Filed on September 2, 2025

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

ANN R. MARIN PEREZ,
Staff Sergeant (E-5),
United States Air Force,
Appellant.

Crim. App. Dkt. No. S32771

USCA Dkt. No. 25-0238/AF

SUPPLEMENT TO THE PETITION FOR GRANT OF REVIEW

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Appellant.	)	September 2, 2025

ERROR ASSIGNED FOR REVIEW

Whether the Air Force Court of Criminal Appeals erred when it affirmed a conviction through exceptions and substitutions after finding that "the military judge erred in accepting Appellant's plea to the specification as drafted."

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d).[1] This Court has jurisdiction to review this case pursuant to Article 67(a)(3),

[1] The version of Article 66, UCMJ, as codified in the 2018 edition of United States Code and as amended by the William M. (Mac) Thornberry National Defense Authorization Act [NDAA] for Fiscal Year 2021, Pub. L. No. 116-283, § 542(b), 134 Stat. 3388, 3611 (2021), and the James M. Inhofe NDAA for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395, 2582 (2022), applied in this case. The amendment of Article 66(d)(1), UCMJ, enacted by section 539E of the NDAA for Fiscal Year 2022, Pub. L. No. 117-81, § 539E, 135 Stat. 1541, 1700 (2021), applies only to cases in which all findings of guilty are for offenses occurring after December 27, 2023. *Id.* at § 539E(f), 135 Stat. at 1706. Hence, that amendment is

UCMJ, 10 U.S.C. § 867(a)(3) (2018) (as amended by § 542(c) of the William M. Thornberry NDAA for Fiscal Year 2021 and § 539A(c) of the NDAA for Fiscal Year 2022).

STATEMENT OF THE CASE

In December 2023, Staff Sergeant (SSgt) Ann R. Marin Perez pleaded guilty to one charge and one specification of larceny in violation of Article 121, UCMJ, 10 U.S.C. § 921. R. at 1, 7, 11, 48. The military judge sentenced SSgt Marin Perez to be reduced to the grade of E-1, to be confined for four months, and to be discharged from the service with a bad-conduct discharge. R. at 108. The convening authority took no action on the findings or sentence but waived all automatic forfeitures for a specified period for the benefit of SSgt Marin Perez's spouse and children. Convening Authority Decision on Action (Jan. 11, 2024).

At the AFCCA, SSgt Marin Perez raised two assignments of error, including whether her plea was provident. Appendix at 2. The AFCCA agreed that there was a substantial basis to question whether the value of the stolen property was "about $21,300.00" as charged. Appendix at 7. The AFCCA found the military judge erred in accepting SSgt Marin Perez's plea, but "affirmed[ed] the finding of guilty to the specification by exceptions and substitutions." Appendix at 7 ("Therefore, we affirm the findings here by excepting the words and figures 'about $21,300.00' and

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inapplicable to this case.

substituting therefor the words 'more than $1,000.00.'"). The AFCCA then reassessed the sentence and found that SSgt Marin Perez "would have received the same sentence" for stealing property worth "more than $1,000.00." Appendix at 8.

STATEMENT OF FACTS

SSgt Marin Perez stole several pieces of jewelry from a home where she periodically provided cleaning services. R. at 22, 27-28. She took two necklaces, three bracelets, and a pair of earrings. R. at 23. She took these items, along with some of her own jewelry, Pros. Ex. 1, Atch. 4, at 8:08, to pawn shops and received $1,650. R. at 23; Pros. Ex. 1 at 13-14, 17. When the owner of the jewelry discovered that some of her jewelry was missing, she called the local police, who assisted with recovering her jewelry. Pros. Ex. 1 at 2, 21-26; R. at 60-61. Mr. DL, the owner of a jewelry repair store, appraised the recovered jewelry. Pros. Ex. 1 at 2, 21-26; Def. Ex. N at 1. The total appraised value of the six items was $21,300. *Id*.

During her providence inquiry, SSgt Marin Perez admitted the value of the jewelry was $21,300, consistent with the Government's charging language of "about $21,300." *Compare* R. at 20-22, *and* R. at 30, *with* Charge Sheet. SSgt Marin Perez agreed that this value was true and accurate. R. at 21-22. The military judge did not define the term "value" during the providence inquiry or at any other time. After admitting to all the elements of the offense, the military judge found that SSgt Marin Perez's "plea of guilty [was] made voluntarily with full knowledge of its meaning

and effect," and that she "knowingly, intelligently, and consciously waived [her] rights against self-incrimination, to a trial of facts by a court-martial, and to be confronted by the witnesses against her." R. at 47. Accordingly, the military judge found her plea to be provident and found her guilty of the charged larceny offense. R. at 47-48.

During sentencing, the defense admitted a letter from Mr. DL, the jewelry store owner who did the appraisal, which prompted the military judge to re-open the providence inquiry. Def. Ex. N; R. at 86. While noting that Mr. DL stood by his appraisal, the military judge pointed out that Mr. DL "explains what goes into appraisal and doesn't say specifically what the current market value would be. Says that there is some inflation that goes into evaluation and that . . . it's a little wish-washy." R. at 86. The military judge paraphrased the last line of the exhibit that "there's an argument to be made the property may be worth less." R. at 86; *see* Def. Ex. N at 1 ("I can confidently tell all parties that there is an argument to be made that the jewelry is not worth that much and the value of the jewelry is less."). The military judge noted there was "a little bit of confusion" on the "about $21,300" value the Government charged when the value does not have to be exactly $21,300, but the exact dollar amount value of the jewelry was unclear. R. at 86-87. The military judge asked whether SSgt Marin Perez agreed that the value of the jewelry was over $1,000. R. at 87. She did. *Id*. The military judge concluded, "And so that

satisfies that the charge [‘]about[’], again, the court has information that says we don’t know that’s exactly what it was but the government charged you [‘]about[’] amount as opposed to the exact amount. And I don’t have enough—the letter doesn’t provide any amount as to what may be otherwise be legitimate argument . . . .” *Id*.

But, in fact, the letter did provide an amount: “[T]he appraised value [$21,300.00] combines several insurance factors and *doubles* the proposed value of the jewelry to reflect inflation and other factors. As such, the appraised values listed for each of the items has been inflated and the actual value of each of the pieces is less.” Def. Ex. N at 1 (emphasis added). The military judge did not analyze or reference this part of the letter from Mr. DL. Instead, the military judge concluded the plea was provident because SSgt Marin Perez pled to a value of over $1,000 and “there is evidence that the property has value of $21,300 or . . . with the [‘]about[’] amount . . . the plea is still provident.” R. at 87-88.

On appeal, SSgt Marin Perez raised the issue of whether her plea was provident based on this conflict over the value of the property. Appendix at 2. The AFCCA “agree[d] with [SSgt Marin Perez] that there [was] a substantial basis to question whether the value of the stolen property was ‘about $21,300.00’ as charged.” Appendix at 7. The lower court determined the military judge erred in accepting SSgt Marin Perez’s plea “to the specification as drafted.” Appendix at 7.

SSgt Marin Perez argued in her filings to the AFCCA that the only way her plea could be provident, if there was a substantial basis to question the value, was through a lesser included offense analysis. Reply Br. on Behalf of Appellant at 6-7, May 13, 2025. But she also asserted a "lesser offense" of a lower valued larceny could not be "a subset of elements for the *same larceny* charged incorrectly" because the elements remained the same—the charged value was simply wrong. *Id*. at 7-8. Thus, the findings had to be set aside and a rehearing authorized. *Id*. at 8.

Rather than setting aside the findings and sentence to authorize a rehearing, the AFCCA affirmed the finding of guilt through exceptions and substitutions, citing *United States v. English*. Appendix at 7 (citing 79 M.J. 116, 122 n.5 (C.A.A.F. 2019) ("Courts of Criminal Appeals (CCA) may affirm a conviction by exceptions and substitutions when it narrows the finding on appeal")). The AFCCA asserted that "under any scenario presented during [SSgt Marin Perez's] guilty plea that the value of the stolen jewelry was substantially in excess of $1,000.00." Appendix at 7. And the lower court noted that the military judge confirmed that SSgt Marin Perez agreed the value was over $1,000. Appendix at 7. Nevertheless, this was not the charged value, Appendix at 2, and the AFCCA did not conduct a lesser included offense analysis. The AFCCA "affirm[ed] the findings here by excepting the words and figures 'about $21,300.00' and substituting therefor the words 'more than $1,000.00.'" Appendix at 7.

REASONS TO GRANT REVIEW

The AFCCA erred when it affirmed a conviction through exceptions and substitutions after finding that "the military judge erred in accepting Appellant's plea to the specification as drafted."

Having found that the military judge abused his discretion in accepting SSgt Marin Perez's plea to the specification as drafted, the AFCCA had two choices: set aside the findings or affirm a lesser included offense. *See United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2010) ("Affirming a guilty plea based on admissions to an offense to which an accused has not in fact pleaded guilty and which is not a lesser included offense of the charged offense is inconsistent with traditional due process notions of fair notice."). It did neither, opting instead to use exceptions and substitutions to change the value listed in the specification to "narrow the finding on appeal," citing *English*. Appendix at 7 (citing 79 M.J. at 122 n.5). This Court should grant review to correct this error while also evaluating whether *English*'s holding about "narrowing" an offense to something other than a lesser included offense applies to assessing the providence of guilty pleas. C.A.A.F. R. 21(b)(5)(A)-(B)(i).

Standard of Review

Article 59(b), UCMJ, states that "[a]ny reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense." 10 U.S.C. § 859(b). Both this Court and the AFCCA are authorized by statute to affirm a lesser included offense of a

crime where the evidence as to the greater offense is not legally sufficient. *United States v. Lubasky*, 68 M.J. 260, 265 (C.A.A.F. 2010) (citing Article 59(b), UCMJ). Whether an offense is a lesser included offense is a question of law that is reviewed de novo. *United States v. Miller*, 67 M.J 385, 387 (C.A.A.F. 2009).

Law and Analysis

"Value is an essential element of pleading and proof in the offense of larceny. It is a matter which must be determined by the court-martial." *United States v. Thompson*, 27 C.M.R. 119, 121 (C.M.A. 1958) (citation omitted). The Manual reiterates this: "Value is a question of fact to be determined on the basis of all the evidence admitted." *Manual for Courts-Martial*, United States (2019 ed.), pt. IV, ¶ 64.c.(1)(g)(i) [hereinafter *MCM*]. There is no requirement to allege a specific value, but when the Government "narrow[s] the scope of the charged offense" by alleging an elemental fact with more particularity than is required by statute, the conviction may only be sustained on the facts alleged. *English*, 79 M.J. at 120.

Here, the AFCCA correctly determined there was a substantial basis to question the value of the property as it was charged. Appendix at 7. The military judge never resolved an inconsistency between SSgt Marin Perez pleading guilty to stealing property worth "about $21,300.00" and evidence suggesting the property was worth, at most, half that value. Appendix at 7. Thus, the AFCCA found that "the military judge erred in accepting [the] plea to the specification as drafted." Appendix

at 7. Thereafter, though, the AFCCA erred by using *English*, a case about legal and factual sufficiency, to determine whether the plea remained provident by using exceptions and substitutions. Appendix at 7.

This is problematic for two reasons. First, *English* is inapplicable because it was a legal (and factual) sufficiency case. *English*, 79 M.J. at 121-22; *United States v. English*, 78 M.J. 569, 576 (A. Ct. Crim. App. 2018). Legal and factual sufficiency are not the issues when a guilty plea is being reviewed. "Because [the appellant] pleaded guilty, the issue must be analyzed in terms of the *providence* of [her] plea, *not* sufficiency of the evidence." *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996) (emphasis added).

The providence of a plea focuses on Article 45, UCMJ, 10 U.S.C. § 845: "If an accused 'sets up 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. Saul*, __ M.J. __, No. 24-0098/AF, 2025 CAAF LEXIS 578, at *7 (C.A.A.F. July 21, 2025) (citing *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996) (quoting Article 45(a), UCMJ)). This is because where an accused has not been properly advised of the elements or where the accused's acts do not constitute the offense to which she is pleading guilty, the plea is not voluntary. *Id.* at *6-7 (first citing *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969); and then citing Rule for Courts-Martial (R.C.M.) 910(e) (2019 ed.)) (describing the

principles behind accepting a plea of guilty). It is these inconsistencies, couched in concerns of ensuring a knowing and voluntary guilty plea, that create the legal or factual basis to overturn the plea. *Faircloth*, 45 M.J. at 174.

But it is up to the military judge to resolve any inconsistencies. R.C.M. 910(e). When he does not, as here, the lower court cannot step in to resolve that inconsistency by finding facts in the record that "narrow" the offense—if that "narrowing" is not to affirm a lesser included offense. Otherwise, making the plea provident on something with which the accused was never charged and on which she was never advised would revive the "closely related offense" doctrine this Court has abandoned. *Morton*, 69 M.J. at 13. Instead, under such circumstances, a guilty plea can only survive if an accused's plea supported a finding of guilty to a lesser included offense. *Id*. at 16. This makes sense because the accused is inherently advised of, and inherently would plead guilty to, a lesser included offense "because it is a subset of the greater offense alleged." *United States v. Medina*, 66 M.J. 21, 27 (C.A.A.F. 2008); *Schmuck v. United States*, 489 U.S. 705, 716 (1989) ("[T]he elements of the lesser offense are a subset of the elements of the charged offense."). Thus, affirming on a lesser included offense in a guilty plea context still satisfies the principles of fair notice and "an accused's right to understand to what [s]he is pleading guilty and on what basis." *Morton*, 69 M.J. at 16 (first citing *Medina*, 66 M.J. at 26; and then citing *Lubasky*, 68 M.J. at 265).

Second, finding by "exceptions and substitutions" is improper on appeal. When a finding of guilt is made on the charge and specification as drafted and an inconsistency between pleadings and proof remains on appeal, the only option appellate courts have is to either reject the findings or affirm a lesser included offense. *Lubasky*, 68 M.J. at 264-65. While R.C.M. 918(a)(1) authorizes a finding of guilty by exceptions and substitutions at the *trial* level to address some differences between pleading and proof, Article 59(b), UCMJ, limits an appellate court's power on *appeal* to only affirming a lesser included offense if it cannot affirm a finding of guilty.

As an essential element of larceny, "value" must be proven at the court-martial. *Thompson*, 27 C.M.R. at 121. Where there is a discrepancy between the charged value and the value proven at trial, but a conviction occurs nonetheless, this essential element cannot be substituted on appeal to the value proven at the court-martial. At trial, this would have been subject to exceptions and substitutions, but on appeal, this factual discrepancy is only subject to a lesser included offense analysis. Thus, the AFCCA erred by not performing a lesser included offense analysis when it used exceptions and substitutions and relied on *English*'s "narrowing" language in this guilty plea context.

The AFCCA is not alone in using "exceptions and substitutions" rather than a lesser included offense analysis for similar cases. *E.g.*, *United States v. Owens*, No.

ARMY 20121071, 2014 CCA LEXIS 344, at *14-15 (A. Ct. Crim. App. May 30, 2014); *United States v. Wilson*, No. ARMY 20110969, 2013 CCA LEXIS 446, at *5 (A. Ct. Crim. App. May 29, 2013) (citing *United States v. Harding*, 61 M.J. 526, 529-30 (A. Ct. Crim. App. 2005)); *United States v. Sibley*, No. ARMY 20080037, 2008 CCA LEXIS 604 (A. Ct. Crim. App. Aug. 29, 2008) (summ. disp.)). But these decisions come without analysis, are inconsistent with the principles of *Care, Morton*, and *Faircloth*, and ignore the fact that appellate courts should be performing lesser included offense analyses where the providence inquiry establishes an offense, but not the one charged and found.

Furthermore, here, in doing this substitution, the plain reading of the substituted language could be read to *exceed* the contested value element of "about $21,300.00" because "a value of more than $1,000.00" has no upper limit. *See* Appendix at 7 ("[W]e affirm the findings here by excepting the words and figures 'about $21,300.00' and substituting therefor the words 'more than $1,000.00.'"). This further shows that substituting values where the factual predicate has not been pled to and no lesser included offense analysis occurs risks *expanding* the specification based on the plain language, rather than "narrowing" it. *See English*, 79 M.J. at 122 (barring "after-the-fact revisions to the charge sheet that sweep more broadly than what was alleged"); *Morton*, 69 M.J. at 16 ("Allowing an appellate court to affirm guilt based on an offense with which the accused has not been

charged, which is not a lesser included offense of the charged offense, or to which [s]he has not entered a plea of guilty is inconsistent with . . . fair notice.").

Thus, while the AFCCA erred, the issue in this case turns on whether a larceny of a lower value is a lesser included offense of a specifically charged larceny value. In *Lubasky*, this Court held "there is no authority for the proposition that larceny from one entity is [a lesser included offense] of larceny from another entity." 68 M.J. at 265 (citing *Medina*, 66 M.J. at 25) ("One offense is not 'necessarily included' in another unless the elements of the lesser included offense are a subset of the elements of the charged offense." (quoting *Schmuck*, 489 U.S. at 716)).

Here, there is no lesser included offense for an appellate court to affirm. Larceny is the same crime regardless of the value alleged. The "lesser offense" of a lower valued larceny is not a subset of the *same larceny* charged *incorrectly*. *See Medina*, 66 M.J. at 25 (citing *Schmuck*, 489 U.S. at 716) (reciting the "elements test" for lesser included offenses, which requires the "lesser offense" have elements that are a *subset* of the "greater offense"). The elements for the stolen jewelry are the same—the charged value is simply wrong. This returns to the anomaly present in this case that the substituted language ostensibly broadened the specification to encompass "a value over $1,000.00," which on its face would include "about $21,000" because there is no cap. Swapping out the specific value to an indeterminate value is not affirming a lesser included offense, especially where SSgt

Marin Perez did not knowingly plead to the crime charged or the correct property value—a value that remains unclear to date. Value is an element of the offense, and she was never properly advised about the definition or how that term relates to the charge and the facts of her case. *See Saul*, 2025 CAAF LEXIS 578, at *6-7 ("[T]he military judge must explain each of the elements of an offense to the accused and question the accused to ensure that the accused's acts or omissions constitute the offense to which the accused is pleading guilty.").

Therefore, this Court should grant review to correct this reoccurring error of using exceptions and substitutions to "narrow" an offense not properly pled to and should authorize a rehearing after determining that the AFCCA erred when it did not set aside the findings.

SSgt Marin Perez requests that this Court grant review.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on September 2, 2025, and that a copy was also electronically served on the Air Force Government Trial and Appellate Operations Division at af.jajg.afloa.filng.workflow@us.af.mil on the same date.

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CERTIFICATE OF COMPLIANCE
WITH RULES 21(b) & 37

This supplement complies with the type-volume limitation of Rules 21(b) because it contains 3,481 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.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM S32771

UNITED STATES
Appellee

v.

Ann R. MARIN PEREZ
Staff Sergeant (E-5), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 13 June 2025

Military Judge: Charles E. Wiedie Jr.

Sentence: Sentence adjudged 18 December 2023 by SpCM convened at Kent County Courthouse in Dover, Delaware. Sentence entered by military judge on 22 January 2024: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

For Appellant: Captain Samantha M. Castanien, USAF.

For Appellee: Lieutenant Colonel Jenny A. Liabenow, USAF; Major Morgan L. Brewington, USAF; Mary Ellen Payne, Esquire.

Before ANNEXSTAD, DOUGLAS, and PERCLE, *Appellate Military Judges*.

Senior Judge ANNEXSTAD delivered the opinion of the court, in which Judge DOUGLAS and Judge PERCLE joined.

ANNEXSTAD, Senior Judge:

A military judge sitting as a special court-martial convicted Appellant, in accordance with her pleas and pursuant to a plea agreement, of one specification of larceny, in violation of Article 121, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 921.[1] The military judge sentenced Appellant to a bad-conduct discharge, confinement for four months, and reduction to the grade of E-1. The convening authority took no action on the findings or the sentence.[2]

Appellant raises two issues on appeal which we have rephrased: (1) whether Appellant's plea to larceny was provident, and (2) whether Appellant's sentence is appropriate. We address the issues together.

As discussed below, we find error and affirm the findings as modified and the sentence as reassessed.

I. BACKGROUND

Appellant enlisted in the Air Force in 2017, and at the time of her court-martial was a 32-year-old staff sergeant assigned to the logistics readiness squadron at Dover Air Force Base, Delaware.

Sometime between December 2022 and March 2023, Appellant sought off-duty employment at a local house cleaning company. As a part of her employment, Appellant cleaned the residence of Ms. NM every two weeks over the course of a few months. On at least one occasion while Appellant was cleaning Ms. NM's bedroom, Appellant wrongfully took several pieces of jewelry from a jewelry box on Ms. NM's dresser. Subsequently, Appellant sold the jewelry to multiple local pawn shops. On 11 March 2023, Ms. NM noticed that she was missing numerous pieces of jewelry and reported the theft to the Delaware State Police (DSP). The DSP investigation established that Appellant had sold Ms. NM's jewelry to local pawn shops. Appellant was later interviewed by DSP investigators and, after waiving her rights, confessed to stealing Ms. NM's jewelry.

Appellant was charged and pleaded guilty to one specification of larceny in violation of Article 121, UCMJ. The specification alleged that Appellant stole "jewelry of a value of about $21,300.00," from Ms. NM.

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

[2] On 3 January 2024, the convening authority waived all automatic forfeitures until Appellant was released from confinement or her expiration of service for the benefit of her spouse and children.

Prior to trial, with the assistance of counsel, Appellant entered into a plea agreement with the convening authority, where Appellant agreed to plead guilty to the charge and specification in exchange for limitations on her sentence. Appellant also agreed, as part of the plea agreement, to enter into a reasonable stipulation of fact concerning the facts and circumstances surrounding the charged offense. Specifically concerning the value of the jewelry, Appellant expressly agreed that the stolen jewelry was appraised by a local expert, Mr. DL, at a value of $21,300.00.

During the plea colloquy, the military judge had the following exchange with Appellant regarding the value of the stolen jewelry:

> [Military Judge (MJ)]: Okay. And I understand that you — when you pawned it you received $1,650[.00], but within the stipulation of fact there is an appraisal that was done by someone who is a professional of appraising jewelry and he lists the value of the property at $21,300[.00]. Have you had an opportunity to kind of look at that appraisal and discuss that appraisal with your defense counsel?
>
> [Appellant]: Yes, Your Honor.
>
> MJ: And based upon your discussions with defense counsel and having an opportunity to review that evidence, are you confident that that is the value of the property that you took?
>
> [Trial Defense Counsel]: May we have a moment, Your Honor?
>
> MJ: And I realize you don't have any personal knowledge but, you know, just — knowing that this individual's professional — do you have confidence in that appraisal that — that that was the value of the property? So, you can just talk with your defense counsel.
>
> [The [Appellant] consulted with her defense counsel.]
>
> [Appellant]: Yes, Your Honor.
>
> MJ: So, just to make sure because there was a little bit of a break there, you — based upon — again, you don't have personal knowledge, but based upon reviewing the evidence and discussing with your defense counsel, you are confident that the value of the property was about $21,300[.00]?
>
> [Appellant]: Yes, Your Honor.

Once finished, before entering any findings, the military judge stated to Appellant, "Now, I want you to take a moment now and consult again with your defense counsel, and after you've done so let me know whether you still

want to plead guilty." Appellant consulted with her trial defense counsel and then reassured the military judge that she still desired to plead guilty. The military judge then entered findings concerning providence and found Appellant guilty of the charge and its sole specification as drafted.

II. DISCUSSION

On appeal, Appellant now contends that her guilty plea to larceny was not provident. Specifically, Appellant argues that there was a substantial question regarding Appellant's plea that was left unresolved—whether the value of the property was "about $21,300.00" as charged. Appellant asks that we set aside the findings and sentence. As explained below, we affirm the finding of guilty to the specification with exceptions and substitutions and reassess the sentence.

A. Additional Background

During presentencing, the Defense introduced evidence, which included a Defense Exhibit N, a memorandum dated 16 December 2023, prepared by Mr. DL, the same jeweler who conducted the appraisal of Ms. NM's jewelry identified in, and attached to, the stipulation of fact. The memorandum provided, in relevant part:

> The appraised value of each of the pieces of jewelry does not reflect the exact cost of how much each piece of jewelry would be listed and sold for on the market today. Instead, the appraised value combines several insurance factors and doubles the proposed value of the jewelry to reflect inflation and other factors. As such, the appraised value listed for each of the items has been inflated and the actual value of each of the pieces is less. Therefore, although combined the total appraised value in my report is $21,300[.00], I can confidently tell all parties that there is an argument to be made that the jewelry is not worth that much and the value is less.

Before hearing sentencing arguments, the military judge, *sua sponte,* reopened the plea inquiry based on concerns he had that the statements made by Mr. DL on 16 December 2023 seemed to undermine the value of the stolen jewelry. The following discussion took place:

> MJ: There's one — before we go to sentencing argument, there's one other additional matter I wanted to address and that has to do with the value of property and I raised this question for myself based upon what the [D]efense has admitted as Defense Exhibit N, which is the memorandum from Mr. [DL's] evaluation of the jewelry and it raises some question on the issue, I mean,

> he stands by his appraisal and he explains what goes into the appraisal and doesn't say specifically what the current market value would be. Says that there is some inflation that goes into evaluation and that — it's a little — it's a little wish-washy.
>
> So, I can confidently tell you that there's an argument to be made that the property may be worth less. Not that it is worth less, but there's an argument to be made and so there is some on that. The [G]overnment — and the [G]overnment has charged it as a value of about $21,300[.00] so it doesn't have to be exactly $21,300[.00] and the court has information indicating [inaudible] is not $21,300[.00] but is not clear asking what the exact dollar amount is. So there is a little bit of confusion on that issue. So I kind of wanted to address that.
>
> Let me ask you first, [Appellant], are you confident, based upon your discussion with counsel, reviewing the evidence in this case, that the value of the property was at least $1000 or greater?
>
> [Appellant]: Yes, sir.
>
> MJ: So that's the statutory as far the breakdown in the military. It's less than a $1000 or — a $1000 or less or more than $1000, and so I may not have asked the questions though. So you agree that it's more than $1000 in price?
>
> [Appellant]: Yes, Your Honor.
>
> MJ: And so that satisfies that the charge about, again, the court has information that says we don't know that's exactly what it was but the [G]overnment charged you about amount as opposed to the exact amount. And I don't have enough — the letter doesn't provide any amount as to what may be otherwise be legitimate argument [would be for someone] [inaudible]. So, I think given that in order to plead provident, you don't have to plead to an offense of more than $1000 and there is evidence that the property has value of $21,300[.00] or that there could be some question, but again, with the about amount, I think that the plea is still provident based upon that but I just wanted to check.

Both Government and Defense confirmed that they did not think any further discussion was warranted. The military judge then confirmed again that Appellant's trial defense counsel was satisfied that Appellant's guilty plea was provident. The military judge then asked Appellant, "[A]re you — you still want to stay with your plea?" To which Appellant answered, "Yes, Your Honor."

B. Law

We review a military judge's decision to accept an accused's guilty plea for an abuse of discretion. *United States v. Riley*, 72 M.J. 115, 119 (C.A.A.F. 2013). "An abuse of discretion occurs when there is 'something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea.'" *Id.* (quoting *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)).

"The military judge must ensure there is a basis in law and fact to support the plea to the offense charged." *United States v. Soto*, 69 M.J. 304, 307 (C.A.A.F. 2011) (citing *Inabinette*, 66 M.J. at 321–22) (additional citation omitted). The military judge may consider both the stipulation of fact and the inquiry with the appellant when determining if the guilty plea is provident. *United States v. Hines*, 73 M.J. 119, 124 (C.A.A.F. 2014) (citation omitted). "A plea is provident so long as [the a]ppellant was 'convinced of, and [was] able to describe, all of the facts necessary to establish [his] guilt.'" *United States v. Murphy*, 74 M.J. 302, 308 (C.A.A.F. 2015) (second and third alterations in original) (quoting *United States v. O'Connor*, 58 M.J. 450, 453 (C.A.A.F. 2003)). "This court must find 'a substantial conflict between the plea and the accused's statements or other evidence' in order to set aside a guilty plea. The 'mere possibility' of a conflict is not sufficient." *United States v. Watson*, 71 M.J. 54, 58 (C.A.A.F. 2012) (quoting *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996)).

The elements of the offense to which Appellant pleaded guilty are: (1) that Appellant wrongfully took certain property from the possession of the owner; (2) that the property belonged to a certain person; (3) that the property was of a certain value, or of some value; and (4) that the taking by Appellant was with the intent permanently to deprive another person of the use and benefit of the property or permanently to appropriate the property for her own use or the use of someone other than the owner. *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. IV, ¶ 64.b.(1).

"Value is a question of fact to be determined on the basis of all of the evidence admitted." *MCM*, pt. IV, ¶ 64.c.(1)(g)(i). The value of stolen property, other than government property, "is its legitimate market value at the time and place of the theft." *MCM*, pt. IV, ¶ 64.c.(1)(g)(iii). "If as a matter of common knowledge the property is obviously of a value substantially in excess of $1,000, the court-martial may find a value of more than $1,000." *Id.*

The maximum punishment for property other than military property of a value of more than $1,000 is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years. *MCM*, pt. IV, ¶ 64.d.(1)(c).

C. Analysis

We agree with Appellant that there is a substantial basis to question whether the value of the stolen property was "about $21,300.00" as charged. To that extent, we find the military judge erred in accepting Appellant's plea to the specification as drafted. After the military judge reopened the providence inquiry following the introduction of Defense Exhibit N, he shifted his focus to establishing: (1) the jewelry was at least valued at more than $1,000.00; and (2) that Appellant desired to continue to plead guilty to the charged offense. We also note that both government and trial defense counsel did not argue that Defense Exhibit N called into question the providence of Appellant's plea. That said, it is questionable to this court whether the military judge ever resolved whether there was an inconsistency between Appellant's guilty plea and the information contained in Defense Exhibit N as to the value of the stolen jewelry.

To remedy this error, Appellant asks this court to set aside the findings and sentence. However, we find that remedy unwarranted. We conclude that based on the record before us, we can affirm the finding of guilty to the specification by exceptions and substitutions. *See United States v. English,* 79 M.J. 166, 122 n.5 (C.A.A.F. 2019) (Courts of Criminal Appeals (CCA) may affirm a conviction by exceptions and substitutions when it narrows the finding on appeal); *United States v. Hale*, 77 M.J. 598, 607 (A.F. Ct. Crim. App. 2018), *aff'd*, 78 M.J. 268 (C.A.A.F. 2019) (Article 66(d), UCMJ, 10 U.S.C. § 866(d), provides service CCAs the authority to make exceptions and substitutions to the findings on appeal, "so long as [they] do not amend a finding on a theory not presented to the trier of fact" (citations omitted)). Here, the record establishes that following the admission of Defense Exhibit N, Appellant's intention to continue with her plea of guilty remained. The record also establishes that under any scenario presented during Appellant's guilty plea that the value of the stolen jewelry was substantially in excess of $1,000.00. Additionally, the military judge confirmed this fact with Appellant when he reopened the providence inquiry. Therefore, we affirm the findings here by excepting the words and figures "about $21,300.00" and substituting therefor the words "more than $1,000.00."

To be clear, we amend and affirm only so much of the finding of guilty of the lone specification as finds that:

> In that STAFF SERGEANT ANN R. MARIN PEREZ, 436th Logistics Readiness Squadron, Dover Air Force Base, Delaware, did, within the continental United States, between on or about 24 February 2023 and on or about 11 March 2023, steal jewelry, of a value of more than $1,000.00, the property of [NM].

As a final matter, we consider the need to reassess Appellant's sentence after having modified the finding of which Appellant was convicted. This court has "broad discretion" first to decide whether to reassess a sentence, and then to arrive at a reassessed sentence. *United States v. Winckelmann*, 73 M.J. 11, 15 (C.A.A.F. 2013). We may reassess a sentence only if able to reliably determine that, absent the error, the sentence would have been "at least of a certain magnitude." *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000) (citing *United States v. Jones*, 39 M.J. 315, 317 (C.M.A. 1994)).

Our review is guided by the following factors: (1) whether there has been a dramatic change in the penalty landscape or exposure; (2) whether sentencing was by members or a military judge alone; (3) whether the nature of the remaining offenses captures the gravamen of criminal conduct included within the original offenses and whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses; and (4) whether the remaining offenses are of the type with which appellate judges should have the experience and familiarity to reliably determine what sentence would have been imposed at trial. *Winckelmann*, 73 M.J. at 15–16. These factors are "illustrative, but not dispositive, points of analysis" to be considered as part of "the totality of the circumstances presented." *Id.* at 15.

Applying these principles to the totality of the circumstances, we are confident we can reassess Appellant's sentence. Given the nature of Appellant's remaining conviction, we are confident that Appellant would have received the same sentence: a sentence of at least a bad-conduct discharge, confinement for 4 months, and reduction to E-1.

III. CONCLUSION

We affirm the findings of guilty to the Charge and its Specification, by excepting the words and figures "about $21,300.00," and substituting therefor the words "more than $1,000.00." 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.)). In addition, 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