation of Appellant’s due process rights. In the absence of prejudice cognizable under *Moreno*, we find the delay was not so egregious as to “adversely affect the public’s perception of the fairness and integrity of the military justice system.” *Toohy*, 63 M.J. at 362.

Furthermore, recognizing our authority under Article 66(d), UCMJ, we have also considered whether relief for excessive post-trial delay is appropriate even in the absence of a due process violation. *See Tardif*, 57 M.J. at 225. After considering the factors enumerated in *Gay*, 74 M.J. at 742, we conclude no such relief is warranted.

III. CONCLUSION

The findings are correct in law and fact, and no error materially prejudicial to the substantial rights of the Appellant occurred. We reassess the segmented sentence for the Specification of Charge I from two months to one month, and the segmented sentence for the Specification of Charge II from two months to one month, and affirm the sentence as entered which calls for a dishonorable discharge, confinement for 27 months, forfeiture of all pay and allowances, and reduction in rank to the grade of E-1. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d).

Accordingly, the findings and sentence, as reassessed, are **AFFIRMED**.



FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

Appendix B

United States v. Davidson

United States District Court for the Northern District of New York

February 19, 2010, Decided; February 19, 2010, Filed

1:07-CR-204 (LEK)

Reporter

2010 U.S. Dist. LEXIS 17239 *

UNITED STATES OF AMERICA, -against- CHARLES DAVIDSON, WILLIAM HOSKINS, TOMAS SOTO CASTILLO, CHRISTOPHER TIESMAN, KENNETH GINES, JR., HASKELL "BUDDY" ROSS, and WENDY MUDRA, Defendants.

Counsel: [*1] For William Hoskins, Defendant: E. Stewart Jones, Jr., LEAD ATTORNEY, Office of E. Stewart Jones, Jr., Troy, NY; Michael L. Koenig, Greenberg, Traurig Law Firm - Albany Office, Albany, NY.

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For Kenneth Gines, Jr., Defendant: Cathy A Fleming, LEAD ATTORNEY, Hodgson, Russ Law Firm - NY Office, New York, NY; Michael L. Koenig, Greenberg, Traurig Law Firm - Albany Office, Albany, NY; Michelle L. Merola, Hodgson, Russ Law Firm - Buffalo Office, Buffalo, NY.

For Haskell Buddy Ross, Defendant: William F. Jung, LEAD ATTORNEY, PRO HAC VICE, Jung, Sisco Law Firm, Tampa, FL; Michael L. Koenig, Greenberg, Traurig Law Firm - Albany Office, Albany, NY.

For Carlos Pelico-Ajanel, Material Witness: Paul J. Evangelista, LEAD ATTORNEY, Office of the Federal Public Defender, Albany Main Office, Albany, NY.

For USA, Plaintiff: Bonnie K. Brady, Tina E. Sciocchetti, LEAD ATTORNEYS, Richard D. Belliss, Sara M. Lord, Office of United States Attorney - Albany, Albany, NY.

Judges: Lawrence E. Kahn, United States District Judge.

Opinion by: Lawrence E. Kahn

Opinion

MEMORANDUM - DECISION AND ORDER

I. INTRODUCTION

Presently [*3] before the Court are eleven Motions (Dkt. Nos. 188, 190, 192, 193, 194, 195, 196, 197, 198, 199, 200) brought by Defendants challenging the Government's second superseding Indictment. They seek, *inter alia*, to dismiss the Indictment in part and as a whole, as well as to obtain disclosure of certain grand jury materials. For the reasons discussed below, the Motions are without merit and are denied in their entirety.

II. BACKGROUND

On January 23, 2009, William Hoskins, Charles Davidson, Tomas Soto Castillo, Wendy Mudra, Christopher Tiesman, Kenneth Gines, Jr., and Haskell "Buddy" Ross (collectively, "Defendants") were indicted, through the return of a second superseding Indictment, for actions in connection with an alleged conspiracy involving the encouragement, transport, concealment and harboring of illegal aliens, in violation of [8 U.S.C. § 1324](#), and the defrauding of the United States by impeding the function of the Internal Revenue Service and Social Security Administration, in violation of [42 U.S.C. § 408](#). See Indictment (Dkt. No. 122). In this second superseding Indictment, each Defendant was indicted on between two and six counts of the seven counts listed in the Indictment. *Id.* [*4] During the time of the alleged conspiracy, the Defendants were managerial employees with IFCO Systems North America ("IFCO"), a pallet servicing company with plants located across the United States. The Court assumes, at this juncture, that the parties are familiar with the procedural and factual background of the case.¹

On October 23, 2009, the Defendants filed eleven separate pre-trial Motions, primarily Motions to dismiss, raising numerous challenges to the Indictment. While the Motions contain areas of substantive overlap, they pose a series of arguments that the Indictment fails to allege an offense for various reasons (Dkt. Nos. 188, 193, 194, 197, 198); that Counts Three and Four are invalid for vagueness (Dkt. No. 195); that Counts Three and Four are multiplicitous (Dkt. No. 196); that the Government failed to preserve testimony, such that the Indictment must fail (Dkt. No. 199); that Counts One and Two are predicated on due process violations (Dkt. No. 200); that an allegation must be struck on due process and *ex post facto* grounds (Dkt. No. 192); and that the Defendants [*5] are entitled to disclosure of grand jury instructions and specific references in that body's proceedings to Defendant Gines (Dkt. No. 190). Taken together, the Motions request that this Court invalidate the Indictment and thereby terminate the impending trial of Defendants. The Court will address each of these contentions in turn.

III. DISCUSSION

a. Standard of Review for Motion to Dismiss Indictment

Pretrial motions attacking an indictment must overcome a difficult standard to prevail in obtaining dismissal. This Court "must examine the indictment as a whole, accept as true the facts alleged, and determine only whether the indictment is valid on its face." [United States v. Elliott, 363 F. Supp. 2d 439, 450](#) (citing [Costello v. United States, 350 U.S. 359, 363, 76 S. Ct. 406, 100 L. Ed. 397, 1956-1 C.B. 639 \(1956\)](#)) (other citations omitted). An indictment is required to be a "plain, concise, and definite written statement of the essential facts constituting the offense charged," [FED. R. CRIM. P. 7\(c\)\(1\)](#), and it is established that "an indictment is sufficient if it, first contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal [*6] or conviction in bar of future prosecutions for the same offense."

¹ For additional background, consult the progression of Indictments and the Court's Orders on discovery issues.

United States v. Alfonso, 143 F.3d 772, 776 (2d Cir. 1998) (quoting Hamling v. United States, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974)). Through challenges to the sufficiency of indictments, this has been found to mean in the Second Circuit that "an indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." United States v. Stavroulakis, 952 F.2d 686, 693 (2d Cir. 1992) (citations omitted). If an indictment defines an offense with "generic terms," however, "it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species, -- it must descend to particulars." Id. (citing Russell v. United States, 369 U.S. 749, 765, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962)) (other citations omitted). "An indictment that fails to allege the essential elements of the crime charged offends both the Fifth and Sixth Amendments." United States v. Pirro, 212 F.3d 86, 92 (2d Cir. 2000) (citing Russell, 369 U.S. at 760).

b. Sufficiency of Allegations in Count One

Defendants argue that Count One of the Indictment, conspiracy [*7] to harbor, encourage and induce illegal aliens, fails to state an offense on the basis that the alleged objects of the conspiracy were lawful acts. (Dkt. No. 193). Pursuant to Federal Rule of Criminal Procedure 12, Defendants assert that Count One is defective for seeking to hold them liable for conduct which is beyond the scope of the underlying criminal statute. Specifically, it is contended that the Defendants' actions in connection with the hiring, housing and relocating of illegal aliens do not, as a matter of law, constitute harboring and encouraging.

Upon review of the Indictment, it is clear this line of argument must fail. Defendants attempt to compartmentalize, parse, isolate and minimize the allegations contained in the Indictment in order to characterize the objects of the conspiracy as a series of lawful actions. The Court is not persuaded by this approach. In establishing the existence of a conspiracy, an overt act may be made by "only a single one of the conspirators and need not be itself a crime." Braverman v. United States, 317 U.S. 49, 53, 63 S. Ct. 99, 87 L. Ed. 23, 1942 C.B. 319 (1942). The question provoked by Defendants' challenge is, assuming that the Government were to prove all of its allegations, whether [*8] the Defendants can be deemed to have committed a crime within the meaning of 8 U.S.C. § 1324(a)(1)(A)(iii)-(iv). Here, the crime alleged is conspiracy to accomplish the harboring and encouragement of illegal aliens. It may well be, as Defendants argue, that employing an illegal alien or providing specific instances of assistance does not rise to the level of harboring or encouraging, but these narrow statements do not speak to the question at issue of whether the conspiracy existed. Defendants in no way show that, as a matter of law, Count One is deficient on these grounds. The Court finds that a conspiracy offense is properly alleged by Count One, and Defendant's Motion (Dkt. No. 193) must be denied.

c. Specific Intent in Counts One and Two

Defendants seek to dismiss Counts One and Two, which allege conspiracy to harbor and encourage illegal aliens and conspiracy to defraud the United States, respectively, on the ground that the Indictment failed to allege that Defendants acted with specific intent as to those crimes. (Dkt. No. 194). Pursuant to Federal Rule of Criminal Procedure 12, Defendants argue that the Counts do not charge an essential element of the crimes alleged and therefore [*9] fail to state an offense. This attack on the Indictment is composed of several parts.

First, Defendants rely on the assertion that the Government was obligated, and failed, to allege specific intent to agree to the conspiracy to accomplish the underlying crime in Count One. Defendants make the additional contention that Count One is defective for failing to allege that Defendants had the specific intent to commit the objects of that underlying crime, the attempt to harbor and encourage illegal aliens. Thus Defendants contend that the Indictment, to state an offense, had to allege that the Defendants specifically intended to agree to the conspiracy with the specific intent to accomplish the statutory offenses. As to Count Two, the Defendants repeat the assertion that the Government must allege specific intent to agree to the alleged conspiracy and allege the specific intent to commit the underlying offenses, the violation of federal tax laws.

Neither the Defendants' challenge to Count One nor to Count Two withstand scrutiny. It appears that Defendants conflate the intent meant by an allegation of conspiracy, the intent requires to establish an underlying statutory

violation of harboring [*10] or encouraging, and the evidence sufficient at trial to prove intent in [§ 1324](#) crimes. Counts One and Two are properly alleged as to the element of intent.

In both Counts, the Government alleges that the designated Defendants "conspired, combined, confederated and agreed, with others known and unknown" to accomplish the underlying offenses of harboring and encouraging illegal aliens and fraud. See Indictment (Dkt. No. 122). This allegation that Defendants so conspired is obviously a sufficient allegation of intent to agree, and the allegation of conspiracy itself necessarily means that the conspirators intended to accomplish the objects of that conspiracy. "[I]ntent to accomplish an object cannot be alleged more clearly than by stating that parties conspired to accomplish it." [Frohwerk v. United States, 249 U.S. 204, 209, 39 S. Ct. 249, 63 L. Ed. 561 \(1919\)](#). The Government was not obligated to state, beyond the allegations of conspiracy to harbor, and encourage and conspiracy to defraud, that Defendants specifically intended to conspire to specifically intend to accomplish the underlying offenses of harboring, harboring, encouraging and defrauding. Defendants' argument creates an utter redundancy and is without [*11] merit. The underlying statutory offense of harboring and encouraging contains a mental state provision within its text, such that the commission of the act of harboring or encouraging must be done in "knowing and in reckless disregard of the fact that the aliens... [were] in the United States in violation of law. . . ." See Indictment (Dkt. No. 122) (paraphrasing [§ 1324\(a\)\(1\)\(A\)\(iii-iv\)](#)). The requirement of such a mental state exists apart from the allegation of conspiracy to accomplish this violation; the allegation of conspiracy suffices in both Counts to properly allege the disputed element of intent.

d. Intent and Vagueness in Counts Three and Four

Defendants assert that Counts Three and Four, charging the aiding and abetting harboring of aliens and the direct encouraging and inducing of aliens, respectively, are similarly deficient in their allegations and fail to state an offense, arguing that the Government has failed to adequately allege intent. (Dkt. No. 195). They also attack these Counts on the ground that they are unconstitutionally vague. Upon review of the specific allegations and the Indictment as a whole, the Court concludes that neither argument has merit.

i. Intent

On the basis [*12] of [18 U.S.C. § 2](#), Count Three charges certain Defendants with aiding and abetting the underlying crime of concealing, harboring and shielding aliens, "knowing and in reckless disregard of the fact that the aliens had come to, entered and remained in the United States in violation of law, contrary to Title [8 United States Code, Section 1324\(a\)\(1\)\(A\)\(iii\)](#)." Indictment (Dkt. No. 122). Under [18 U.S.C. § 2](#), a defendant maybe convicted of aiding and abetting a given crime where the government proves that the underlying crime was committed by a person other than the defendant, that the defendant knew of the crime, and that the defendant acted with the intent to contribute to the success of the underlying crime." [United States v. Hamilton, 334 F.3d 170, 180 \(2d Cir. 2003\)](#). Defendants make the odd contention, similar to their argument regarding the allegations of conspiracy discussed above, that the Count's allegation of aiding and abetting is actually insufficient to allege such a crime on the basis that it is well established that aiding and abetting is a crime that requires a certain mental state of intent. Without bringing any legal support for the proposition, Defendants claim that the [*13] Government cannot merely allege that Defendants aided and abetted a crime but must state that they specifically intended to aid and abet that crime. This argument is without merit, as it contravenes the very meaning of the term aiding and abetting. To wit, the allegation of aiding and abetting necessarily alleges intent.

With respect to Count Four, Defendants present an even more strained argument. That Count simply alleges that certain Defendants "encouraged and induced aliens to reside in the United States, knowing and in reckless disregard of the fact that such residence was and would be in violation of law. . . ." It appears to be the Defendants' contention that this Count is defective for failing to allege that the Defendants "acted knowingly or intended to violate the law," as distinguished from the allegation that the encouragement be "with knowledge or in reckless disregard of the alien's illegal status." Motion to Dismiss (Dkt. No. 195) at 6-7. In other words, the Defendants seem to argue that the Count must allege that the Defendants acted with the specific intent to violate the law when they engaged in encouragement, in addition to alleging, as was properly done in the Indictment, [*14] that the act of encouragement was done with knowledge or in reckless disregard for the illegality of aliens' residence in the United States. Having so deciphered the Defendants' argument, the Court must reject it; there is simply no basis given for

requiring the additional former allegation of specific intent to violate the law. The text of [section 1324\(a\)\(1\)\(A\)\(iv\)](#) clearly specifies that the crime of encouragement rests upon the knowledge of or reckless disregard for the fact that an alien's presence in the United States is in violation of the law. See [United States v. Calhelha, 456 F. Supp. 2d 350, 361 \(D. Conn. 2006\)](#) (discussing sufficiency of allegations for harboring and encouragement crimes and upholding indictment that tracks statutory language consistent with the instant Indictment).

ii. Vagueness

Defendants' arguments that both Counts Three and Four are invalid by reason of unconstitutional vagueness present a closer case than Defendants' intent assertions, but the Court concludes that they cannot succeed and that the Counts pass muster. It is true that these Counts merely track the statutory language of the offenses. It is by no means the case, however, that this renders them [*15] defective. Reviewing each Count "as if it were a separate indictment. . ." and recognizing "that the validity of a count cannot depend upon the allegations contained in any other count not expressly incorporated," [United States v. Hernandez, 980 F.2d 868, 871 \(2d Cir. 1992\)](#) (citations omitted), the Court finds that the each Count fulfills the constitutional requirements for an indictment, that: "first, [it] contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, [it] enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." See [Hamling, 418 U.S. at 117](#).

Count Three alleges the act of aiding or abetting, performed during a time period of October 2004 through April 19, 2006 in the Northern District of New York, the underlying statutory offense of concealing, harboring and shielding aliens, and the attempt thereof, with knowledge or in reckless disregard of those aliens illegal status, in violation of [8 U.S.C. § 1324](#) and [18 U.S.C. § 2](#). Count Four alleges the act of encouraging and inducing illegal aliens to reside in the United States, performed from October 2004 through [*16] April 19, 2006 in the Northern District of New York, with knowledge or in reckless disregard of the fact that those aliens' residence in the United States was unlawful, in violation of [§ 1324](#). By way of employing statutory language and stating the approximate time and place in which Defendants are alleged to have engaged in the given criminal act, each Count thus states all of the elements of the offense it alleges against the listed Defendants. Accordingly, there is no [Sixth Amendment](#) violation of the Defendants' rights "to be informed of the nature and cause of the accusation," which arises when an indictment does not state the essential elements of the crime. [Russell v. United States, 369 U.S. 749, 761, 82 S. Ct. 1038, 8 L. Ed. 2d 240 \(1962\)](#).

Defendants argue that the mere tracking of statutory language in this manner is deficient. Under modern pleading practices, however, courts have "consistently upheld indictments that 'do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime.'" [United States v. Walsh, 194 F.3d 37 \(2d Cir. 1999\)](#) (citations omitted). Such tracking does not violate the [Fifth Amendment's](#) requirement that an indictment [*17] "contain some amount of factual particularity to ensure that the prosecution will not fill in elements of its case with facts other than those considered by the grand jury." *Id.* at 44. Rather, constitutional limitations depend upon the nature of the crime being alleged, such that "for an indictment to fulfill the functions of notifying the defendant of the charges against him and of assuring that he is tried on the matters considered by the grand jury, the indictment must state some fact specific enough to describe a particular criminal act, rather than a type of crime." [Pirro, 212 F.3d at 93](#). In the instant case, Counts Three and Four allege particular criminal acts, not merely particular types of crime, namely the aiding and abetting of harboring of illegal aliens and the encouragement of illegal aliens. No elements are omitted in this instance of statute tracking, and thus no opportunity is created for the prosecution to fill in elements at trial in violation of the [Fifth Amendment](#).

The Supreme Court, in [United States v. Resendiz-Ponce, 549 U.S. 102, 127 S. Ct. 782, 166 L. Ed. 2d 591 \(2007\)](#), upheld a similar statute-tracking indictment and offered instruction on why more particularity is unnecessary in alleging counts [*18] such as Counts Three and Four. The Court considered an indictment which simply alleged that an alien knowingly and intentionally attempted to enter the United States at an approximate time and place in violation of a federal statute. The Court determined that its "reasoning in [Russell](#) suggests that there was no infirmity in the present indictment" because unlike the statute at issue in that case, making it a crime for a witness summoned before a congressional committee to refuse to answer any question "pertinent to the question under

inquiry" and where the indictment was faulted for failing to allege even the subject of the inquiry itself, the crime alleged in Resendi-Ponce did not depend on the identification of specific fact. Counts Three and Four similarly do not rest on a statute in which criminal activity implicitly hinges on a specific fact that has not been alleged in the Indictment. For that reason, as in Resendi-Ponce, no deficiency exists simply because the Counts do little more than track statutory language.

e. Multiplicity as to Counts Three and Four

Defendants argue that Counts Three and Four are multiplicitious, threaten double jeopardy and should be dismissed on this basis. [*19] (Dkt. No. 196). Multiplicity in an indictment is understood as charging a "single offense as an offense multiple times, in separate counts, when, in law and fact, only one crime has been committed." United States v. Chacko, 169 F.3d 140, 145 (2d Cir. 1999). Whether this form of Fifth Amendment violation exists within an indictment is generally answered by the same-elements or Blockburger test, which asks if each charged offense contains an element not contained in the other charged offense. See Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). If an element is contained in each offense that is not contained in the other, the charges do not constitute a threat of double jeopardy. See Knapp v. Leonardo, 46 F.3d 170, 178 (2d Cir. 1995). However, this analysis yields to a clear indication of contrary legislative intent prohibiting the charging of multiple offenses based on the same conduct. Albernaz v. United States, 450, U.S. 333, 341 (1981). Defendants argue that Congress has clearly indicated an intent that persons should not be charged with multiple offenses under § 1324 for the same nexus of conduct and that, therefore, Blockburger should not apply. They contend that Counts Three [*20] and Four allege offenses for a single act or transaction, require no different elements and should be considered multiplicitious.

Count Three and Count Four cannot be found invalid under Blockburger, as each contains an element that the other does not. Among other facts, Count Three requires the Government to establish that a Defendant knew of and acted with the intent to contribute to the success of the underlying crime, committed by somebody other than that Defendant, of concealing, harboring or shielding an alien, or attempting to do so, with knowledge or in reckless disregard of that alien's illegal status in the United States. Count Four, on the other hand, requires that the Government establish that a Defendant did, in fact, encourage or induce an alien to illegally reside in the United States and did so knowing that or in reckless disregard for the fact that such residence would be violation of the law. The specific acts which may constitute encouragement versus the acts which may constitute harboring as well as the proof of Defendants' conduct and mental state constituting aiding and abetting of the latter acts versus the proof of Defendants' conduct and mental state in directly [*21] performing the former acts clearly represent sufficient independence and difference to pass the Blockburger test. Indeed, if only certain facts alleged in the Indictment were established, it would be quite possible to establish a prima facie case for a Defendant's guilt for one offense and not the other.

The Court is not persuaded that legislative intent may be found to bar the charging of multiple offenses under § 1324 for the extensive activity alleged on the part of Defendants in the Indictment. Defendants present no legislative history to support their contention, but rather rely on language in the case of United States v. Sanchez-Vargas, 878 F.2d 1163 (9th Cir. 1989), which is inapposite. In that case, the court determined that the statutory structure and congressional intent, as demonstrated by the expansion of the terms of criminal activity under § 1324 without alteration of the penalty provisions, prohibited the imposition of multiple punishments for the same single act of transporting an illegal alien into the United States. The entire conduct at issue consisted of driving an illegal alien from Mexico into the United States on a single occasion, resulting in separate convictions [*22] for bringing the alien into the United States and transporting the alien within the United States. The Sachez-Vargas court opined that the defendant "necessarily committed the offenses of bringing in and transporting at virtually the same time and place," and such conduct "exhibited neither the temporal nor spatial distance characterizing our prior decision upholding multiple penalties." Id. at 1171.

Counts Three and Four allege offenses standing in a markedly different position from the transporting and bringing in convictions resting on identical conduct, which prompted the Sachez-Vargas court to prohibit multiple *punishments*. In the instant case, the crime of aiding and abetting the concealing, harboring or shielding of illegal aliens is readily distinguishable in time, place and activity from the crime of actually encouraging and inducing illegal

aliens to reside in the United States. Defendants may properly be indicted on both Counts. In [United States v. Maria Guadalupe Devalle](#), 894 F.2d 133, 139 (5th Cir. 1990), the Fifth Circuit drew precisely this distinction between the holding in [Sanchez-Vargez](#) and the case then under its consideration, concluding that the former case's "rationale [*23] is wholly inapplicable to the setting of this particular case[.]" where the defendant was convicted of transporting and harboring offenses because of conduct that "occurred on the same day" but where those offenses occurred "each at separate times and places and [were] each of a different character (transporting in a moving vehicle and harboring in a specified apartment) from the other." Counts Three and Four charge offenses of greater substantive difference than those found not multiplicitous by the [Devalle](#) court, and, in the absence of any presentation of legislative history speaking to this issue, the Court cannot conclude that Congress intended to prevent the indictment of persons who, through an extensive course of criminal activity, commit multiple offenses under [§ 1324](#). This Court does not disagree with the [Sanchez-Vargez](#) decision but finds its holding to have no application to the facts as alleged in the Indictment at issue here. Accordingly, Defendants' Motion to dismiss (Dkt. No. 196) must be denied.

f. Counts Five, Six and Seven

Defendants argue that Counts Five, Six and Seven must be dismissed for not properly alleging violations of [§ 1324\(a\)\(1\)\(A\)\(ii\)](#). (Dkt. No. 197). These [*24] Counts each allege that Defendant Tomas Soto Castillo, at different specified time periods and with respect to certain specified aliens, transported and moved those aliens within the United States knowing and in reckless disregard of the illegal status of those aliens and in furtherance of that violation of law. The essence of Defendants' attack is that such allegations do not actually run afoul of [§ 1324\(a\)\(1\)\(A\)\(ii\)](#) because the allegations are based on employment-related transportation and that such transportation of aliens, without something more to meet what they contend is the meaning of the "in furtherance of" element of the crime, does not state an offense. This argument is misplaced, and the Court shall not dismiss Counts Five through Seven on this basis.

Multiple circuits have articulated the meaning of [§ 1324\(a\)\(1\)\(A\)\(ii\)](#) in several ways, particularly with respect to its "in furtherance of" provision; the Second Circuit has not done so. The Eighth Circuit and Ninth Circuit follow what the Ninth Circuit calls the "direct or substantial relationship" test for determining whether the "in furtherance of" element has been satisfied. See, e.g., [United States v. Moreno](#), 561 F.2d, 1321, 1323 (9th Cir. 1977); [*25] [United States v. Velasquez-Cruz](#), 929 F.2d 420 (8th Cir. 1991). This approach looks to the "time, place, distance and overall impact" of the transportation, and suggests that the "in furtherance of" element is not met when an act of transportation "only incidentally connected to" continued illegal presence. [Moreno](#), 561 F.2d at 1322-1323. The Sixth Circuit takes what it calls an "intent-based" approach, wherein a factfinder should consider all credible evidence concerning a defendant's intentions in transporting an illegal alien. [United States v. 1982 Ford Pick-Up](#), 873 F.2d 947, 951 (6th Cir. 1989). The Fifth Circuit employs something of a hybrid approach, encompassing the factors of the "direct and substantial relationship" test and focusing on all credible evidence regarding a defendant's intentions in transporting an alien. [United States v. Merkt](#), 764 F.2d 266, 271 (5th Cir. 1985). The Seventh Circuit rejects both the "direct and substantial" test and the "intent-based" test, instead allowing the government to prove the "in furtherance of" element "by reference to the facts and the circumstances surrounding [each particular] case." [United States v. Parmelee](#), 42 F.3d 387, 391 (7th Cir. 1994). [*26] The Tenth Circuit "believe[s] the proper approach is a general one" akin to the Fifth and Seventh Circuit approaches, wherein "a factfinder may consider any and all relevant evidence bearing on the "in furtherance of" element (time, place, distance, reason for trip, overall impact of trip, defendant's role in organizing and/or carrying out the trip)." [United States v. Barajas-Chavez](#), 162 F.3d 1285, 1289. (10th Cir. 1999). In the application of these tests, however, there is disagreement on whether "in furtherance of" requires proof that a defendant transported an alien with the intent to further that alien's illegal presence or merely with the effect. The "direct and substantial relationship" test may find the in furtherance element met based on the effect of an act of transportation, while the "intent-based" approaches require either knowledge of or specific intent that the transportation assists an illegal alien's continued presence in the United States. In the single district court case addressing this issue within the Second Circuit, the District of Vermont expressed agreement with the Sixth Circuit's view, concluding that [§ 1324\(a\)\(1\)\(B\)](#) requires that the government must prove [*27] a defendant intended, by means of the transportation, to advance or assist an alien's violation of law, not merely that the effect of the transportation was to allow the alien to remain in the United States. [United States v.](#)

[Moreno-Duque, 718 F. Supp. 254, 259 \(D. Vt. 1989\)](#). The Court agrees with this proposition. Thus, to establish the alleged violations of [§ 1324\(a\)\(1\)\(A\)\(ii\)](#) by Defendant Castillo, the Government must prove beyond a reasonable doubt, *inter alia*, that the Defendant intended to assist or advance the continued illegal presence in the United States of the designated illegal aliens. The Government may, of course, demonstrate such proof "by reference to the facts and the circumstances surrounding the case," [Parmelee, 42 F.3d at 391](#), and have a factfinder "consider all evidence it finds credible about [the defendant's] intentions, direct as well as circumstantial" [Merkt, 764 F.2d at 272](#).

The Court, upon review of extant case law and the statutory text itself, can see no reason to order the dismissal of the Counts. The sufficiency of the Indictment is not called into question by the variation in interpretations given to what is required by the "in furtherance of" provision. **[*28]** Those interpretations differ in their views or particular articulation of the extent to which the prosecution must establish that a given act of transportation can be found to have been done to advance the continued illegal presence of an alien in the United States. In the instant case, no matter which of these variations were treated as clarifying the minimum content of what it means to transport "in furtherance of," there can be no effect on the validity of the Indictment. The Counts each fully allege an offense, tracking the very language Congress used in mandating a transportation offense, and are facially valid; the question of whether the Government will be able to sufficiently prove that Defendant Castillo committed the alleged offenses presents a separate issue than that of the sufficiency of the Indictment. The Defendants argument that the act of transporting for employment purposes alone is not an offense and that the Counts should, therefore, be dismissed, ignores the elementary point that the Counts allege transportation "in furtherance of. . ." and that the prosecution may prove that the Defendant Castillo committed that fully alleged offense. The Government, of course, **[*29]** may or may not succeed in proving that Defendant Castillo engaged in transportation of illegal aliens, knowing and in reckless disregard of that illegal status, in furtherance of that alien's illegal presence, and its success at trial may depend in part upon the meaning attributed to the furtherance provision. Clearly, however, these potentialities do not present a plausible basis on which the Counts themselves may be dismissed.

g. Defendant Davidson's Motion

Defendant Charles Davidson's Motion to Dismiss (Dkt. No. 198) Counts One, Three and Four raise only arguments that the Court has already rejected, as they appeared in Motions by the Defendants; accordingly, the instant Motion must be denied. It is contended that these Counts were deficient for reason of failing to properly allege intent. The Motion also asserts that the latter two Counts are deficient for lack of factual allegations. Subsections c. and d. of this Decision and Order address the Defendant's arguments. For the reasons contained therein, the Court will not dismiss Counts One, Three and Four on the basis argued.

h. Due Process Violations in Counts One and Two

Defendants seek to dismiss Counts One and Two on the ground **[*30]** that they violate Defendants' due process right to fair notice of the offenses alleged. (Dkt. No. 200). This challenge to the Indictment proceeds on two theories: that the Counts are based on ambiguous regulations and that the underlying factual allegations are deficient for purposes of notice. Upon the Court's review, it is evident that neither of these theories present a meritorious attack on the Indictment.

The right to fair notice of a criminal offense is a well-established area of constitutional protection. It is essential that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." [Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 \(1983\)](#). See also [Bouie v. City of Columbia, 378 U.S. 347, 350-354, 84 S. Ct. 1697, 12 L. Ed. 2d 894 \(1964\)](#). "Fair notice, of course, is a right of federal constitutional dimension, grounded in the due process guarantee, established by the Supreme Court, and requiring that a criminal statute give fair warning of the conduct that it makes a crime." [Lurie v. Wittner, 228 F.3d 113, 126 \(2d Cir. 2000\)](#) (citations, quotations and emphasis omitted). **[*31]** Were there an unclear duty contained in the statutes under which Defendants face prosecution, the Court has no doubt that a serious constitutional question would exist. See [Pirro, 212 F.3d at 91](#).

Counts One and Two simply do not allege offenses resting on an ambiguous statute. Defendants conflate the violation of the right to fair notice of an offense with the purported difficulty of dealing with "vague or ambiguous governmental rules and regulations" or "guidance," Motion to Dismiss Br. (Dkt No. 197) at 3-5, coming from different government agencies. The glaring defect in Defendants' argument is the complete absence of any indication of ambiguity in the actual offenses alleged against them. Their focus on assorted government sources that impact the manner in which an employer may become aware of, or take action with respect to, an employee's possible status as an illegal alien does not provide a basis to attack the Indictment. Defendants' discussion of the possibility of discrimination suits and the function of social security number "no-match" letters in no way illustrates an unclear much less conflicting duty. Nor does the assorted case law cited by Defendants have any bearing on [*32] the instant case. The Counts allege clear statutory offenses, and those offenses simply do not hinge on Defendants' interpretation of rules and regulations; and critically, there is no question whatsoever about the *application* of the criminal statute to the Defendants. As the Court finds that Defendants raise no constitutional issue as to fair notice in the Counts, their Motion (Dkt. No. 197) must be denied.

In the final portion of their Motion, Defendants assert the existence of "a secondary violation of Defendants' due process rights" in the form of unconstitutional vagueness with respect to the Counts' allegations of conspiracy. *Id.* at 21. It is contended that the Counts do not sufficiently allege an intent to conspire, and that the factual allegations do not provide sufficient notice of the nature of the conspiracy, including who may be alleged to have participated. The Court finds that this challenge to the Indictment has no merit. First, Defendants' argument as to the allegations of intent simply recycles the specific intent arguments already considered and rejected by the Court. Accordingly, the Court rejects that basis of Defendants' argument for the reasons explained in subsection [*33] c. Second, the assertion that the Indictment does not provide sufficient notice of the conspiracy charges because the Indictment does not specify unindicted co-conspirators and because the fraud count lacks specific allegation is baseless. The latter reason is conclusory, and the Defendants provide no legal substantiation to undermine the facial validity of Count Two. In the case of an indictment for conspiracy, "the government need not set out with precision each and every act committed in furtherance of the conspiracy." [United States v. LaSpina, 299 F.3d 165, 182 \(2d Cir. 2002\)](#). As for the omission of un-indicted co-conspirators, that is simply not a defect in the Indictment, and indeed comports with normal practice. See, e.g., [United States v. Briggs, 514 F.2d 794 \(5th Cir. 1975\)](#) ("we find no substantial authority permitting a federal grand jury to issue a report accusing named private persons of criminal conduct[, and w]e perceive no persuasive reason why the federal grand jury should be permitted to do by indictment what it could not do within the historical outer limits of a grand jury report."); see also United States Attorney's Manual., 9-11.130 ("Ordinarily, there is no need [*34] to name a person as an unindicted co-conspirator in an indictment in order to fulfill any legitimate prosecutorial interest or duty. For purposes of indictment itself, it is sufficient, for example, to allege that the defendant conspired with "another person or persons known."). Without a doubt, Counts One and Two contain "plain, concise, and definite written statement[s] of the essential facts constituting the offense charged," [FED. R. CRIM. P. 7\(c\)\(1\)](#), and are valid on their face. Defendants present no persuasive argument to the contrary.

i. Defendant Tiesman's Motion

Defendant Tiesman seeks to dismiss Counts One and Two on the basis of insufficient allegations of specific intent and of multiplicity. (Dkt. No. 188). The Court has already addressed and rejected precisely this specific intent argument in subsection c. as it was raised by other Defendants, and, accordingly, the Court rejects that basis of Defendant Tiesman's Motion for the reasons given above. The Court has only addressed the issue of multiplicity with respect to Counts Three and Four, however, and so it now turns the contention that the allegation of conspiracy to harbor and encourage aliens in violation of [8 U.S.C. § 1324\(a\)\(1\)\(A\)](#) [*35] and the allegation of conspiracy to defraud the United States in violation of [42 U.S.C. § 408\(a\)\(7\)\(B\)](#) are multiplicitous.

It is apparent that such an argument is unpersuasive by its very terms. Count One alleges an illegal immigration conspiracy, while Count Two alleges a conspiracy to defraud the United States through impeding the operations of the Internal Revenue Service and Social Security Administration. Under [Blockburger, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306](#), if an element is contained in each offense that Defendants contend is multiplicitous that is not contained in the other, the charges do not constitute a threat of double jeopardy. The immigration and tax fraud

conspiracy counts readily meet this test, and Defendant Tiesman does not offer any explanation to the contrary. Nor does the Defendant indicate the existence of legislative intent that would prohibit the charging of both Counts. See [Albernaz v. United States, 450 U.S. 333, 341, 101 S. Ct. 1137, 67 L. Ed. 2d 275 \(1981\)](#). Therefore, the Court rejects this basis of Defendant Teisman's attack on the Indictment, and must deny his Motion (Dkt. No. 188) to dismiss.

j. Production of Grand Jury Transcripts

Pursuant to [Federal Rule of Criminal Procedure 6\(e\)\(3\)\(E\)\(ii\)](#), Defendants move [*36] for the Court to require the production of the Government's instructions on law to the grand jury, including responses, and any references to Defendant Gines in the grand jury proceedings. Dkt. No. 190. Defendants offer four justification for the Court to require such production. They assert that the conspiracy charge in Count One is predicated on an erroneous intent standard; that Counts One and Two, relatedly, lack allegations that Defendants conspired with intent to commit the objects of those conspiracies; that Count Two is, in some manner, defective for stating that Defendant's action were taken "with intent to deceive" rather than "knowing and willful;" and that the instant Indictment excised a reference to conduct by Gines that appeared in the preceding Indictment.

The Court is authorized to permit disclosure of grand jury material "at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." [FED. R. CRIM. P. 6\(e\)\(3\)\(E\)\(ii\)](#). Because grand jury proceeding carry a "presumption of regularity," [Hamling, 418 U.S. at 139 n. 23](#), however, "[a] review of grand jury minutes is rarely permitted without [*37] specific factual allegations of government misconduct." [United States v. Torres, 901 F.2d 205, 233 \(2d Cir. 1990\)](#). The onus is on the Defendants to show "particularized proof of irregularities in the grand jury process" before the Court will invade the secrecy which traditionally surrounds grand jury proceedings. [United States v. Mechanik, 475 U.S. 66, 74, 106 S. Ct. 938, 89 L. Ed. 2d 50 \(1986\)](#). [Rule 6\(e\)\(3\)](#) codifies the exceptions to a grand jury's blanket of secrecy, and in the discretion of a court, "[p]arties seeking grand jury transcripts under [the Rule] must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed." [Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222, 99 S. Ct. 1667, 60 L. Ed. 2d 156 \(1979\)](#). The Court may also require disclosure of grand jury materials in "special circumstances" outside of [Rule 6\(e\)](#). See [In re Petition of Craig, 131 F.3d 99, 106 \(2d Cir. 1997\)](#) (describing set of non-exhaustive factors that a trial court may consider in whether there is a sufficient need to disclose particular material). It is clear that Defendants [*38] must persuade the Court that the materials they seek to disclose are justified by real and substantial concerns, and that the Court has considerable discretion in weighing the arguments presented.

Given this standard and the justifications asserted by Defendants, the Court concludes that disclosure of the grand jury materials is not warranted. While the reasons supporting secrecy may be less compelling at this juncture, the Defendants' arguments simply do not represent valid concerns or articulate a real and particular need. The first two justifications rely on the premise of the Indictment containing an erroneous intent standard and insufficient allegations of conspiracy with respect to the intent to accomplish the object of the conspiracy, claims that the Court has effectively rejected in other Motions. The Defendants' third justification regarding the language of "intent to deceive" is without apparent relevance and not strongly argued by Defendants. Thus, as to their request for grand jury transcripts, the Defendants fail to actually show irregularities. Similarly, the omission of an allegation of conduct by Defendant Gines in the instant Indictment which appeared in the first superseding [*39] Indictment is simply not an irregularity, and Defendants provide no plausible explanation of how it could be regard as such. The essence of the claim is that:

Since the same grand jury heard the evidence and legal instructions and voted both the first Superseding Indictment (which alleged Gines participated in this conversation) and the Second Superseding Indictment (which excludes Gines from the same described conversation), the instruction about that change is significant in determining whether the grand jury properly withdrew the erroneous allegation from consideration when it voted to indict him in the Second Superseding Indictment.

Motion to Dismiss Br. (Dkt. No. 190). In other words, Defendants seek to reverse the very presumption of regularity afforded grand juries in order to inspect whether that body really understood the Indictment it returned. Defendants,

of course, can cite no support for disclosure based on the conjecture of a mere possibility of a single misapprehension by the grand jury. Further, it is unclear what purpose such disclosure would even serve, as the issue to which it pertains is sufficiency of evidence. "[I]t would run counter to the whole history of the [*40] grand jury institution to permit an indictment to be challenged on the ground that there was inadequate or incompetent evidence before the grand jury." [United States v. Williams, 504 U.S. 36, 54, 112 S. Ct. 1735, 118 L. Ed. 2d 352 \(1992\)](#) (quotations and citations omitted). Because the Motion to disclose (Dkt. No. 190) any references to Defendant Gines in the grand jury proceedings provides no valid reason for doing so, as is the case with Defendants' Motion to disclose grand jury instructions and responses on law, the Court denies these requests.

k. Motion to Strike Paragraph 28

Pursuant to [Federal Rule of Criminal Procedure 7\(d\)](#), Defendants move for the Court to strike an allegation, paragraph 28, from the indictment as a surplusage on the basis of due process and ex post facto principles. Dkt. No. 192. Paragraph 28 reads in full: "It was part of the conspiracy that conspirator IFCO managers would and did ignore SSA no-match letters and take no meaningful steps to respond to no-match letters." Indictment (Dkt. No. 122). The "no-match" letters to which the allegation refers are letters sent annually by the Social Security Administration to employers that state that an employee's reported social security number does not [*41] correspond to the Administration's records for that number. During the period of the alleged conspiracy, the letters specified that they did not make any statement about an employee's immigration status and that an employer should not draw an inference about an employee's legal status based on receiving a notice of a non-match. Because of this caveat, the Defendants contend that it is unfair for the Government to present Defendant's actions with respect to no-match letters as evidence of the alleged conspiracy. This argument is couched in terms of due process and ex post facto principles, in that Defendants claim the Government is seeking to prosecute them for acts which were lawful when taken.

"Motions to strike surplusage from an indictment will be granted only where the challenged allegations are not relevant to the crime charged and are inflammatory and prejudicial." [United States v. Mulder, 273 F.3d 91, 99 \(2d Cir. 2001\)](#) (quoting [United States v. Scarpa, 913 F.2d 993, 1013 \(2d Cir. 1990\)](#)). The Court finds that paragraph 28 is relevant to the offenses and that, while it may have some prejudicial effect, it not unfairly prejudicial pursuant to [Federal Rule of Evidence 403. FED. R. EVID. 403](#) [*42] ("evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . ."). There is no due process or ex post facto violation created by the inclusion of that paragraph in the Indictment. Regardless of the caveat appearing on the no-match letters, which in no way represent binding law, the letters are relevant under [Federal Rule of Evidence 401](#) by virtue of their tendency towards showing that Defendants conspired to harbor or encourage illegal aliens, knowing or with reckless disregard of their illegal status. The Defendants are charged with this immigration conspiracy, not with the actions or inactions they are alleged to have taken in response to receiving the letters; such actions or inactions only go towards the proof of the crime alleged, and the language on the no-match letters, accordingly, may affect the sufficiency of evidence but not the Indictment itself. Further, the Court finds that the probative value of the allegations in regard to the no-match letters is not substantially outweighed by the danger of unfair prejudice, see [FED. R. EVID. 403](#), because the caveat language, which [*43] is simply an advisory statement on SSA documents, does not nullify the probative value of Defendants' conduct with respect to those letters as it indicates criminal knowledge and activity. Therefore, the Court will not strike paragraph 28 from the Indictment.

l. Allegations of Failure to Preserve Evidence

Finally, Defendants seek to dismiss the Indictment in its entirety on the basis of the Government's alleged failure to preserve evidence in violation of their [Fifth Amendment](#) due process and [Sixth Amendment](#) compulsory process rights. Defendants argue that the deportation of illegal aliens or a subset of aliens, particularly when the Defense had not yet interviewed those aliens, employed at IFCO constituted a failure to preserve evidence in the form of potential defense witnesses who may possess material and favorable testimony. This Motion to dismiss follows a lengthy discovery process that devoted significant attention to the production of material concerning the illegal aliens forming the basis of the charges in the instant case. Presently at issue are a group of approximately 114 or

115 aliens within the approximately 1,182 illegal aliens employed by IFCO, which the Defendants contend [*44] would offer exculpatory testimony. The basis of this subset of aliens requires some clarification.

In the course of discovery, the Government delivered to Defendants documentation of statements of IFCO employees taken by government agents, I-213s of detained aliens, and an initial and updated summary chart containing information including status and removal facts. In response to Defendants' requests to have the Government impose a blanket suspension on administrative proceedings on over 1,000 aliens, the Government asked Defendants for identification of any possibly exculpatory aliens whom Defendants had been unable to find; the Government then informed Defendants that 10 of the 24 aliens designated by Defendants had not been removed and proffered the last known addresses for the ten aliens. In the instant Motion to dismiss, Defendants cite those 24 aliens and an additional 91 aliens as material and exculpatory witnesses deported in violation of the [Fifth](#) and [Sixth Amendments](#). As the Government details, eight of these aliens have still not been removed and ten were removed after Defendants had information on the identity of the aliens and content of their statements. Of the remaining [*45] listed aliens, approximately 94, they were either removed prior to Defendants receiving information about their identities or statements, or their whereabouts are otherwise unknown.

Defendants assert that the Government's deportation of potentially material and exculpatory witnesses deprives them of their right to present a defense because of lost evidence. The Second Circuit set forth the proper inquiry for such a claim in [Buie v. Sullivan, 923 F.2d 10, 11-12 \(2d Cir. 1990\)](#). The court opined:

To establish a violation of the right to present a defense based on lost evidence, a defendant must show that the evidence was material and exculpatory, and that it was of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Moreover, unless the defendant can show bad faith on the part of the state, failure to preserve potentially useful evidence does not constitute a denial of due process of law. Finally, the misconduct must demonstrate that the absence of fundamental fairness infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.

Id. (extensive citations and quotations omitted). Consistent [*46] with this multi-prong evaluation, the Court noted that the contours of the constitutional right to present a defense and the right to compulsory process are "not unqualified; they are subject to countervailing public interests," giving the example of the United States' interest in faithfully executing its immigration policies. Id. (citations omitted).

Given the inquiry outlined by [Buie](#), the Court shall treat the question of whether the Government acted in bad faith when deporting the illegal aliens whom Defendants contend may have provided material and exculpatory testimony as the primary issue before it. The Defendants, within their Motion for dismissal of the Indictment, request the Court to hold an evidentiary hearing on their allegations of Government bad faith. Thus, the need for analysis of the other prongs of [Buie](#) as well as the necessity of an evidentiary hearing both turn on the merits of Defendants' arguments as to the existence of bad faith.

The request for an evidentiary hearing requires a lesser showing by Defendants than the one they must make to actually prevail on demonstrating bad faith. It is entirely the Defendants' burden to establish bad faith on the part of the [*47] Government, which it may do by showing, for example, that the Government departed from normal deportation procedures or deported the aliens to gain an unfair tactical advantage at trial. See [United States v. Dring, 930 F.2d 687, 695 \(9th Cir. 1991\)](#). Critically, however, the Defendants must demonstrate that official animus or a conscious effort to suppress exculpatory evidence. [United States v. Gastelum-Almeida, 298 F.3d 1167, 1174 \(9th Cir. 2002\)](#). In this regard, Defendants' showing must pertain to the Government's actual intentions and actions in removing the aliens, as "[t]he proper focus must be on the Government's knowledge when, exercising its deportation authority, it arranged for the departure of the witnesses, not on its subsequent conduct." [United States v. Chaparro-Alcantara, 226 F.3d 616, 624 \(7th Cir. 2003\)](#). While Defendants ultimately face this standard in order to establish bad faith, the Court may hold an evidentiary hearing to settle the question if Defendants convince the Court that such a proceeding is appropriate. Quoting [United States v. Boffa, 89 F.R.D. 523, 528 \(D. Dela. 1981\)](#), the Second Circuit has explained that:

In general, an evidentiary hearing need not be [*48] granted as a matter of course and must be held only if the moving papers allege facts with sufficient definiteness, clarity and specificity to enable the trial court to

conclude that relief must be granted if the facts alleged are proved. General and conclusory factual allegations which are based upon mere suspicion or conjecture, however, will not suffice to necessitate a hearing. Moreover, if facts urged in support of a hearing would not entitle the moving party to relief as a matter of law, no evidentiary hearing is required.

[*Gentile v. County of Suffolk*, 926 F.2d 142, 148 \(2d Cir. 1991\)](#). Accordingly, this Court will determine whether Defendants' arguments on the existence of bad faith specifically and sufficiently allege facts to support the need for further development at an evidentiary hearing. If Defendants fail to allege such facts that, if proven, would substantiate their Motion, the Court will decline to hold the hearing.

Review of Defendants' arguments on the issue of government bad faith reveals a narrative that attests to a variety of activity by government officials and repeatedly concludes that evidence of bad faith has therefore been shown; consistently missing, however, [*49] are explanations of why the activity either constitutes bad faith or is sufficiently indicative thereof. The Defendants simply do not allege specific facts surrounding the deportation of the aliens that amount to bad faith. Nor are sufficient facts alleged to support the need for an evidentiary hearing because Defendants in no way state with particularity what they anticipate to find or why they expect to uncover such findings; in essence, they seek a hearing on the speculative basis that a hearing might unearth something to fill the gap between their general descriptions of activity and conclusions of bad faith. The clear deficiencies in Defendants' arguments, in light of evidence of the Government's good faith during the discovery process through comprehensive and narrowed production, convince the Court that the Government did not act in bad faith and that no hearing is necessary to further develop the record on that question.

First, Defendants fail to establish that the Government deviated from normal deportation procedures in immigration enforcement actions. The Defendants argue that bad faith is indicated by the Government's interview process, wherein agents deemed aliens to be [*50] "strong witnesses" or "less info given," by worksite enforcement agents holding longer or shorter interviews, by the use of different forms at enforcement action in different states, and by the inconsistent completion, including the appearance of blanks or notation of "N/A," of those forms. Taken together, the Defendants allege that because agents engaged in a "qualitative assessment" of IFCO employees' answers, the Government failed to preserve evidence and acted in bad faith. Conspicuously absent, however, is any discussion of how these data collecting and processing actions do not comply with normal deportation procedures as set forth by Congress and the Department of Homeland Security or how they amount to the deportation of witnesses to obtain an advantage at trial. Certainly, the collection of information from over 1,000 aliens during worksite enforcement actions in the manner described by Defendants does not in and of itself constitute a failure to preserve evidence in which the Government acted in bad faith; and Defendants do not explain why it should be deemed otherwise. Assuming that facts Defendants describe are true, the Court does not see how an inference, much less a [*51] conclusion, of bad faith can be drawn.

Second, Defendants argue that the act of deportation itself was necessarily unconstitutional. Relying on language in [*United States v. Nebraska Beef*, 194 F. Supp. 2d 949, 951 \(D. Neb. 2002\)](#) that it is a general practice of the INS not to remove anyone considered a material witness for the defense, Defendants contend that the deportations were therefore in violation of normal procedures, and the Indictment should be dismissed or an evidentiary hearing held. Additionally, Defendants point out that the immigration proceedings for the aliens detained at different plants across the country were carried out at different times by local Immigration Customs Enforcement offices, though it is entirely unclear why this should be considered faulty. Rather, this indicates that the Government did not act in bad faith, as regional immigration offices processed illegal aliens in accord with varying local circumstances and considerations.

In [*Nebraska Beef*](#), a district court dismissed an indictment for an immigration conspiracy because it found that the government acted in bad faith in rendering material, favorable testimony unavailable to the defendants through the [*52] deportation of aliens, such that no alien employees were available to the defense before trial. The court's decision appears to have rested on a finding that the enforcement action departed from practices or policies either generally known to agents or set forth for that particular action. Apparently on the basis of testimony, that court determined some informal norms had been violated by agents' treatment of potentially material and exculpatory

testimony made by detained aliens and subsequent deportation of those aliens. Nebraska Beef is [*53] not applicable or persuasive in the instant case. Defendants fail to note a single immigration or deportation procedure, either in statutory or regulatory form, that the Government can be considered to have violated. Nor do Defendants indicate how the government's deportation authority was abused or otherwise exercised in order to obtain an advantage at trial. Without an indication of how the deportation of hundreds of illegal aliens found employed at IFCO plants involved bad faith in failing to preserve evidence, the alleged loss of evidence cannot be deemed unconstitutional. In short, the essential element of bad faith is never sufficiently alleged.

In Reply, Defendants allege and emphasize the awareness of immigration agents with regard to the purpose of the enforcement actions and investigation of IFCO. Taking as true the contention that Albany investigators had, in some manner, communicated enough information for agents to understand the nature of the investigation, there is once again no explanation given for why this fact should provide a basis on which to conclude that the Government acted in bad faith; the defense merely offers that "keeping those sort of witnesses around undermine [*54] the Government's goal." Reply to Response (Dkt No. 224) at 25. In effect, the Defendants wish to impose a presumption of irregularity or bad faith on the tenuous basis of immigration officials having awareness of the goals of an investigation. Clearly, this cannot be a sufficient allegation or showing to justify further development on the existence of bad faith. See United States v. Pena-Gutierrez, 222 F.3d 1080, 1085 (9th Cir. 2000) (finding that because the government had decided not to prosecute Pena-Gutierrez when it deported a witness, the government could not have been motivated by any perceived tactical advantage at trial).

In contrast with Defendants' conclusory statements of Government wrongdoing, the record shows no differential deportation in detained aliens similarly situated by location. Rather, aliens who made statements favorable to the government were deported, as were aliens who did not make statements that substantiate the alleged offenses. Thus Defendants cannot support a claim the Government directed or manipulated the immigration hearings of IFCO alien employees. See United States v. Litt, No. 02:08-cr-0404-04, 2009 U.S. Dist. LEXIS 103633, at *15-17 (W.D. Pa. Nov. 6, 2009) [*55] (explaining that defendants' bad faith argument fails because witnesses both favorable and unfavorable were deported and the government did not deviate from normal deportation procedures). The failure to provide sufficient and specific factual allegations demonstrating or indicating bad faith on the part of the Government is fatal to Defendants' Motion. Therefore, while the Court is skeptical that the Defendants could establish that the lost evidence of the deported or unavailable aliens would be both material and exculpatory and non-cumulative, it is unnecessary to reach those prongs of the Buie analysis. The Court finds no basis to dismiss the Indictment or to hold a hearing for further development on the existence of bad faith, as the Defendants have not sustained their burden in either regard.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that Defendants' Motions to dismiss (Dkt. Nos. 188, 193, 194, 195, 196, 197, 198, 199, 200) the Second Superceding Indictment (Dkt. No. 122); Motion to strike language (Dkt. No. 192) from that Indictment; Motion to compel disclosure (Dkt. No. 190) of grand jury materials; and Motion for an evidentiary hearing (Dkt. No. 199) are **DENIED in their [*56] entirety**; and it is further

ORDERED, that the Clerk serve a copy of this Order on the parties.

IT IS SO ORDERED.

DATED: February 19, 2010

Albany, New York

/s/ Lawrence E. Kahn

Lawrence E. Kahn

U.S. District Judge

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Appendix C



Positive

As of: September 17, 2024 9:40 AM Z

[United States v. Raasch](#)

United States Air Force Court of Criminal Appeals

October 14, 2005, Decided

ACM 35717

Reporter

2005 CCA LEXIS 342 *; 2005 WL 2875113

UNITED STATES v. Airman Basic EDWARD A. RAASCH JR., United States Air Force

Notice: [*1] THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL RELEASE.
NOT FOR PUBLICATION

Subsequent History: Review denied by [United States v. Raasch, 2006 CAAF LEXIS 817 \(C.A.A.F., June 14, 2006\)](#)

Prior History: Sentence adjudged 2 July 2003 by GCM convened at Kadena Air Base, Japan. Military Judge: David F. Brash (sitting alone). Approved sentence: Bad-conduct discharge and confinement for 21 months.

Case Summary

Procedural Posture

Appellant servicemember sought review of a decision of the convening authority, which approved the findings and sentence determined by the general court-martial. The servicemember was convicted, in accordance with his pleas of various specifications related to theft of currency and writing bad checks.

Overview

The servicemember contended on appeal that his guilty plea to larceny of currency of a value more than \$ 500 on divers occasions was improvident and that a miscalculation of the punishment that could be assessed for the larceny charge was substantial enough to render the guilty plea improvident. The court held that the record showed that the servicemember clearly understood the essence of the offense of larceny and that he knew the nature of the offense to which he was pleading guilty. The court agreed with the servicemember that the military judge did not make sufficient findings to establish that the larceny claims exceeded \$500 for sentencing assessment under Manual for Courts-Martial, pt. IV, para. 46e(1)(b) (2002). Because of the error the military judge should have calculated a total maximum sentence of 43 years, 6 months for all of the servicemember's charged crimes, but instead calculated a total of 48 months of confinement. Nevertheless the servicemember's guilty pleas were provident, notwithstanding the erroneous advice about the maximum available confinement.

Outcome

The court affirmed the findings and sentence.

Counsel: For Appellant: Colonel Beverly B. Knott, Lieutenant Colonel Gilbert J. Andia Jr., Major Terry L. McElyea, Major Antony B. Kolenc, and Major L. Martin Powell.

For the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Lane A. Thurgood.

Judges: Before MOODY, SMITH, and PETROW Appellate Military Judges.

Opinion by: PETROW

Opinion

OPINION OF THE COURT

PETROW, Judge:

The appellant was convicted in accordance with his pleas of dereliction of duty, disobeying a lawful regulation, divers thefts of currency, and the writing of bad checks with intent to defraud, in violation of Articles 92, 121, and 123a, UCMJ, [10 U.S.C. §§ 892, 921, 923a](#). On appeal, the appellant argues that his guilty plea to larceny of currency of a value of more than \$ 500 on divers occasions was improvident, and that a miscalculation of the maximum punishment for Charge II was substantial [*2] enough to render his plea of guilty improvident. Finding no error, we affirm the findings and sentence.

If an accused, after entering a guilty plea, sets up a matter inconsistent with the plea the court shall proceed as though he had pleaded not guilty. Article 45(a), UCMJ, [10 U.S.C. § 845\(a\)](#); [United States v. Prater, 32 M.J. 433, 436 \(C.M.A. 1991\)](#). On appeal, we review the military judge's acceptance of the plea for an abuse of discretion. [United States v. Eberle, 44 M.J. 374, 375 \(C.A.A.F. 1996\)](#). A providence inquiry into a guilty plea must establish not only that the accused himself believes he is guilty, but also that the factual circumstances as revealed by the accused objectively support that plea. [United States v. Higgins, 40 M.J. 67, 68 \(C.M.A. 1994\)](#); [United States v. Rothenberg, 53 M.J. 661, 662 \(A.F. Ct. Crim. App. 2000\)](#). Mere conclusions of law recited by an accused are insufficient to provide a factual basis for a guilty plea. [United States v. Outhier, 45 M.J. 326, 331 \(C.A.A.F. 1996\)](#).

The essence of the first error raised by the appellant is premised on the assertion [*3] that, during the *Care*¹ inquiry, the military judge failed to adequately impress upon the appellant that there was a distinction between pleading to the theft of a sum in excess of \$ 500, and pleading to several thefts which, in the aggregate, exceeded the sum of \$ 500. Based on this alleged oversight, the appellant contends that his plea of guilty was improvident.

While the military judge did not specifically define the term "on divers occasions" for the appellant, the record reflects that the appellant clearly understood that the specification for Charge II accused him of perpetrating more than one act. We need hardly proceed past the appellant's first utterances regarding the matter:

MJ: All right. Tell me about this theft from [Senior Airman (SrA) Paige Hart]. What happened there?

ACC: On diverse occasions, I had Paige Hart's ATM card. . . . On some occasions I've taken money out for her when she asked . . . I sometimes [*4] took more money than I should have when she asked and kept it for myself.

This was shortly followed by:

MJ: So would you agree then you exceeded the authorization she gave you?

ACC: Yes, sir.

MJ: You did this on more than one occasion, correct?

ACC: Yes, sir.

MJ: And collectively, talking about all the money you took from her beyond her authorization, was that over 500 bucks?

ACC: It was around that, sir.

MJ: Okay. Have you sat down and reviewed some of the--possibly the receipts--and thought back in your mind and talked about this with Captain Thomas? As we sit here today, can you look me in the eye and tell me it was over 500 bucks?

ACC: Yes, sir.

¹ [United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247 \(C.M.A. 1969\)](#).

MJ: Sure about that?

ACC: Yes, sir.

MJ: Okay. Now although Airman Hart didn't give you any authorization to take these additional amounts of money, say the \$ 40 to \$ 60 *on those different occasions*, did you think you had authorization to take that?

ACC: Not--no, I really didn't.

(Emphasis added.) These are not mere conclusions of law being recited by an accused, but are clearly a recitation of the facts surrounding the offense which reflects that he understood [*5] the essence of the offense, and knew to what he was pleading guilty. Accordingly, we find no merit to the first assigned error. See [Prater, 32 M.J. at 436](#).

With regard to the second assigned error, the military judge calculated the maximum period of confinement under Charge II to be five years. The trial defense counsel concurred. The *Manual* specifies the maximum punishment for larceny of property other than military property based upon the total amount stolen. For a value of \$ 500 or less, the maximum punishment is a bad-conduct discharge, forfeiture of all pay and allowances, and confinement for six months. *Manual for Courts-Martial, United States (MCM)*, Part IV, P46e(1)(b) (2002 ed.). For a value of more than \$ 500, the maximum punishment is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years. *Id.* at P46e(1)(d).

In [United States v. Oliver, 43 M.J. 668 \(A.F. Ct. Crim. App. 1995\)](#), this court explained the methodology used in discerning the maximum punishment in offenses involving multiple thefts.² Where the specification alleges multiple thefts of an aggregate value in excess of \$ 500, the [*6] military judge must first analyze the evidence to determine if the government can prove separate thefts. [Id. at 670](#). If the government can prove that any one theft was for more than \$ 500, then the higher "more than \$ [5]00" punishment level is to be applied. *Id.* In the alternative, if "the government could allege and prove separate specifications with punishments which, when combined, equal or exceed the maximum punishment for the aggregate specification," then the "more than \$ [5]00" punishment level would again be appropriate. [Id. at 668](#). See also Rule for Courts-Martial (R.C.M.) 307(c)(3), Discussion (H)(iv).

A review of the stipulation of fact and of the accused's testimony during the *Care* inquiry has convinced us that neither of the above techniques were satisfied in this case. Regarding the first calculation method, there is simply no evidence that [*7] any one theft exceeded \$ 100 much less \$ 500.

With regard to the second method, the appellant testified during the *Care* inquiry, that "on some occasions" SrA Hart would ask him to get money for her through use of her ATM card, and that he "sometimes" took more money out than she had requested and kept it for his own use. He would take \$ 40 to \$ 60 more than authorized by SrA Hart. The appellant testified that on one occasion, he used SrA Hart's debit card absent a request from her to do so, and on that occasion used it to purchase some small items at the shoppette.

From the stipulation of fact, the only fact relevant to this issue is that, in April 2003, SrA Hall discovered there were some transactions on her bank statement that she did not make which totaled over \$ 500.

To apply the second method, it is necessary to cobble together from the available evidence enough specifications to produce an aggregate amount of punishment that equals or exceeds five years confinement. The average theft appears to be in the amount of \$ 50. Although there is testimony that the total amount stolen was over \$ 500, there is no estimate as to how many thefts occurred. Thus, the available evidence [*8] is insufficient to determine if the higher punishment is triggered under the second method.

In *Oliver*, the accused was found guilty of stealing telephone services by using his roommate's telephone credit card number to make over \$ 1,300 in long distance phone calls. In the stipulation of fact introduced at trial, the government included the roommate's phone bills which established the dates and amounts of the calls from which could be fashioned specifications sufficient to equal or exceed the equal to or over \$ 100 punishment level.

² At that time, the enhanced punishment amount was of a value more than \$ 100 rather than the current \$ 500.

However, no equivalent quality or quantity of evidence is available in the instant case to identify ten separate incidents of theft.

The failure of the trial defense counsel to object to the military judge's determination of the maximum sentence at trial constituted waiver. R.C.M. 905(e). Therefore, we review for plain error. [United States v. Powell, 49 M.J. 460 \(C.A.A.F. 1998\)](#). To constitute plain error the error must be "obvious and substantial," and is invoked in cases in which the "fairness, integrity or public reputation of judicial proceedings" is seriously affected. [United States v. Fisher, 21 M.J. 327, 328 \(C.M.A. 1986\)](#); [*9] [United States v. Atkinson, 297 U.S. 157, 160, 56 S. Ct. 391, 80 L. Ed. 555 \(1936\)](#).

The maximum sentence calculated by the military judge for all offenses was 48 years confinement, including the maximum 5 years confinement for Charge II. Based on the above analysis, however, the correct maximum sentence is 43 years, 6 months confinement. The sentence imposed consisted of a bad-conduct discharge and 21 months confinement.

We find no plain error and conclude that the appellant's pleas of guilty were provident, notwithstanding the erroneous advice regarding the maximum confinement. See [United States v. English, 25 M.J. 819, 822 \(A.F.C.M.R. 1988\)](#). While a 4 year, 6 month error in the calculation of the punishment was substantial when considered in isolation, it ceases to be so in view of the maximum punishment of 43 years and 6 months confinement. The circumstances of this case do not lend themselves to the observation that the appellant's pleas of guilty were viewed by him as "the only means of avoiding a crushing sentence." *Id.* (citing [United States v. Hunt, 10 M.J. 222, 224 \(C.M.A. 1981\)](#)). Nor is the error of such a magnitude that it materially prejudices [*10] a substantial right of the appellant. Article 59(a), UCMJ, [10 U.S.C. § 859\(a\)](#); [Powell, 49 M.J. at 465](#).

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, [10 U.S.C. § 866\(c\)](#); [United States v. Reed, 54 M.J. 37, 41 \(C.A.A.F. 2000\)](#). Accordingly, the findings and sentence are

AFFIRMED.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Rule 21(b) because it contains 8,603 words.
2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Century Schoolbook font, using 14-point type with one-inch margins.



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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was sent via electronic mail to the Court and served on the Air Force Government Trial and Appellate Operations Division on September 17, 2024.



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