February 10, 2025

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee,

v.

JAMES L. TAYLOR, JR.,
Staff Sergeant (E-5),
United States Air Force,

Appellant.

USCA Dkt. No. 24-0234/AF

Crim. App. Dkt. No. ACM 40371

REPLY BRIEF ON BEHALF OF APPELLANT

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Pursuant to Rules 19(a)(6)(B) and 34(a) of this Court's Rules of Practice and Procedure, Staff Sergeant (SSgt) James Taylor, Appellant, hereby replies to the Government's Brief (hereinafter Gov. Br.), filed on February 3, 2025.

Argument

The Air Force Court of Criminal Appeals erred by misusing the absurdity doctrine to interpret Article 2(d)(2), Uniform Code of Military Justice, 10 U.S.C. § 802(d)(2), in a manner that conflicts with the plain and unambiguous meaning of the statute, incorrectly finding that the convening authority had the authority to involuntarily order Staff Seargeant Taylor to active duty for trial by court-martial.

A. The plain text of the statute indicates that the periods specified in Article 2(a)(3)(B) are not periods of inactive duty training, meaning Article 2(d)(2) does not authorize involuntary orders to active duty for offenses committed in those periods.

"The Supreme Court has 'stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'" *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992)). Article 2(d)(2), Uniform Code of Military Justice (UCMJ) plainly says, "A member of a reserve component . . . may not be ordered to active duty under [Article 2(d)(1), UCMJ] except with respect

to an offense committed while the member was – (A) on active duty; or (B) on inactive-duty training." 10 U.S.C. § 802(d)(2). Based on this clear language, this Court must conclude that the statute means that a reservist may not be involuntarily ordered to active duty for proceedings related to offenses allegedly committed in the intervals between inactive-duty training (IDT) periods.

The result here is that SSgt Taylor could not be involuntarily ordered to active duty for proceedings regarding the charged offense, and the court-martial therefore lacked jurisdiction over him at arraignment and trial. The Government argues that the text means something different, but its argument for this proposition defies the plain language of the statute, this Court's precedent, and the canon against surplusage. Gov. Br. at 16–24.

The Government first asserts, without explanation, that "[t]his Court should find that Article 2(d) is ambiguous as to whether it is meant to allow involuntary recall to active duty of reservists who committed offenses in the interval between two consecutive IDT periods." Gov. Br. at 16. There is nothing ambiguous about statutory text that says a reservist "may not be" involuntarily ordered to active duty "except" for

offenses committed "*on* active duty[] or *on* [IDT]." Article 2(d)(2), UCMJ, 10 U.S.C. § 802(d)(2) (emphasis added). The Government points to no text in Article 2(d) that is the source of this claimed ambiguity. The Government also offers no argument as to why Article 2(d) would be ambiguous. Instead, it proposes an alternative interpretation based on a strained reading of the word "and" in a separate provision, Article 2(a)(3)(A), UCMJ. Gov. Br. at 16–19.

Claiming to "have unearthed [hidden meaning] to replace the text of the provision right in front of them," *MSPA Claims 1, LLC v. Tenet Fla., Inc.*, 918 F.3d 1312, 1322 (11th Cir. 2019), the Government asserts that the word "and" in Article 2(a)(3)(A), UCMJ, should be read as meaning a phrase found nowhere else in the entirety of the UCMJ. *See* 10 U.S.C. § 801 et. seq. In the Government's eyes, "and" really means "which includes," so the phrase "on inactive-duty training" includes the periods listed in Article 2(a)(3)(B), UCMJ.[1] Gov. Br. at 17–18. There are

[1] The periods in Article 2(a)(3)(B), UCMJ, 10 U.S.C. § 802(a)(3)(B), are:

> (i) Travel to and from the inactive-duty training site of the member, pursuant to orders or regulations.
> (ii) Intervals between consecutive periods of inactive-duty training on the same day, pursuant to orders or regulations.
> (iii) Intervals between inactive-duty training on consecutive days, pursuant to orders or regulations.

several problems with this argument. First, the Government offers no authority to support its proposition that "and" can be read to mean "which includes." Gov. Br. at 17–18. "The word 'and' is conjunctive." *Idaho v. Wright*, 497 U.S. 805, 829 n.2 (1990) (Kennedy, J., dissenting) (quoting *State v. Ryan*, 103 Wash. 2d 165, 174 (1984)). It is generally used "to indicate connection or addition esp. of items within the same class or type." *And*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2020). Put another way, "and" means "along with or together with." *Pulsifer v. United States*, 601 U.S. 124, 133 (2024) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 80 (1993)). This word joins separate items of the same type. It does not indicate that one item is included within the other, as the Government avers, and the Government cites no authority or examples where the word bears that meaning. If Congress wanted the periods in Article 2(a)(3)(B) to be included in the meaning of being on IDT, it would have said so. But it did not, instead listing the two as separate items joined by the conjunctive "and." 10 U.S.C. § 802(a)(3)(A).

Not only does plain meaning of "and" run counter to the Government's argument, but the Government's basis for embarking on this adventurous construction rests on a weak foundation. In the

Government's view, the "and" in Article 2(a)(3), UCMJ, is so unclear because of the preceding legislative history. But "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it." *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011). Yet creating ambiguity is exactly what the Government endeavors to do.

Having blown past the statute's clear text and harnessed legislative history for an improper purpose, the Government's argument then goes against the other language of the statute. Under the Government's preferred reading, intervals between IDT periods would be included in the meaning of "on IDT," so a reservist would be on IDT when they are also between IDTs. Gov. Br. at 18–19. The Air Force Court of Criminal Appeals (AFCCA) considered the Government's proposed construction and concluded it "lacks logical support" and "belies common sense." Joint Appendix (JA) at 020. A reservist cannot simultaneously be on IDT and between IDT periods, so this Court must reject the Government's interpretation.

Reading "and" to mean "which includes" also goes against this Court's holding in *United States v. Hale*, 78 M.J. 268 (C.A.A.F. 2019). In *Hale*, this Court stated that IDT refers to "a designated 'four-hour period

of training, duty or instruction.'" *Id.* at 272 (quoting *United States v. Hale*, 77 M.J. 598, 604 (A.F. Ct. Crim. App. 2018)). That definition excludes the intervals between the four-hour periods, meaning a reservist is not on IDT during those periods. *Id.* The addition of Article 2(a)(3)(B), UCMJ, did not expand the meaning of being on IDT; it merely added new periods during which reservists are subject to the UCMJ. 10 U.S.C. § 802(a)(3)(B).

If being "on IDT" included what the Government claims it does, it would have been unnecessary for Congress to add Article 2(a)(3)(B), UCMJ, because the phrase "on inactive-duty training" would have already covered the additional periods. With that in mind, the Government's reading of Article 2(a)(3)(A), UCMJ, would make Article 2(a)(3)(B), UCMJ, surplusage. When interpreting a statute, "every word and every provision is to be given effect and . . . no word should be ignored or needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." *Sager*, 76 M.J. at 161. "The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Id.* at 162 (quoting *Yates v. United States*, 574 U.S. 528, 543 (2015)). The

Government's interpretation renders Article 2(a)(3)(B), UCMJ, superfluous because it duplicates part of the supposed meaning of Article 2(a)(3)(A), UCMJ, which is part of the same statutory scheme. This Court should therefore reject the Government's interpretation.

Being "on IDT" and in an interval between IDT periods are two separate statuses, and Article 2(d)(2), UCMJ, does not allow involuntary orders to active duty for offenses committed in an interval between IDT periods. 10 U.S.C. § 802(d)(2). The Government claims this leads to absurd results because a reservist could refuse orders to active duty for UCMJ proceedings regarding offenses committed in the intervals between IDT periods. Gov. Br. at 20–24. However, the Government's absurdity analysis is deficient. It focuses on what it believes Congress "meant" to do based largely on the history of adding Article 2(a)(3)(B), UCMJ. Gov. Br. at 16, 20. A proper interpretation of this statute should not consider legislative history or intent because the text of the statute has a plain and unambiguous meaning. *Sager*, 76 M.J. at 161 ("When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." (quoting *Connecticut Nat. Bank*, 503 U.S. at 253–54).

Moreover, "the question for absurdity purposes is not whether [Congress] *in fact* intended [the result] . . . but instead whether *a Congress could have* done so." *United States v. McPherson*, 81 M.J. 372, 380 (C.A.A.F. 2021) (cleaned up). The Government utilizes the same erroneous reasoning as the AFCCA by concluding that Congress could not have intended this result because, as the Government presumes, Congress did not intend this result. *See* JA at 021. Challenging though it may be to a prosecution, Congress could have intended the plain meaning of the statute, which excludes the intervals between IDT periods from Article 2(d)(2), UCMJ. *See* Br. on Behalf of Appellant, Jan. 3, 2025, at 20–22. If that is not what Congress intended, then Congress can amend the statute, but this Court cannot fix what it might perceive as an error. *E.g., McPherson*, 81 M.J. at 378 ("an 'unintentional drafting gap' is insufficient to warrant judicial correction; correction is the province of Congress in cases where an admittedly 'anomalous' result 'may seem odd, but . . . is not absurd'" (alterations in original) (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 565–66 (2005))). This Court must give Article 2(d)(2), UCMJ, its plain meaning and conclude that SSgt Taylor could not be involuntarily ordered to active duty for UCMJ

proceedings regarding an offense committed in the interval between IDT periods on consecutive days.

B. The requirements of Article 2(d), Uniform Code of Military Justice, are jurisdictional, and even if they were not, Staff Sergeant Taylor did not waive this issue.

"Jurisdiction is the power *of a court* to try and determine a case and to render a valid judgment." *United States v. Ali*, 71 M.J. 256, 261 (C.A.A.F. 2012) (emphasis added) (quoting *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006)). To support its contention that issues arising under Article 2(d) are not jurisdictional, the Government relies on requirements for jurisdiction over an offense and a person generally. Gov. Br. at 8–13. It does not, however, grapple with the need for a specific court-martial to have jurisdiction over a person to exercise authority over them at the time of trial.

Article 2, UCMJ, is titled "Persons subject to this chapter [the UCMJ]." 10 U.S.C. § 802. Under this heading, Article 2(d), UCMJ, describes how a reservist can be made subject to the UCMJ for some proceedings by involuntary orders to active duty. 10 U.S.C. § 802(d). Following the Government's reasoning, which is based largely on a case where the accused was already on active duty, jurisdiction would remain

regardless of a reservist's status once the Government took action with a view toward trial, such as preferral. Gov. Br. at 12 (citing *United States v. Self*, 13 M.J. 132 (C.M.A. 1982)). This would make Article 2(d) surplusage because it would not be necessary to have a reservist on active duty for UCMJ proceedings to make them a person subject to the UCMJ. The text should be read to avoid this surplusage. *Sager*, 76 M.J. at 161–62.

By the Government's logic, a court-martial would have jurisdiction over a reservist in any duty status, or no duty status at all, at the time of trial. That is not the law. "[J]urisdiction over the person depends on the person's status as a 'person subject to the Code' both at the time of the offense *and at the time of trial*." *Ali*, 71 M.J. at 265 (emphasis added). A reservist must be in a status that subjects them to the UCMJ at the time of trial. Under Rule for Courts-Martial (R.C.M.) 204(b)(1), that status must be active duty prior to arraignment and trial.

Since the purported involuntary orders to active duty were without authority under Article 2(d), UCMJ, SSgt Taylor was not in any military duty status at arraignment and trial. Even if, as the Government suggests, a reservist could be tried while on IDT, absent R.C.M. 204(b)(1),

that would not help the Government's argument because SSgt Taylor was not on IDT for arraignment or trial. Gov. Br. at 11 n.2. Since SSgt Taylor was not in a military duty status at the time of trial, the court-martial that entered findings and a sentence against him lacked jurisdiction. This is a non-waivable issue that necessitates the findings and sentence be set aside. R.C.M. 907(b)(1); *see also United States v. Daly*, 69 M.J. 485, 486 (C.A.A.F. 2011) ("A question of jurisdiction is not subject to waiver and may be raised at any time.").

Even if this Court concludes that issues arising under Article 2(d), UCMJ, are not jurisdictional, SSgt Taylor did not waive this issue. "[W]aiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). Trial defense counsel's single comment highlighted by the Government does not constitute waiver because it does not demonstrate an intentional relinquishment of a known right. Gov. Br. at 14 (citing JA at 143). On the contrary, this comment came as trial defense counsel was arguing that SSgt Taylor was not properly ordered to active duty. JA at 142–44. This argument means the issue was not even forfeited, but if it was, it would meet the plain

error standard.

Plain error requires that "(1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." *United States v. Davis*, 76 M.J. 224, 230 (C.A.A.F. 2017) (quoting *United States v. Payne*, 73 M.J. 19, 23 (C.A.A.F. 2014)). Here, the error was arraigning and trying SSgt Taylor when he was not on active duty because the purported orders to active duty lacked authority. This error is plain and obvious based on the plain language of Article 2(d), UCMJ, and it prejudiced SSgt Taylor by subjecting him to findings and sentencing by a court-martial when he was not in a military duty status. Although this satisfies the standard for plain error, it is not necessary for this Court to conduct such an analysis because this is a non-waivable error of jurisdiction at the time of trial.

Conclusion

The purported involuntary orders to active duty for SSgt Taylor were without authority under Article 2(d), UCMJ, 10 U.S.C. § 802(d), and were therefore invalid. Because of this error, SSgt Taylor was not on active duty or in any military duty status at arraignment and trial, and the court-martial lacked personal jurisdiction over him. Because of this

lack of jurisdiction, SSgt Taylor requests that this Court set aside the findings and the sentence.

Respectfully Submitted,

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Certificate of Compliance

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I certify that an electronic copy of the foregoing was sent via electronic mail to the Court and electronically served on the Air Force Government Trial and Appellate Operations Division at AF.JAJG.AFLOA.Filng.Workflow@us.af.mil on February 10, 2025.

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