IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee,

v.

THOMAS M. SAUL
Staff Sergeant (E-5),
United States Air Force,
Appellant.

USCA Dkt. No. 24-0098/AF

Crim. App. Dkt. No. ACM 40341

BRIEF ON BEHALF OF APPELLANT

SPENCER R. NELSON, Maj, USAF
U.S.C.A.A.F. Bar No. 37606
Appellate Defense Counsel
Appellate Defense Division
1500 Perimeter Road, Ste 1100
Joint Base Andrews, MD 20762
Phone: (240) 612-4773
Email: spencer.nelson.1@us.af.mil

MICHAEL J. BRUZIK, Capt, USAF
U.S.C.A.A.F. Bar No. 37931
Appellate Defense Counsel
Appellate Defense Division
1500 Perimeter Road, Ste 1100
Joint Base Andrews, MD 20762
Phone: (240) 612-4770
E-mail: michael.bruzik@us.af.mil

Counsel for Appellant

INDEX

TABLE OF AUTHORITIES

STATUTES

SUPREME COURT CASES

COURT OF APPEALS FOR THE ARMED FORCES AND COURT OF MILITARY APPEALS CASES

SERVICE COURTS OF CRIMINAL APPEALS CASES

RULES AND OTHER AUTHORITIES

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	
THOMAS M. SAUL	)	
Staff Sergeant (E-5),	)	Crim. App. Dkt. No. ACM 40341
United States Air Force,	)	
Appellant	)	USCA Dkt. No. 24-0098/AF

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

ISSUE PRESENTED

I.

WHETHER A GUILTY PLEA FOR *WILLFUL* DESTRUCTION OF PROPERTY UNDER ARTICLE 109, UCMJ, 10 U.S.C. § 909, CAN BE PROVIDENT WHEN AN ACCUSED THRICE TOLD THE MILITARY JUDGE THAT HE "DID NOT INTEND TO DAMAGE THE [PROPERTY]" AND THAT HE WAS SURPRISED THERE WAS ACTUAL DAMAGE.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (Air Force Court) reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C.

§ 866(d).[1] This Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

On April 15, 2022, pursuant to mixed pleas, a Military Judge sitting at a general court-martial, at Tinker Air Force Base, OK, convicted Staff Sergeant (SSgt) Thomas M. Saul of one charge, one specification of willfully and wrongfully destroying property, in violation of Article 109, UCMJ, 10 U.S.C. § 909; one charge, one specification of wrongfully using a controlled substance, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a; and one charge, one specification of willfully disobeying a superior commissioned officer, in violation of Article 90, UCMJ, 10 U.S.C. § 890. Joint Appendix (JA) at 002. The Military Judge sentenced SSgt Saul to be reprimanded, to be reduced to the grade of E-2, to forfeit $1,000 pay for nine months, to be confined for nine months, and to be discharged with a bad conduct service characterization. *Id.* The Convening Authority took no action on the findings or sentence and denied SSgt Saul's request for waiver of all automatic forfeitures. *Id*.

[1] All references to the UCMJ, the Military Rules of Evidence, and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (*MCM*) (2019 ed.) unless otherwise noted.

STATEMENT OF FACTS

1. SSgt Saul Explained that he "did not Intend to Damage the Vehicle"

SSgt Saul pled guilty to willfully destroying the windshield on his wife's rental car. JA at 019. The night and early morning before hitting the windshield, SSgt Saul got drunk to the point of passing out. JA at 027, 041. This was problematic for SSgt Saul because he is diabetic, so alcohol affects him "tenfold, [not] *per se*, or two-fold, or just it magnifies it by [his] metabolism process." JA at 042. He was angry at his wife about an argument they had about their kids. JA at 026-27.

When SSgt Saul woke up the following morning, he and his wife continued their argument. JA at 027. SSgt Saul told his wife that she needed to leave the house permanently, and he walked outside to start her car. *Id.* His wife refused to get into the car and leave. *Id.*

In frustration, SSgt Saul slammed his open palm on the top corner of the windshield. JA at 054. SSgt Saul did not realize he broke the windshield until he walked away from the car and his wife pointed it out. JA at 047-48. SSgt Saul expressed "surprise" that the windshield was damaged. JA at 048-49.

> When asked why he was guilty, SSgt Saul first told the Military Judge:
>
> I got frustrated with [my spouse] and slammed my hand down on the windshield with an open palm. *I did not intend to damage the vehicle*, but, especially since I was drunk, I must have hit it a lot harder than I intended.

JA at 027 (emphasis added). He again stated he was drunk when he hit the windshield and that he "did not intend to break the windshield." JA at 028. SSgt Saul said that the windshield, without making a sound, "spider webbed" after he hit it. JA at 031, 048. After multiple discussions and a specific question from the Military Judge, SSgt Saul affirmed, "My specific goal wasn't to completely demolish, or annihilate, or damage the window, but my intent was to hit the windshield with a large amount of force." JA at 048.

2. The Military Judge Realized SSgt Saul's Intoxication Could Impair his Ability to Form the Required Intent

A specific concern that the Military Judge raised with the parties was that SSgt Saul "talked to [him] about drinking alcohol and being drunk" and "voluntary intoxication from alcohol may negate the elements of willfulness." JA at 033. Defense Counsel told the Military Judge that he did not think voluntary intoxication was an issue because SSgt Saul could still appreciate the nature of his conduct. JA at 035. After moving on from this issue, the Military Judge returned to it when he stated, "if you're too drunk to have that intent, that's fine." JA at 040.

3. The Military Judge Stated, "I Don't Think we Have the on Purpose"

The Military Judge realized that SSgt Saul's account of what happened was problematic. JA at 036. He told SSgt Saul, "I need to understand, now if you tell me you did not intend to damage the vehicle, [sic] you are able to willfully damage the vehicle. Does that make sense?" JA at 036. The Military Judge then said, "[B]ut if you did not intend to cause the damage, how is the plea provident to this?" JA at 037. The Military Judge later told the parties that SSgt Saul "specifically told me, I did not intend to damage the vehicle . . . . That's the hang up." JA at 040.

After stating that he would accept the guilty plea as provident, and after he elicited additional facts from SSgt Saul, the Military Judge said, "I am just hung up on willfully." JA at 040, 055. He then said, "Willfully, when I read it, is done intentionally or on purpose, and that's — I don't think we have the on purpose. I will state that much." JA at 055.

4. The Military Judge was "Kind of Hung up on" the "Natural Consequences of the Action"

Another concern the Military Judge had throughout the *Care*[2] inquiry was "the natural consequences of the action and I guess that's what I'm kind of hung up on as well." JA at 038. He rhetorically asked, "[Y]ou slap the corner of the windshield, is that the natural consequence that it's going to spider web to the point of Appellate Exhibit XLV?" JA at 039. The damage in Appellate Exhibit XLV is:

After seeing this image, the Military Judge said, "I mean, that's a big spider web. That's not small by any means." *Id.* The Defense Counsel answered the Military Judge's concern by explaining recklessness:

[2] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969)

> [I]f you were to ask Sergeant Saul, what was it [sic] your specific intention to completely destroy the windshield, like when you set out, when you were angry, I think the answer would be no, like, *I didn't strike it with the intent of making it completely unusable or annihilate it*, but it is, did you have the intent of very forcefully hitting this windshield ***with, you know, reckless disregard for the consequences*** or with full knowledge of the likely consequences of your actions? *The answer is squarely yes*. That was my intent, I wanted to hit it, I recognized when I was using that force that was a very real possibility that it would damage. Did I think in the moment that I hit is [sic] so hard that it was going to cause that much damage? That's hard to say.

Id. (emphases added). At the end of this colloquy, the Military Judge and the Defense Counsel concluded that all of this "might've just been inartfully [sic] worded during the initial portion of the *Care*." JA at 040.

With the assistance of the parties, the Military Judge presented SSgt Saul with two additional lines of questioning. First, whether it was a "logical consequence" that the windshield would be "destroyed" when SSgt Saul hit it. JA at 053. SSgt Saul agreed with the Military Judge's proposition. *Id.* Second, that because SSgt Saul was "a large man," he would naturally use more force than "a normal size man" when hitting an object. JA at 053-54. SSgt Saul also agreed to this proposition. *Id.* After these answers the Military Judge said he was still concerned about "willfully" and told the parties he would review relevant case law. JA at 055.

5. The Military Judge Relied on Tort Law: "Kind of Like . . . Where we Have the Eggshell Client"

The Military Judge and the parties reviewed several cases, but primarily discussed two: *United States v. White*, 61 M.J. 521 (N-M Ct. Crim. App. 2005) and

United States v. Hoyt, 48 M.J. 839 (N-M Ct. Crim. App. 1998). JA at 596. The Military Judge also reviewed *United States v. George*, 35 C.M.R. 801 (U.S. A.F.B.R. 1965), but recognized it was a litigated case. JA at 071. The Military Judge got counsel to agree that the "requirements for finding someone guilty during whenever they're pleading guilty and the providence is different than if it was — if they pled not guilty?" *Id.* The Military Judge rephrased the question for counsel: "[W]hat I mean by that is, during this portion, I'm not allowed to use circumstantial evidence to find him guilty. You would agree with that, Defense Counsel?" *Id*. Both parties agreed. *Id.*

While discussing the remaining cases, the Defense Counsel told the Military Judge that it was the "probable consequence" that there would be "some damage that's done," so that is "sufficient to find it provident." JA at 075. The Military Judge then asked, "So, [the damage is] the probable consequences of him slapping the windshield?" *Id.* After an affirmative answer from the Defense Counsel, the Military Judge mused:

> And I want to talk about that. I mean, kind of like if we're dealing with, I guess, tort and all, don't ask me, I'm not caught up in it, but you know, where we have the eggshell client . . . . Is what comes to mind for me. *Where it would not normally cause damage*, but they're in such a state that it does.

Id. (emphasis added).

The Military Judge settled on the "natural consequences" of the action rationale that the cases "seem[ed] to imply." JA at 071. He asked SSgt Saul if the "windshield cracking out and spidering [sic] like it did is a natural consequence" of him hitting the windshield. JA at 077. SSgt Saul said, "Yes." *Id.*

At the end of the case law discussion, the Military Judge found SSgt Saul's guilty plea provident on two rationales. First, he believed that "whenever Sergeant Saul himself says, 'yeah, it's probable that I smacked the windshield and therefore, it cracks out; that is a different distinction than me merely finding him guilty because he's a larger individual." JA at 078. Second, SSgt Saul "understands that is a probable consequence of him striking the windshield, I do feel like his discussion is sufficient for that specification." JA at 079.

6. The Government Used the Conviction in its Sentencing Argument

In its sentencing argument, the Government argued SSgt Saul hitting the windshield was "severe" misconduct. JA at 097. The Government argued, "The accused's wife was standing nearby when he did this, holding their one-year-old in her arms. After the incident, she felt scared for her life." *Id*. The Government said that SSgt Saul's wife left the state "in part due to this misconduct." JA at 100. The Government recommended that SSgt Saul be sentenced to four months of confinement for just breaking the windshield. JA at 099.

7. The Air Force Court Opinion Relied on "Natural and Probable Consequences" to Find the Plea Provident

The Air Force Court found SSgt Saul's guilty plea provident on the "longstanding legal principle that 'as a rule of circumstantial evidence, a court-martial is certainly free to infer that a sane person intends the natural and probable consequences of his conduct.'" JA at 006 (quoting. *Hoyt*, 48 M.J. at 842) (quoting *United States v. Christensen*, 15 C.M.R. 22, 25 (C.M.A. 1954)). Because the Military Judge asked SSgt Saul about the natural consequences of his actions and SSgt Saul answered that the windshield could break, this was enough for the Air Force Court to find the plea provident. JA at 007. The Air Force Court underscored that the "mere possibility of a conflict is not sufficient" to find a plea improvident, and it "found no such substantial conflict" in SSgt Saul's case. *Id.*

SUMMARY OF THE ARGUMENT

There are three substantial bases in law and fact that make SSgt Saul's guilty plea improvident. *United States v. Prater*, 32 M.J. 433, 436 (C.A.A.F. 1991). First, SSgt Saul's guilty plea failed to show the mens rea of willfulness to meet the elements of Article 109 as required by the charge sheet, the text of Article 109 itself, and this Court's interpretations of that statute.

Second, the Military Judge sought to get SSgt Saul through the deficient plea by adopting a recklessness mens rea. He did so by not relying on this Court's seminal case interpreting Article 109, but rather by interpreting a sister service case which

ultimately found the appellant's conviction under Article 109 was factually insufficient.

Third, even if this Court disagrees that the Military Judge used a recklessness mens rea, it is evident that the Military Judge misread caselaw to use the principles of circumstantial evidence and inferences to find SSgt Saul guilty. In so doing, the Military Judge failed to "resolve the apparent inconsistency" of SSgt Saul's original statements with the statements that the Military Judge later elicited from him. Thus, the Military Judge violated Article 45, UCMJ, in not rejecting the guilty plea.

Accordingly, this Court should overturn SSgt Saul's conviction not only because there is a "substantial basis" in law and fact "for questioning the guilty plea," but also because there is prejudice. The Government argued SSgt Saul's conduct was "severe" and he was sentenced to two months of confinement. JA at 097.

ARGUMENT

I.

A GUILTY PLEA FOR *WILLFUL* DESTRUCTION OF PROPERTY UNDER ARTICLE 109, UCMJ, 10 U.S.C. § 909, CANNOT BE PROVIDENT WHEN AN ACCUSED THRICE TOLD THE MILITARY JUDGE THAT HE "DID NOT INTEND TO DAMAGE THE [PROPERTY]" AND THAT HE WAS SURPRISED THERE WAS ACTUAL DAMAGE.

Standard of Review

This Court reviews a military judge's decision to accept a guilty plea for an abuse of discretion; however, this Court reviews de novo the military judge's legal

conclusion that an appellant's plea was provident. *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005); *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). A military judge abuses his discretion when there is a "substantial basis" in law and fact "for questioning the guilty plea." *Prater*, 32 M.J. at 436. An appellant "bears the burden of establishing that the military judge abused that discretion, i.e., that the record shows a substantial basis in law or fact to question the plea." *United States v. Phillips*, 74 M.J. 20, 21-22 (C.A.A.F. 2015).

Law and Analysis

1. SSgt Saul's Guilty Plea Failed to Evince the Mens Rea of Willfulness as Required by the Charge Sheet, the Text of Article 109, and this Court's Interpretations of that Statute

a. *The Text of the Charge Sheet and Statute Require Willfulness*

A conviction based on a legal standard that does not constitute an offense is legally insufficient. *United States v. Shavrnoch*, 49 M.J. 334, 338–39 (C.A.A.F. 1998). Here, the mens rea that the Government charged under Article 109 was "willfully." JA 009. The language of Article 109 provides two separate and exclusive charging schemes; one consisting of waste and spoilage which can be carried out willfully *or* recklessly, and another for actual destruction of properly which must be willful. 10 U.S.C. § 109; *see also MCM* pt. iv, ¶ 45.b. The Government chose to charge SSgt Saul only under the latter mechanism, thereby requiring proof he acted willfully. JA 009.

The distinction between each of these charging schemes is drawn out in the Manual for Courts-Martial. *MCM* pt. iv, ¶ 45.c(1) ("This destruction [wasting or spoiling] is punishable whether done willfully, that is intentionally, recklessly, or is through a culpable disregard of the foreseeable consequences of some voluntary act."). The explanation to Article 109 and the listed elements state that willfulness is the required mens rea for destruction of personal property:

> This portion of Article 109 proscribes the willful and wrongful destruction or damage of the personal property of another . . . . To constitute an offense under this section, the destruction or damage of the property must have been willful and wrongful. As used in this section "willfully" means intentionally and "wrongfully" means contrary to law, regulation, lawful order, or custom.

MCM pt. iv, ¶ 45.c(2). The elements also require willfulness: "That the accused willfully and wrongfully damaged certain personal property in a certain manner." *Id.* at ¶ 45.b(2)(a).

b. This Court's Case Law Requires Willfulness, i.e., Specific Intent

If the plain text was not enough, this Court's seminal case[3] further buttresses the conclusions that willfulness is the required mens rea. The Court of Military Appeals considered the very question sub judice: whether the "plea of guilty was improvident" under Article 109 "because the offense of willful and wrongful

[3] It is worth noting that that the 2016 Analysis of the Punitive Articles cites to *Bernacki* as authoritative for the damage of non-military property. *MCM* (2016 ed.), App. 23, at A23-10.

damage to private property requires proof of *an actual intention to damage*, as distinguished from a reckless disregard of property rights of such a high degree as to carry an implication of willfulness?" *United States v. Bernacki*, 33 C.M.R. 173, 174 (C.M.A. 1963) (emphasis added).

The Court in *Bernacki* started its analysis by recognizing that with personal property under Article 109, "a reckless act is singularly missing; the Code outlaws damage or destruction done 'willfully and wrongfully.' Regarding the second category, then, it is patent the act denounced must be, always and in every instance, willful." *Id.* at 175. Thus, the quiddity of destruction of personal property under Article 109 is specific intent. *Id.* at 176. The Court underscored this, stating, "[I]t is obvious something more than mere reckless action is contemplated thereby, for recklessness is mentioned, in the very same Article but separately from, willful acts." *Id.* at 175.

Although not explicitly stated, the Court used the related-statutes canon to determine that Article 109 required specific intent. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."). The Court found that an analysis of Article 108, UCMJ, (Destruction and Loss of Military Property) was "quite illuminating" for two reasons. *Bernacki*, 33 C.M.R. at 176. First, negligent damage can constitute an offense under Article 108, UCMJ, with

regard to military property, while under Article 109 it cannot with regard to personal property. *Id.* Second, the Court found that the definition of "willfully" in Article 108, UCMJ, "has long been settled" to mean "specific intent." *Id.* For those reasons, the Court held that "the term has the same import in Article 109." *Id.* The court reasoned:

> [I]t would be placing a strained interpretation on the two sections to hold that the Congress intended different meanings when it used "willfully" in each. To the contrary, it would appear that, having treated with an extremely similar subject and in consecutive Articles, *the legislature in its wisdom meant precisely the same thing when it outlawed willful damage in each instance*. Surely, had a different result been contemplated, action of different and less culpable nature would have been specifically denounced as, for example and as we have earlier noted, reckless and negligent acts were in other portions of the two Articles.

Id. (emphasis added).

c. Only one Word of the Text has Changed Since Bernacki *was Decided*

As seen below in the original 1951 text and the 2019 text, respectively, the only change to Article 109 has been to replace the word "code" with "chapter":

> Any person subject to this code who willfully or recklessly wastes, spoils, or otherwise willfully and wrongfully destroys or damages any property other than military property of the United States shall be punished as a court-martial may direct.

> **Any person subject to this chapter who willfully or recklessly wastes, spoils, or otherwise willfully and wrongfully destroys or damages any property other than military property of the United States shall be punished as a court-martial may direct.**

The fact that Article 109 has substantively gone unchanged is confirmed by Judge Maggs' munificent work, *Amendments to the Uniform Code of Military Justice Since 1950 (2024 Edition)*, at 359, which states, "The Act of August 10, 1956 moved this article to Title 10 of the U.S. Code *without changing its text*." (emphasis added).

d. Regardless of the Definition Used, SSgt Saul Told the Military Judge he Lacked Willfulness and the Military Judge Understood

The upshot of the text of Article 109 and *Bernacki*'s interpretation of it, is that SSgt Saul had to *intentionally destroy* the windshield for his plea to be provident. In the language of *Bernacki*, SSgt Saul had to have "an actual intention to damage" the property, known as "specific intent." 33 C.M.R. at 174, 176. This Court has, at times, turned to *Black's* Law Dictionary to discern plain meaning. *See*, *e.g.*, *United States v. Edwards*, 82 M.J. 239, 245 (C.A.A.F. 2022) (examining the plain meaning of "oral"); *United States v. Dinger*, 77 M.J. 447, 453 (C.A.A.F. 2018) (addressing the plain meaning of "conclusive"). *Black's* gives a definition of "willful" that stands in contrast to what the Military Judge used, but aligns perfectly with *Bernacki*:

> A voluntary act becomes willful, in law, only when it involves conscious wrong or evil purpose on the part of the actor, or at least inexcusable carelessness, whether the act is right or wrong. The term *willful* is stronger than *voluntary* or *intentional*; it is traditionally the equivalent of *malicious*, *evil*, or *corrupt*.

BLACK'S LAW DICTIONARY (11th ed. 2019). "Willfully" differentiates "between deliberate and unwitting conduct." *Bryan v. United States*, 524 U.S. 184, 191 (1998). However, in the criminal context it also "refers to a culpable state of mind." *Id.*

Stated differently, "a 'willful' act is one undertaken with a 'bad purpose.'"[4] As such, to prove that a defendant "willfully" violated a statute, the Government "must prove that the defendant acted with knowledge that his conduct was unlawful." *Bryan*, 524 U.S. at 192 (citation omitted). This requires that the Government evince that a defendant acted "with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful." *Id.* at 193. The Supreme Court's definition of "willful" falls into place with the definition of "specific intent" that *Bernacki* required: "The intent to accomplish the precise criminal act that one is later charged with." *Bernacki*, 33 C.M.R. at 176; BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military*

[4] *Id.* (citing *Heikkinen* v. *United States,* 355 U.S. 273, 279 (1958)) ("There can be no *willful* failure by a deportee, in the sense of § 20(c), to apply to, and identify, a country willing to receive him in the absence of evidence . . . of a 'bad purpose' or '[non-]justifiable excuse,' or the like . . . . It cannot be said that he acted 'willfully' -- *i.e.*, with a 'bad purpose' or without a 'justifiable excuse'"); *United States* v. *Murdock*, 290 U.S. 389, 394 (1933) ("when used in a criminal statue [willfully] generally means an act done with a bad purpose"); *Felton* v. *United States,* 96 U.S. 699, 702 (1878) ("Doing or omitting to do a thing knowingly and wil[l]fully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it. The word "wil[l]fully" . . . in the ordinary sense in which it is used in statutes, means not merely "voluntarily," but with a bad purpose . . . It is frequently understood . . . as signifying an evil intent without justifiable excuse.") (cleaned up); 1 L. Sand, J. Siffert, W. Loughlin, & S. Reiss, *Modern Federal Jury Instructions* 3A.01, p. 3A-18 (1997) ("'Willfully' means to act with knowledge that one's conduct is unlawful and with the intent to do something the law forbids, that is to say with the bad purpose to disobey or to disregard the law.").

Judge's Benchbook, para 3a-16-3, *Dereliction of Duty* (Article 92) ("'Willfully' means intentionally.")

Starting off on the right foot, the Military Judge agreed with SSgt Saul and initially recognized the legal problem with his statements. The Military Judge told SSgt Saul, "[B]ut if you did not intend to cause the damage, how is the plea provident to this?" JA at 037. The Military Judge later told the parties that SSgt Saul "specifically told me, I did not intend to damage the vehicle . . . . That's the hang up." JA at 040.

Despite eliciting additional facts from SSgt Saul, the Military Judge said, "I am just hung up on willfully." JA at 040, 055. He then said, "Willfully, when I read it, is done intentionally or on purpose, and that's — I don't think we have the on purpose. I will state that much." *Id.* The Military Judge was correct that the parties did not have the "on purpose" because Article 109 also defines "willfully" as "intentionally." *MCM* pt. iv, ¶ 45.c(2).

Using either the Supreme Court's, *Black's*, *Bernacki's*, or Article 109's formulation of willfulness, the evidence SSgt Saul provided during his colloquy was insufficient to find him guilty because he did not have the specific intent to cause damage to the windshield. *Care*, 40 C.M.R. at **7 ("[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.").

SSgt Saul said three times that he "*did not intend to damage* the vehicle"—let alone intend to "destroy" it as the Government charged. JA at 027-28, 048 (emphasis added). SSgt Saul's three statements show that he did not have an evil mind, bad purpose, or that he was acting with knowledge that his action would be unlawful. *Id.* Additionally, SSgt Saul was intoxicated, making it more likely he did not have the specific intent to destroy the windshield—just like he said. JA at 027. Finally, SSgt Saul never retracted his statements that he did not intend to the damage the windshield.

The result mandated by these facts is that the Military Judge's acceptance of SSgt Saul's guilty plea must be set aside. The plea colloquy must establish the elements of the charged offense for the conviction to be legally sound. *United States v. Weeks*, 71 M.J. 44, 46 (C.A.A.F. 2012). Yet SSgt Saul's plea was far from the elements, falling within a range of "natural consequences," and straying far from the willfulness required by the charge sheet and by law. It therefore should have been rejected. Article 45(a), UCMJ, 10 U.S.C. § 845(a) ("If an accused . . . after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently . . . a plea of not guilty *shall* be entered in the record, and the court shall proceed as though he had pleaded not guilty.") (emphasis added).

2. The Military Judge Used a Reckless Mens Rea to Push SSgt Saul Through the *Care* Inquiry

Because the Military Judge recognized that SSgt Saul did not "have the on purpose," the parties erroneously pivoted to a reckless mens rea. In doing so, the Military Judge essentially cured one problem with the providence inquiry—pleading insufficiently with the required mens rea—with a different problem of pleading to the wrong mens rea This Court can see in the record exactly when that irreparable wrong turn occurred:

> [I]f you were to ask Sergeant Saul, what was it [sic] your specific intention to completely destroy the windshield, like when you set out, when you were angry, I think the answer would be no, like, *I didn't strike it with the intent of making it completely unusable or annihilate it*, but it is, did you have the intent of very forcefully hitting this windshield ***with, you know, reckless disregard for the consequences*** or with full knowledge of the likely consequences of your actions? *The answer is squarely yes*. That was my intent, I wanted to hit it, I recognized when I was using that force that was a very real possibility that it would damage. Did I think in the moment that I hit is so hard that it was going to cause that much damage? That's hard to say.

JA at 039 (emphases added). The parties' articulation of their own theories of the correct standard does not make it binding upon a court-martial or the accused. *See United States v. Moon*, 73 M.J. 382, 388 (C.A.A.F. 2014) ("Accordingly, trial counsel's understanding of her own case theory does not render the plea provident."). At the end of this colloquy, the Military Judge and the Defense Counsel brushed away all of SSgt Saul's statements as having "been inartfully [sic] worded during the initial portion of the *Care*." JA at 040.

Ultimately the Military Judge settled on the "natural consequences" or "probable consequence" of the action rationale to find SSgt Saul guilty. JA at 071, 075, 079. These terms were discussed throughout the remainder of the *Care* inquiry. JA at 038-39, 076-77, 079.

The Military Judge found the guilty plea provident because of this mens rea, as evidenced by his statement that because SSgt Saul "understands that [the damage] is a probable consequence of him striking the windshield, I do feel like his discussion is sufficient for that specification." JA at 079. The question then becomes whether a disregard to the natural consequences amounts to recklessness or willfulness. The answer, across an array of legal sources discussed below, is that the Military Judge convicted SSgt Saul using a recklessness mens rea and thereby abused his discretion.

With Defense Counsel planting the seed through their own summation of SSgt Saul's mens rea as a "reckless disregard for the consequences," various sources confirm that the mens rea the Military Judge used was "recklessness." *Black's* offers a definition of "recklessness" that closely follows how the Military Judge got past SSgt Saul's three-time claim that he did not intend the damage he caused:

> Conduct whereby the actor does not desire harmful consequence but nonetheless foresees the possibility and consciously takes the risk . . . the state of mind in which a person does not care about the consequences of his or her actions.

BLACK'S LAW DICTIONARY (11th ed. 2019). Definitions of "recklessness" in the UCMJ also mirror the Military Judge's "probable" or "natural consequence" language. Article 114 describes "reckless" as:

> [C]onduct that exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved. The accused need not intentionally cause a resulting harm or know that his conduct is substantially certain to cause that result.

MCM, pt. IV, ¶ 52.c.(1)(c). This Court and the Air Force Court have recently, accurately, and favorably quoted definitions of recklessness that include the Military Judge's "probable consequence" language. *United States v. Herrmann*, 76 M.J. 304, 308 (C.A.A.F. 2017) ("This approach is consistent with the President's explanatory text regarding the offense of reckless endangerment, which states that '[w]hen the natural or probable consequence of particular conduct would be death or grievous bodily harm, it may be inferred that the conduct is 'likely' to produce that result.'") (citing *MCM* pt. IV, ¶ 100a.c.(5)); *United States v. Cooper*, No. ACM 40092 (f rev), 2023 CCA LEXIS 7, at *17 (A.F. Ct. Crim. App. Jan. 11, 2023) ("The operation of a vehicle is reckless 'when it exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved.'") (citing *MCM* pt. IV ¶ 51.c.(7)). Taken together, the plain meaning of "recklessness" and that term's consistent meaning across the *MCM* and case law match the "natural consequences" approach employed by the Military Judge—an approach that fails to comport with both the charge sheet and requirements under Article 109 discussed above.

The Military Judge's use of a recklessness mens rea is therefore incurable because "[a]n essential aspect of informing Appellant of the nature of the offense is a correct definition of legal concepts." *United States v. Negron*, 60 M.J. 136, 141 (finding the plea improvident because the military judge used an incorrect definition of "obscene"); *see also United States v. Tucker*, 78 M.J. 183, 184 (C.A.A.F. 2018) ("We further hold that because the military judge incorrectly instructed Appellant on a negligence mens rea during the *Care* inquiry, Appellant's guilty plea to one specification of providing alcohol to an underage individual is not provident.").

3. If not Recklessness, then the Military Judge Misapplied Caselaw on Circumstantial Evidence and Inferences, Failing to Resolve the Inconsistent and Contradictory Direct Evidence

If this Court disagrees that the Military Judge used a recklessness mens rea, it then becomes evident that he misread caselaw to wrongly apply the rules of circumstantial evidence and inferences in his attempt to resolve the inconsistencies in the plea colloquy. The Air Force Court then gave its imprimatur to the Military Judge's mistake.

The Military Judge relied on *White* for his use of a "natural" or "probable" consequence mens rea. JA at 071-72. *White* cites and relies on *United States v. Johnson*, 24 M.J. 101 (C.M.A. 1987). However, both cases make clear that such a standard is not a mens rea in-and-of-itself, but rather a "permissible inference" that members or a military judge can use to determine "that the accused decided to act

despite the likely consequences." *Johnson*, 24 M.J. at 105. The Court in *Johnson* then made the upshot clear: "However, only an *inference* is involved." *Id.* Because both *Johnson* and *White* were litigated cases, it makes sense that both cases would discuss "a permissive inference that [an accused] acted with the knowledge of the likely consequences of doing so, and *thus, intended such consequences*." *White*, 61 M.J. at 523 (emphasis added). In other words, the "permissible inference" was a way to get to the requisite willfulness in the absence of direct evidence of intent.

But this case is not like *Johnson* and *White* because it was not a contested case and there *was* direct evidence of intent. SSgt Saul testified against himself that he did not intend for the windshield to break and that he was surprised by it breaking—direct evidence about intent from an accused that was missing in *Johnson* and *White*. And, SSgt Saul never disowned those statements despite additional questioning from the Military Judge on the proposed natural and probable consequence standard.

It is also notable that the Court in *White* overturned the accused's conviction on this very issue of inferences: "However, we also hold that the evidence is factually deficient because, in our view, there is insufficient proof of the appellant's mens rea." *Id.* at 524. Thus, it is unclear why the Military Judge was relying on *White* and not guarding against a deficiency of proof given that the case was overturned because the mens rea was lacking. *See also United States v. United States Gypsum Co.*, 438 U.S. 422, 430 (1978) (invalidating an instruction that "The law presumes that a

person intends the necessary and natural consequences of his acts" because "a defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent.").

Because SSgt Saul's case was a guilty plea, unlike *Johnson* and *White*, the Military Judge abused his discretion by relying on rules of inferences and circumstantial evidence to contradict *direct* evidence from the *Care* inquiry. Even though the Military Judge recognized he was "not allowed to use circumstantial evidence to find [SSgt Saul] guilty," this is what the Military Judge did. The Military Judge recognized that *George* was a litigated case, so he disregarded it because "the requirements for finding someone guilty during whenever they're [not] pleading guilty and the providence is different." JA at 071. Yet, the Military Judge relied on *White*—which was litigated case—to come up with the "natural consequence" language that he used to convict SSgt Saul "regardless of any desire." JA at 076. The Military Judge abused his discretion by using the principles of circumstantial evidence and inferences from litigated cases to create a new mens rea.

The Military Judge failed to meet the law's requirements by chalking up SSgt Saul's three, never-retracted declarations that he "did not intend to damage the vehicle" as having merely been "inartfully [sic] worded." JA at 040. SSgt Saul's statements that he did not have the specific intent were crystal clear and the Military

Judge abused his discretion by using inapplicable caselaw on inferences to accept SSgt Saul's guilty plea as provident.

The legal defect in this approach is that a military judge must resolve conflicts in the evidence during a *Care* inquiry. "[I]f an accused 'sets up a matter inconsistent with the plea' at any time during the proceeding, the military judge must either resolve the apparent inconsistency or reject the plea." *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996) (quoting Article 45(a), UCMJ, 10 U.S.C. § 845(a)). What a military judge must not do is use a permissive inference to ignore a proven fact from the accused's own mouth. *See Francis v. Franklin*, 471 U.S. 307, 314-15 (1985) ("A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify *in light of the proven facts before the jury*.") (citing *Cnty. Court v. Allen*, 442 U.S. 140 (1979)) (emphasis added).

The Air Force Court sanctioned the Military Judge's error using his same logic. It relied on the "longstanding legal principle that 'as a rule of circumstantial evidence, a court-martial is certainly free to *infer* that a sane person intends the natural and probable consequences of his conduct.'" *Hoyt*, 48 M.J. at 842 (quoting *Christensen*, 15 C.M.R. at 25)(emphasis added). However, relying on this language from *Christensen* was an error for two reasons.

First, just as the Air Force Court later adopted, the Military Judge conflated the "rule[s] of circumstantial evidence" and the requirements of mens rea. JA at 006. While it is true that a court can make inferences using circumstantial evidence, a Court is not allowed to contradict direct evidence from the *Care* inquiry. 10 U.S.C. § 845(a). Therefore, the Military Judge was not allowed to *infer* that SSgt Saul possessed the requisite intent because the evidence he provided proved the exact opposite. This Court's predecessor recognized the distinction between making an inference and ignoring evidence when it said, "To say, however, that the evidence would *support* a finding of intent to kill is quite distinct from an assertion that it *compels* such a conclusion." *Christensen*, 15 C.M.R. at 26. *See also United States v. Moore*, 31 C.M.R. 282, 288 (C.M.A. 1962) ("From this, however, it does not follow that accused *necessarily* intended to inflict death or grievous bodily harm. So to hold would mean that, assuming such to be the natural and probable consequence of his deliberate use of the hose, the court members must infer as a matter of law that he intended the infliction of death or grievous bodily harm. We have nonetheless pointed out that this inference of intent is permissive only.") (citations omitted).

Second, relying on *Christensen* was an error because this Court's predecessor only used the language, "a court-martial is certainly free to infer," as a strawman to knock down later in its analysis. The Court held that the Military Judge erred in providing an erroneous instruction to the panel members because the "members

might convict of assault with intent to murder, although they found only an intent to inflict grievous bodily harm." *Id.* Thus, *Christensen* does not stand for the proposition that the Air Force Court cited it for and structured its opinion on. Rather, *Christensen* holds that you cannot do what the Military Judge and the Air Force Court did: uphold a conviction for a higher mens rea based on an inference the court would like to make when the direct evidence proved SSgt Saul only had the lower mens rea.

Accordingly, the Military Judge's acceptance of the guilty plea through inference was an impermissible use of SSgt Saul's *Care* inquiry. SSgt Saul's persistent denial that he had intended the destruction of the windshield was inconsistent with the offense he pled guilty to. Instead of providing clarity as required, *Garcia*, 44 M.J. at 498, the Military Judge's attempt to resolve this inconsistency only piled on more confusion.

This was not a case of Appellant squaring a gap in his memory with other available evidence in order to personally convince himself of his own guilt. *United States v. Jones*, 69 M.J. 294, 299 (C.A.A.F. 2011) (citations omitted). Instead, it was a case where Appellant knew exactly what he did and affirmatively disavowed three times any intention to willfully damage personal property. This dissonance with the required elements was never cured, even with the Military Judge's pivot towards

"natural consequences." In turn, it resulted in SSgt Saul pleading to a crime that was non-existent and non-charged.

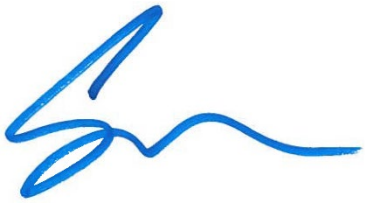
The Military Judge was not at liberty to fill this gap through inference. Rather, rejection of the plea was the only permissible option. Article 45(a), UCMJ, 10 U.S.C. § 845(a) ("If an accused . . . after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently . . . a plea of not guilty *shall* be entered in the record, and the court shall proceed as though he had pleaded not guilty.") (emphasis added).

4. SSgt Saul Suffered Prejudice

"To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process." *Dunn v. United States*, 442 U.S. 100, 106 (1979). While the efforts the Military Judge took to find SSgt Saul's guilty plea provident may be laudable, a court is "not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial." *Id.* at 107. Stated differently, "An appellate court may not affirm an included offense on a theory not presented to the trier of fact." *United States v. Riley*, 50 M.J. 410, 415 (C.A.A.F. 1999) (quotation and citation omitted). The Government did not charge a recklessness theory and, indeed, could not charge that theory. The Government argued that SSgt Saul's conduct was "severe," made his wife "fear for her life," and was a factor in her leaving the area

where they lived. JA at 097, 100. The Military Judge sentenced SSgt Saul to two months confinement for an offense he could not have committed because he did not have the requisite mens rea. JA at 013. Neither the flawed guilty plea nor the resulting sentence should persist in light of their underlying legal errors.

WHEREFORE, SSgt Saul respectfully requests that this Honorable Court find that his guilty plea to willful destruction of property was improvident and remand the case to the Air Force Court for a sentence re-assessment.



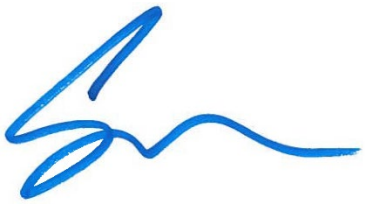
SPENCER R. NELSON, Maj, USAF
U.S.C.A.A.F. Bar No. 37606
Appellate Defense Counsel
Appellate Defense Division
1500 Perimeter Road, Ste 1100
Joint Base Andrews, MD 20762
Phone: (240) 612-4773
Email: spencer.nelson.1@us.af.mil

MICHAEL J. BRUZIK, Capt, USAF
U.S.C.A.A.F. Bar No. 37931
Appellate Defense Counsel
Appellate Defense Division
1500 Perimeter Road, Ste 1100
Joint Base Andrews, MD 20762
Phone: (240) 612-4770
E-mail: michael.bruzik@us.af.mil

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on July 8, 2024 and that a copy was also electronically served on the Government Trial and Appellate Operations Division on the same date.



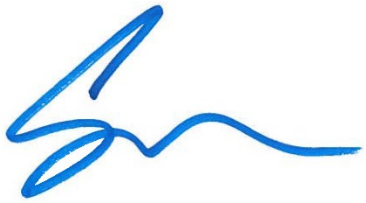
SPENCER R. NELSON, Maj, USAF
U.S.C.A.A.F. Bar No. 37606
Appellate Defense Division
1500 Perimeter Road, Ste 1100
Joint Base Andrews, MD 20762
Phone: (240) 612-4770
Email: spencer.nelson.1@us.af.mil

Counsel for Appellant

CERTIFICATE OF COMPLIANCE WITH RULES 21(b), 24(b) & 37

This supplement complies with the type-volume limitation of Rules 21(b) and 24(b) of no more than 9,000 words because it contains 7,183 words.

This brief complies with the typeface and type-style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word with Times New Roman 14-point typeface.



SPENCER R. NELSON, Maj, USAF
U.S.C.A.A.F. Bar No. 37606
Appellate Defense Division
1500 Perimeter Road, Ste 1100
Joint Base Andrews, MD 20762
Phone: (240) 612-4770
Email: spencer.nelson.1@us.af.mil

Counsel for Appellant