March 2, 2025

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

JOSE A. ASTACIO BURGESS,
Airman First Class (E-3),
United States Air Force,
Appellant.

USCA Dkt. No. 26-0124/AF

Crim. App. Dkt. No. ACM S32827

SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

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Error Assigned for Review

DID THE LOWER COURT ERR IN APPLYING RIPENESS TO DECLINE TO RESOLVE WHETHER PREJUDICE ATTACHED TO THE DISMISSAL OF THREE CHARGES IMMEDIATELY, OR ONLY AFTER COMPLETION OF APPELLATE REVIEW?

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1)(A) (as amended by the James M. Inhofe National Defense Authorization Act (NDAA) for Fiscal Year 2023, Pub. L. No. 117-263, § 544(d), 136 Stat. 2395, 2582 (Dec. 23, 2022)). This Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Summary of Proceedings

Airman First Class Jose A. Astacio Burgess (Appellant) was tried by a special court-martial composed of a military judge alone at Beale Air Force Base (AFB), CA, on 13 May 2025. The Charges and Specifications on which he was arraigned, his pleas, and the findings of the court-martial are summarized as follows:

Charge	UCMJ Art.	Spec	Summary of Offense	Plea	Finding
I	104a			NG	Withdrawn and dismissed with prejudice
		1	Did, at a location worldwide, between on or about 1 June 2022	NG	Withdrawn and

			and on or about 4 October 2022, by means of knowingly false representations that he had not ever experimented with, used, or possessed any illegal drug or narcotic, when in fact he had experimented with, used, or possessed an illegal narcotic or drug, procure himself to be enlisted as an Airman Basic in the United States Air Force and did thereafter, at or near Beale AFB, California, receive pay and allowances under the enlistment so procured.		dismissed with prejudice
II	112a			G	G
		1	Did, at a location worldwide, on divers occasions between on or about 22 June 2022 and on or about 29 February 2024, wrongfully possess psilocybin, a Schedule I controlled substance.	G	G
		2	Did, at a location worldwide, on divers occasions between on or about 22 June 2022 and on or about 29 February 2024, wrongfully distribute some psilocybin, a Schedule I controlled substance.	G	G
		3	Did, at or near Beale AFB, California, on or about 9 February 2024, wrongfully introduce psilocybin, a Schedule I controlled substance, onto an installation used by the armed forces or under control of the armed forces, to wit: Beale Air Force Base, California, with the intent to distribute the said controlled substance.	G	G

		4	Did, at or near Beale AFB, California, on or about 14 February 2024, wrongfully introduce psilocybin, a Schedule I controlled substance, onto an installation used by the armed forces or under control of the armed forces, to wit: Altus Air Force Base, Oklahoma, with the intent to distribute the said controlled substance.	G	G
III	80			NG	Withdrawn and dismissed with prejudice
		1	Did, at or near Marysville, California, on or about 11 January 2024, attempt to wrongfully introduce psilocybin, a Schedule I controlled substance, onto an installation used by the armed forces or under control of the armed forces, to wit: Altus AFB, Oklahoma, with the intent to distribute the said controlled substance.	NG	Withdrawn and dismissed with prejudice
IV	131b			NG	Withdrawn and dismissed with prejudice
		1	Did, at or near Beale AFB, California, on or about 17 May 2024, wrongfully do a certain act, to wit: instructed A1C Cynthia Camargo to tell the Air Force Office of Special Investigations (AFOSI) she did not know anything about the investigation when he knew she had	NG	Withdrawn and dismissed with prejudice

			information pertinent to the investigation, with intent to obstruct the due administration of justice in the case of himself, against whom the accused had reason to believe that there were or would be criminal proceedings pending.		

The military judge sentenced Appellant to a bad-conduct discharge and a reprimand. Tr. at 100. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action (June 2, 2025).

Due to the Government charging Appellant with a date range that included a jurisdictional deficiency, the AFCCA excepted the date "22 June 2022" from Specifications 1 and 2 of Charge II, and substituted it with "1 January 2024." *United States v. Astacio Burgess*, No. ACM S32827, 2025 CCA LEXIS 573, at *11 (A.F. Ct. Crim. App. Dec. 12, 2025) (Appendix). It then set aside the findings regarding the excepted date and found the modified findings correct in law. Appendix at 7. The AFCCA then reassessed the sentence and found it correct in law and fact with no changes made. *Id*.

Statement of Facts

Appellant and the convening authority entered into a plea agreement whereby, in exchange for Appellant doing–among other things–pleading guilty to Charge II and its specifications, the convening authority agreed to dismiss the remaining

charges and specifications. App. Ex. X. Specifically, Appellant affirmed in the plea agreement,

> Pursuant to this agreement . . . [t]he Government will withdraw and dismiss, with prejudice, Charge I and its specification, Charge III and its specification, and Charge IV and its specification after such time as the military judge announces a sentence and before the court-martial adjourns. I understand that prejudice will not attach until the completion of appellate review of the offense to which I have pleaded guilty.

App. Ex. X at 1. Despite being written from Appellant's perspective, the Government drafted the plea agreement. Tr. at 74.

After the military judge announced the sentence, Trial Counsel "move[d], pursuant to the plea agreement, to withdraw and dismiss, with prejudice, Charge I and its Specification, Charge III and its Specification, and Charge IV and its specification." Tr. at 100. Trial Counsel's motion to the military judge did not include any qualifiers as to whether appellate review had to be completed before prejudice attached to the dismissal. *Id*. The military judge then granted Trial Counsel's motion. Tr. at 101.

Trial Counsel then "Z-ed" out Charges I, III, and IV from the Charge Sheet in red ink pen, wrote "withdrawn and dismissed with prejudice 13 May 2025", and affixed his initials. Charge Sheet.

That same day the acting Wing-level Staff Judge Advocate (SJA) indorsed the Statement of Trial Results, which stated that Charges I, III, and IV and their

associated specifications were "withdrawn and dismissed with prejudice." Statement of Trial Results dated 13 May 2025.

On 2 June 2025, the Convening Authority–after consulting with his SJA–made the decision to take no corrective actions. Convening Authority's Decision on Action. Two days later, on 4 June 2025, the actual SJA indorsed a "corrected Statement of Trial Results," which also stated that that Charges I, III, and IV and their associated specifications were "withdrawn and dismissed with prejudice." *See* Statement of Trial Results dated 14 May 2025.

Then, on 12 June 2025 in the Entry of Judgement (EOJ), the military judge again stated that Charges I, III, and IV and their associated specifications were "withdrawn and dismissed with prejudice." Entry of Judgment. The SJA indorsed EOJ with it prejudice language the same day. *Id*.

On appeal, the AFCCA specified three issues, the third of which ordered Appellant and the Government to brief the question of whether "Charges I, III and IV and their Specifications [were] dismissed with prejudice, vice dismissed with prejudice conditioned upon the completion of appellate review as agreed upon in the plea agreement?" Appendix at 2. In its brief to the AFCCA, the Government argued that prejudice would not attach to the dismissed charges "until the close of appellate review." United States' Brief Regarding Specified Issues at 20.

The AFCCA never reached the merits of the issue it specified; instead the court summarily dismissed the issue with one sentence in the unpublished opinion stating, "As to specified issue (3), we determined this issue is not ripe and decline to address it." Appendix at 2.

Reason to Grant Review

THIS COURT SHOULD GRANT REVIEW BECAUSE THE AFCCA DECIDED THE NOVEL ISSUE OF WHETHER AND HOW THE RIPENESS DOCTRINE APPLIES TO A TRIAL COURT'S ORDER DISMISSING CHARGES AND SPECIFICATIONS WITH PREJUDICE.

Standard of Review

Whether an issue is ripe for review is a question of law that is reviewed de novo. *United States v. Wall*, 79 M.J. 456, 458 (C.A.A.F. 2020).

A judge's order dismissing charges with prejudice is reviewed using an abuse of discretion standard. *United States v. Stellato*, 74 M.J. 473, 489 (C.A.A.F. 2015).

Law and Analysis

The AFCCA specified an issue for briefing as to whether Charges I, II, and IV and their specifications were dismissed with prejudice when the military trial judge granted the trial counsel's motion, or was the prejudice conditioned upon the completion of appellate review. Appendix at 2. Rather than maintain the position that trial counsel moved the trial court for, Government appellate counsel took the position that prejudice did not attach until appellate review was completed and, in

doing so, prejudiced Appellant. *See* United States' Brief Regarding Specified Issues at 20.

The AFCCA, instead of deciding the issue it specified, avoided the issue by holding that the issue was not ripe for review. Appendix at 2. However, as discussed below, the Government's position has made the issue ripe for review. Therefore, the AFCCA erred in finding the specified issue not ripe for review.

A. The prejudice caused by the Government to Appellant makes this issue ripe for review.

"'Ripeness' is the 'state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made.'" *Wall*, 79 M.J. at 459 (citing *Ripeness*, BLACK'S LAW DICTIONARY (10th ed. 2014)). "The ripeness doctrine originates in the Constitution's Article III case or controversy language." *Id.* at 459 (citing *DaimlerChrysler Corp. v. Cuno*, 574 U.S. 332, 352 (2006)). "Nevertheless, Article I courts, such as [this Court], 'generally adhere' to this doctrine and ordinarily decline to consider an issue that is 'premature.'" *Id*. (citing *United States v. Chisolm*, 59 M.J. 151, 152 (C.A.A.F. 2003)). "If the appeal is not ripe, it deprives the court of subject matter jurisdiction and must be dismissed." *Id*. at 459-60.

"A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (cleaned up). In *United States v. Texas*, the

Supreme Court employed a two-part test that was articulated in *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). 523 U.S. 296, 301 (1998). A claim is ripe if (1) the issue is fit for judicial decision, and (2) a hardship would result to a party if the court's consideration is withheld. *Id*.

First, deciding, at the appellate level, the effect a military trial judge's ruling has upon an appellant is certainly an issue that is fit for review; indeed, many actions at the appellate level involve this very thing. *See, e.g.*, *United States v. Gurczynski*, 76 M.J. 381, 385 (C.A.A.F. 2017) (stating "this Court reviews the military judge's decision directly").

Second, Appellant would endure a hardship if this Court, like the AFCCA, withheld consideration of the issue. In *United States v. Wall* this Court discussed the parameters of the hardship required by the ripeness doctrine. 79 M.J. 456 (C.A.A.F. 2020). On one end was *Abbott Labs v. Gardener* in which the issue was found to be ripe for review. 387 U.S. at 152. As the dissent in *Wall* pointed out, "*Abbott* involved an administrative regulation that forced Abbott Laboratories into a dilemma where they would either incur massive costs by complying with the regulation or face criminal prosecution for non-compliance." *Id*. at 464 (Ryan, J., Maggs, J. dissenting). "It was in that context that the Supreme Court deemed resolution of the purely legal question ripe because of the adverse impact on a party." *Id*. On the other end was *Texas v. United States*, whereby the issues were found to not yet be

ripe for review because it relied on a "contingent future event[] that may not occur as anticipated, or indeed may not occur at all." *Id*. at 464-65 (citing 523 U.S. at 300).

Appellant's case is more like *Abbott*, than it is like *Texas*. Like the plaintiff in *Abbott*, Appellant faces a real non-speculative possibility of criminal prosecution. *See* 387 U.S. at 152. We know that it is a real non-speculative possibility because the Government appellant counsel argued for it at the AFCCA level. *See* United States' Brief Regarding Specified Issues at 22. Specifically, Government appellant counsel argued that if the AFCCA found that prejudice had attached, then "Charges I, III, and IV have not yet been properly withdrawn or dismissed pursuant to the direction of the convening authority." *Id*. at 22.

The Government then argued that if AFCCA found "any of Appellant's guilty pleas were not provident, [the AFCCA] should do nothing regarding Charge I, III, and IV, and, instead, return the case to The Judge Advocate General to allow the convening authority to withdraw *from the now cancelled original plea agreement*[.]" *Id*. (emphasis added). Then, as the Government argued, if the convening authority so desires, the Government can "proceed to trial on all four charges, as well as any other charges or specifications for misconduct known by the legal office, law enforcement agencies, or the convening authority at the time the plea agreement was signed." *Id*. This solidifies Appellant's prejudice because AFCCA did, in fact, find portions of Appellant's pleas improvident. *See* Appendix at 7 (holding Appellant's

guilty plea to the original timeframes of the specification to be improvident). Thus, under the Government's current position, the plea agreement is cancelled, and the timing of the attachment of prejudice is irrelevant because the trial judge's dismissal order has been cancelled. United States' Brief Regarding Specified Issues at 22. Thus, it is the Government's position that the convening authority is free to retry Appellant for all the original Charges and Specifications, as well as any other charges.

Government appellate counsel stripped away from Appellant the position whereby Appellant was secure in the fact that there was no possibility that he could be tried by the Federal Government for the acts contained in Charges I, II, and IV and their Specifications. Rather than abide by the results of the trial counsel's motion, the Government appellate counsel hung the sword of Damocles over Appellant's head and explicitly stated that the Government was free to prosecute him again. *See* United States' Brief Regarding Specified Issues at 22. Appellant had security in the fact that the charges and specifications could not be referred against him, and the Government took that security away.

This is prejudicial to Appellant. And, the issue is ripe because the Government decided to make it ripe by taking the position that the convening authority can, and should, prosecute Appellant for the Charges and Specifications that were dismissed

with prejudice. Because the Appellant has been prejudiced, this issue is ripe for review.

B. The Trial Counsel made a motion to dismiss the Charges and their Specifications with prejudice. The military judge granted that motion. Therefore, the Charges and their Specifications have been dismissed with prejudice.

Trial counsel made an oral motion to dismiss Appellant's remaining charges and specifications with prejudice. Tr. at 100. The Government did not condition the attachment of prejudice on any other subsequent action occurring. *Id*. Thus, the effect of the military judge granting that motion is that the judge ordered the prejudice to attach immediately. The Government current position to the contrary is in error. United States' Brief Regarding Specified Issues at 22.

Statements made by a trial counsel during trial are binding upon the Government. *United States v. Augspurger*, 61 M.J. 189, 194 (C.A.A.F. 2005) (Crawford, J., dissenting in part and concurring in the result); *see United States v. Blood*, 806 F.2d 1218, 1221 (4th Cir. 1986) (reasoning that statements by a government attorney during voir dire would be binding against the government if they had constituted a clear and unambiguous admission); *United States v. McKeon*, 738 F.2d 26, 30 (2d Cir. 1984) (citing *Oscanyan v. Arms Co.*, 103 U.S. 261, 263 (1880)) (stating a clear and unambiguous admission of fact made by a party's attorney in an opening statement in a civil or criminal case is binding upon the party). The trial counsel's statements in this case consisted of moving the trial court to

dismiss Appellant's remaining Charges and Specifications with prejudice. The military judge unambiguously granted that motion. The Government is now bound.

1. The military judge's order was clear and unambiguous; prejudice attached immediately.

As the Army Court of Criminal Appeals has repeatedly pointed out, "[w]ords matter, especially words that are legally significant." *United States v. Hurd*, ARMY 20240033, 2025 CCA LEXIS 374, at *4 (A. Ct. Crim. App. Aug. 6, 2025). Specifically with regard to court orders, the First Circuit has held, "when a court's order is clear and unambiguous, neither a party nor a reviewing court can disregard its plain language 'simply as a matter of guesswork or in an effort to suit interpretive convenience.'" *Negron-Alemda v. Santiago*, 528 F. 3d 15, 23 (1st Cir. 2008) (citation omitted).

The military judge in the instant case clearly and unambiguously granted the trial counsel's motion "to withdraw and dismiss, with prejudice, Charge I and its specification, Charge III and its Specification, and Charge IV and its Specification," without any qualifier. Tr. at 100. Therefore, the military judge did exactly what he was asked to do; he dismissed the charges and specifications with prejudice. The trial counsel did not condition the prejudice on any other factors, and, therefore, the military judge did not order the prejudice to be conditioned on any other factors. The attachment of prejudice, therefore, was immediate.

2. The actions of the Government actors and the military judge following the court-martial show their intent that prejudice attach immediately.

Although further evidence of the immediacy of the attachment of prejudice is not necessary, the Trial Counsel's actions after the motion, the SJA's indorsement of the Statement of Trial Results, the Convening Authority's Decision on Action, and military judge's Entry of Judgement show that the Government's and trial court's intent was for the prejudice to attach immediately.

Trial Counsel "Z-ed" out Charges I, III, and IV and their specifications from the Charge Sheet in red ink and wrote, "withdrawn and dismissed with prejudice" without any qualifiers. Charge Sheet. Trial Counsel did not wait for the completion of appellate review to physically effectuate these charges' withdrawal and dismissal with prejudice, further showing that withdrawal and dismissal with prejudice is not conditioned upon that event.

Additionally, trial counsel's actions cannot be attributed to inexperience or misunderstanding. The acting SJA, as well as the actual SJA, indorsed versions of the Statement of Trial Results which included the "dismissed with prejudice" language; neither sought a modification to correct any errors they perceived in the results. *See* Statement of Trial Results, dated May 13, 2025; Statement of Trial Results, dated 14 May 2025.

Later, the SJA consulted with the Convening Authority in preparation for the decision on the action. Convening Authority's Decision on Action. The Convening

Authority made the decision to take no corrective actions and, apparently, did not seek any post-trial motion for correction of the Statement of Trial Results through his SJA. *Id*.

Then, on 12 June 2025, the military judge reiterated the granting of the trial counsel's motion in the Entry of Judgement that that Charges I, III, and IV and their associated specifications were "withdrawn and dismissed with prejudice." Entry of Judgment.

At no time did anyone seek to correct the Statement of Trial Results because there was nothing to correct. The military judge granted a motion to dismiss the charges and specifications with prejudice. That order was reflected in a Statement of Trial Results, a corrected Statement of Trial Results, and the Entry of Judgement; it was presented to the trial counsel, an acting SJA, the SJA, and the convening authority. No one sought a correction because no one believed there to be an error with the military judge's order dismissing the charges and specification with prejudice.

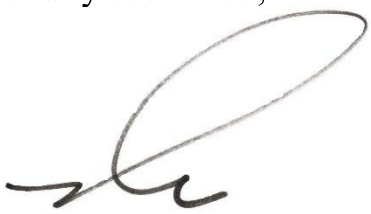
3. The Government's new position on appeal prejudices Appellant.

In this very narrow situation--as discussed above in the ripeness analysis--the Government's explicit position that (1) prejudice has not yet attached to the dismissed charges and specifications, and (2) that because the AFCCA found that portions of Appellant's plea are improvident, the plea agreement is cancelled and

Appellant can be retried for all the charges and specification, Appellant has suffered prejudice.

WHEREFORE, Appellant respectfully requests this Honorable Court grant review of the issue.

Respectfully submitted,



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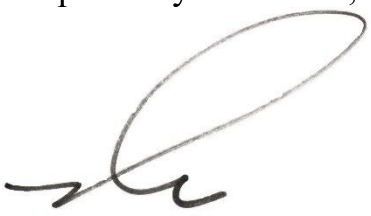
Certificate of Filing and Service

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 2 March 2026.

Respectfully submitted,



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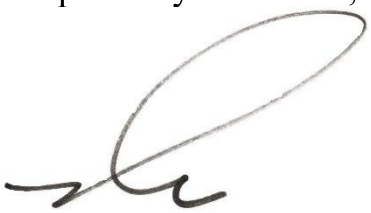
Certificate of Compliance

This brief complies with the type-volume limitation of Rules 21(b) and 21(6) of no more than 9,000 words because it contains approximately 3,430 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.

Respectfully submitted,



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Appendix

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM S32827

UNITED STATES
Appellee

v.

Jose A. ASTACIO BURGESS
Airman First Class (E-3), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 12 December 2025

Military Judge: Kirk W. Albertson.

Sentence: Sentence adjudged 13 May 2025 by SpCM convened at Beale Air Force Base, California. Sentence entered by military judge on 12 June 2025: Bad-conduct discharge, forfeiture of $1,546.00 pay per month for six months, reduction to E-1, and a reprimand.

For Appellant: Captain Paige F. Markley Denton, USAF.

For Appellee: Colonel G. Matt Osborn, USAF; Major Vanessa Bairos, USAF; Mary Ellen Payne, Esquire.

Before GRUEN, PERCLE, and MORGAN, *Appellate Military Judges*.

Judge PERCLE delivered the opinion of the court, in which Senior Judge GRUEN and Judge MORGAN joined.

PERCLE, Judge:

A military judge sitting as a special court-martial convicted Appellant, consistent with his pleas and pursuant to a plea agreement, of one specification of divers wrongful possession of psilocybin, a Schedule I controlled substance; one

specification of divers wrongful distribution of psilocybin, a Schedule I controlled substance; and two specifications of wrongfully introducing psilocybin, a Schedule I controlled substance, onto an Air Force installation with the intent to distribute the same substance, all in violation of Article 112a, Uniform of Code Military Justice (UCMJ), 10 U.S.C. § 912a.[1,2] The military judge sentenced Appellant to a bad-conduct discharge, to forfeit $1,546.00 pay per month for six months, reduction to the grade of E-1, and a reprimand.[3] The convening authority took no action on the findings or the sentence.

On 18 September 2025, counsel on behalf of Appellant submitted a brief to this court stating Appellant "does not admit that the findings and sentence are correct in law and fact but submits this case to this [c]ourt on its merits with no specific assignments of error." On 24 September 2025, we specified three issues for briefing in the case: (1) whether the military judge abused his discretion in accepting Appellant's pleas to each specification of Charge II; (2) assuming the military judge did abuse his discretion in accepting Appellant's plea to one or more specifications, what is the appropriate remedy; and (3) are Charges I, II, and IV and their specifications dismissed with prejudice, vice dismissed with prejudice conditioned upon the completion of appellate review as agreed upon in the plea agreement.

As to specified issue (3), we determined this issue is not ripe and decline to address it. *See*, *e.g.*, *United States v. Wall*, 79 M.J. 456, 459 (C.A.A.F. 2020) (citation omitted) (explaining that appellate courts "generally adhere" to the principle that issues not ripe for appeal cannot be decided). As to the remaining specified issues, we address them together and find the military judge abused his discretion in accepting Appellant's pleas to Specifications 1 and 2 of Charge II (wrongful possession and wrongful distribution of psilocybin, each on divers occasions) because during the first 104 days of the charged timeframe of each offense the court lacked personal jurisdiction over Appellant. However, we find no substantial basis in law and fact for questioning Appellant's guilty pleas to

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[1] Unless otherwise noted, all references in this opinion to the UCMJ and Rules for Courts-Martial are to the *Manual for Courts-Martial*, *United States* (2019 ed.).

[2] These convicted offenses formed the basis for Charge II. All remaining specifications to Charges I, III, and IV were withdrawn and dismissed with prejudice. We also note the specifications for Charge II were erroneously identified on the Statement of Trial Results and the entry of judgment as roman numerals. We find this was a scrivener's error.

[3] Related to the punishment, the plea agreement required the military judge impose a sentence of a bad-conduct discharge, reduction to the grade of Airman Basic (E-1), a reprimand, and "two-thirds forfeiture of basic pay per month," which the parties agreed meant "forfeiture of two-thirds pay, $1,546 per month for six months."

a narrower charged timeframe in Specifications 1 and 2 and therefore set aside language in Specifications 1 and 2 of Charge II accordingly. Having found no other error that materially prejudiced Appellant's substantial rights, we affirm the modified findings and sentence as reassessed.

I. BACKGROUND

During Appellant's short time in the Air Force, beginning when he enlisted on 4 October 2022, he committed several crimes involving psilocybin mushrooms, a Schedule I controlled substance. Related to Specification 1 of Charge II, on two separate instances in January and February 2024, Appellant ordered and received in the mail packages containing approximately 20 grams of psilocybin mushrooms.[4] Appellant possessed each of these packages in his residence for approximately one month. One of these packages was later seized by authorities and the contents were tested, which confirmed the contents were psilocybin mushrooms.

Related to Specification 2 of Charge II, on or about 14 February 2024, Appellant distributed approximately two grams of psilocybin mushrooms to a fellow Airman, receiving $39.00 in exchange. Appellant also distributed approximately four grams of psilocybin mushrooms on 23 February 2024, to a different Airman with whom he lived.

Related to Specifications 3 and 4 of Charge II, also in the early months of 2024, Appellant introduced psilocybin mushrooms onto two separate Air Force installations by mailing packages to the base post offices with the intention of distributing the mushrooms to Airmen on those bases.

II. DISCUSSION

A. Law

We review questions of court-martial jurisdiction de novo. *United States v. Hale*, 78 M.J. 268, 270 (C.A.A.F. 2019) (citing *EV v. United States*, 75 M.J. 331, 333 (C.A.A.F. 2016)). "When challenged, the [G]overnment must prove jurisdiction by a preponderance of evidence." *Id.* (citing *United States v. Morita*, 74 M.J. 116, 121 (C.A.A.F. 2015) (citation omitted)).

"Jurisdiction is the power of a court to try and determine a case and to render a valid judgment." *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006).

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[4] The facts summarized in this section are contained in Appellant's sworn statements to the military judge during his guilty plea inquiry. Nothing in the record contradicts the statements made by Appellant related to his 2024 misconduct.

> For courts-martial jurisdiction to vest, three requirements must be met: (1) jurisdiction over the offense, (2) jurisdiction over the accused, and (3) a properly convened and composed court-martial. For jurisdiction over the offense, the inquiry focuses on "whether the person is subject to the UCMJ at the time of the offense." For jurisdiction over an accused, the inquiry focuses on whether the accused was a "'person subject to the [Uniform Code of Military Justice' both at the time of the offense and at the time of trial."

United States v. Dodson, No. ACM 20051, 2022 CCA LEXIS 65, at *7–8 (A.F. Ct. Crim. App. 31 Jan. 2022) (unpub. op.) (citations omitted).

We review a military judge's acceptance of "a guilty plea for an abuse of discretion and questions of law arising from the guilty plea de novo." *United States v. Murphy*, 74 M.J. 302, 305 (C.A.A.F. 2015) (quoting *United States v. Inabinette,* 66 M.J. 320, 322 (C.A.A.F. 2008)). In reviewing a military judge's acceptance of a guilty plea, we consider whether "the record as a whole show[s] 'a substantial basis' in law and fact" to question the plea. *Inabinette,* 66 M.J. at 322 (internal quotation marks and citation omitted).

A military judge abuses his discretion by accepting a plea of guilty where a portion of the pleaded-to charged timeframe extends outside the statute of limitations. *United States v. Jensen*, No. ACM 39573, 2020 CCA LEXIS 163, at *10–11 (A.F. Ct. Crim. App. 19 May 2020) (unpub. op.). "Erroneous findings, however, do not reach the providence of an appellant's pleas which encompass acts of misconduct committed within a statutory limit." *Id.* (citing *United States v. Lee*, 29 M.J. 516, 518 (A.C.M.R. 1989) (holding "time-barred period of a specification does not 'affect the provident portions of guilty pleas encompassing acts of misconduct committed *within* the statutory limit'")).

This court has the power to reassess a sentence after it has set aside language from the findings of guilty. *See United States v. Winckelmann*, 73 M.J. 11, 15 (C.A.A.F. 2013); *United States v. Kibler*, 84 M.J. 603, 609–10 (A. Ct. Crim. App. 2024) (en banc) (reassessing the sentence after finding the guilty plea to one of the specifications improvident). In these circumstances, this court has broad discretion first to decide whether to reassess a sentence, and then to arrive at a reassessed sentence. *Winckelmann*, 73 M.J. at 12. In deciding whether to reassess a sentence or, in the alternative, return a case for a rehearing, we consider the totality of the circumstances including but not limited to the following factors set forth in *Winckelmann*: (1) any "[d]ramatic changes in the penalty landscape and exposure;" (2) whether the appellant was sentenced by court members or a military judge; (3) whether "the remaining offenses capture the gravamen of criminal conduct . . . within the original offenses and . . . whether significant or aggravating circumstances addressed at

the court-martial remain admissible and relevant to the remaining offenses;" and (4) whether "the remaining offenses are of the type that [appellate] judges . . . should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial." *Id.* at 15–16 (citations omitted).

These factors are "illustrative, but not dispositive, points of analysis" to be considered as part of "the totality of the circumstances." *Id.* at 15. This court must order a rehearing when it cannot determine that the sentence would have been at least of a certain magnitude. *See United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000) (citation omitted). In considering reassessment we also consider the nature of the available punishments at the court-martial concerned. Insofar as a bad-conduct discharge was adjudged at trial in this case, we note that "[a] bad-conduct discharge is less severe than a dishonorable discharge and is designated as a punishment for bad-conduct rather than as a punishment for serious offenses of either a civilian or military nature." R.C.M. 1003(b)(8)(C).

B. Analysis

We find the military judge did not abuse his discretion when he accepted Appellant's pleas to Specifications 3 and 4 of Charge II as charged and pleaded.

However, Specifications 1 and 2 allege Appellant committed misconduct from the date range of 22 June 2022 until 29 February 2024 even though the record reflects that Appellant did not enter active duty until 4 October 2022. In response to the court's specified issues related to the charged timeframe, both parties agree Appellant was not on active duty during part of the original charged timeframe to which Appellant pleaded guilty, from 22 June 2022 through 3 October 2022.[5] Therefore, both parties agree personal jurisdiction over Appellant attached on 4 October 2022, when Appellant entered active duty and was "a 'person subject to the [Uniform Code of Military Justice]' both at the time of the offense and at the time of trial." *United States v. Ali,* 71 M.J. 256, 265 (C.A.A.F. 2012). Therefore, we find the military judge abused his discretion in accepting Appellant's pleas for Specifications 1 and 2 for the broader timeframe.

However, despite there being a period of time in his plea that was error, both parties also agree we could uphold Appellant's pleas of guilty to Specifications 1 and 2 of Charge II by excepting out the charged time period pre-dating Appellant's regular component status and affirm the specifications

[5] This is consistent with Appellant's plea inquiry, wherein the military judge clarified Appellant's date of enlistment was 4 October 2022.

encompassing only those acts of misconduct committed within the statutory limit. *Lee*, 29 M.J. at 518.[6]

The judgment of a court-martial without jurisdiction is void. We urge the exercise of vigilance by all justice practitioners in respecting the requisites for courts-martial jurisdiction. Still, we agree with both parties and are convinced jurisdiction existed over Appellant and his crimes related to his criminal conduct in 2024. For the same reasons as this court found in *Jensen*, we find based on the evidence in the record that Appellant's pleas to Specifications 1 and 2 of Charge II are provident for the period between on or about 1 January 2024 and on or about 29 February 2024. Therefore, we modify the affected specifications in our decretal paragraph to narrow the charged timeframe to cover only that period when the United States Air Force had personal jurisdiction over Appellant because he was serving on active duty.

Having narrowed the charged timeframe for those two specifications, we look to see if we should reassess the sentence. Applying the *Winckelmann* factors, first, we determine that there have been no dramatic changes in the penalty landscape or Appellant's exposure to punishment. Second, because a military judge sentenced Appellant, rather than him having been sentenced by court members, we are well-equipped to determine what the military judge would have done. Third, the remaining offenses still capture the gravamen of Appellant's criminal conduct—in fact, it still captures everything Appellant pleaded to in his *Care*[7] inquiry. Considering the totality of the circumstances, the sentence imposed for the remaining specifications remain wholly appropriate for a servicemember who possessed psilocybin mushrooms, and distributed, on divers occasions, psilocybin mushrooms on and off military bases to a multitude of Airmen during his brief military career.

As to the fourth and final factor, based on our expertise and familiarity with the offenses, we are confident we can reasonably reassess the sentence to that which was originally imposed at trial: bad-conduct discharge, to forfeit $1,546.00 pay per month for six months, reduction to the grade of E-1, and a reprimand. Appellant's improvident plea has no impact on his sentence to confinement since he was given none. Pursuant to the plea agreement, the remaining sentence remains in part because those were mandatory terms established by the plea agreement for substantially the same conduct. We note that excluding consideration of the plea agreement, having reviewed the entire record

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[6] We note that Appellant specifically requested that this court not find any remedy that could "create a question as to whether he has complied with his promises from his plea agreement."

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

of trial considering the *Winckelmann* factors, we are likewise confident that the military judge would have imposed the same sentence. We are particularly persuaded by the fact that the gravamen of Appellant's convicted misconduct remains after the narrowing of the date range, and such conduct was not mitigated by any factors extant in the record. His repeated conduct well justifies a punitive discharge for misconduct, which qualifies as "bad conduct." Accordingly, based on our application of the *Winckelmann* factors, we find sentence reassessment to be appropriate in Appellant's case. 73 M.J. at 16.

III. CONCLUSION

The date "22 June 2022" is excepted from Specifications 1 and 2 of Charge II, and substituted with "1 January 2024," and the excepted date is **SET ASIDE**. The findings, as modified, are correct in law. Article 66(d), UCMJ, 10 U.S.C. § 866(d). *Manual for Courts-Martial*, *United States* (2024 ed.). We reassess the sentence to a bad-conduct discharge, forfeiture of $1,546.00 pay per month for six months, reduction to the grade of E-1, and a reprimand. The sentence, as reassessed, is correct in law and fact, and no other error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings, as modified, and sentence, as reassessed, are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court