June 22, 2022

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

KATELYN L. DAY,
Airman First Class (E-3), USAF
Appellant

Crim. App. No. 39962

USCA Dkt. No. 22-0122/AF

BRIEF ON BEHALF OF APPELLANT

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ISSUE PRESENTED

WHETHER ATTEMPTED CONSPIRACY, "A CREATURE UNKNOWN TO FEDERAL LAW," IS A VIABLE OFFENSE UNDER THE UCMJ.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals ("Air Force Court") had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866.[1] This Honorable Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867.

STATEMENT OF THE CASE

On April 2 and July 22-23, 2020, at Barksdale Air Force Base, Louisiana, a military judge sitting as a general court-martial accepted Appellant A1C Katelyn L. Day's guilty plea to attempted wrongful possession of fentanyl, attempted murder of TD, and two specifications of attempted conspiracy to murder TD, in violation of Article 80, UCMJ, 10 U.S.C. § 880; as well as two specifications of solicitation (one soliciting the commission of murder and one soliciting SP to find someone to

[1] Unless otherwise stated, all references to the UCMJ and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.) [2019 *MCM*].

commit murder), in violation of Article 82, UCMJ, 10 U.S.C. § 882. (JA at 17–22, 166, 192.) The military judge sentenced A1C Day to 10 years' confinement, reduction to E-1, and a dishonorable discharge.[2] (JA at 202.) The convening authority took no action on the findings or sentence. (JA at 52.) On January 5, 2022, the Air Force Court affirmed the findings and sentence. (JA at 16.) On May 23, 2022, this Honorable Court granted review. *United States v. Day*, 2022 CAAF LEXIS 385 (C.A.A.F. May 23, 2022).

STATEMENT OF FACTS

1. Background

A1C Day met TD in 2017 while they were in outpatient mental health treatment. (JA at 53.) They began a relationship shortly thereafter; however, unbeknownst to A1C Day, TD remained in a

[2] The military judge sentenced A1C Day to the following terms of confinement: 1 year for attempted fentanyl possession (Specification 1 of the Charge); 10 years for attempted premeditated murder (Specification 2 of the Charge); 10 years for attempted conspiracy to commit premeditated murder with JM (Specification of the Additional Charge) and 8 years for attempted conspiracy to commit premeditated murder with TL (Specification of the Second Additional Charge); 8 years for soliciting JJ to commit premeditated murder (Specification 1 of Additional Charge II) and 5 years for soliciting SP to find someone to commit premeditated murder (Specification 2 of Additional Charge II). (JA at 202.) All sentences were adjudged to run concurrently. (*Id.*)

separate relationship with JM. (*Id.*) A1C Day and TD married approximately two months later. (*Id.*) Within weeks of her marriage, A1C Day discovered that JM and TD were expecting a child. (JA at 54.) JM and A1C Day became friends and later discussed how TD played a limited role in JM's daughter's life, only becoming involved at TD's mother's direction. (JA at 55, 100–01.)

By March 2018, A1C Day and TD were expecting a baby. (JA at 42.) While A1C Day was thrilled, TD and his family were upset. (*Id.*) After her son arrived, A1C Day grew increasingly anxious about TD's commitment and abilities as a parent. (JA at 197–98.) A1C Day grew up with a strained and distant relationship with her biological father, for whom she never seemed good enough. (JA at 194–95.) She feared that her son "would grow up feeling as unlovable and neglected as [she] had." (JA at 197–98.) Numerous issues in the marriage, including their son, led to the couple's separation in March 2019. (JA at 54, 197.) Under Louisiana law, the couple had to remain separated for one year before divorcing. (JA at 54.) During their separation, A1C Day struggled financially to support her son, as TD often failed to pay child support. (*Id.*)

2. JM and the Sting Operation

In October 2019, JM and A1C Day discussed TD's failings over Facebook Messenger. (JA at 100–03.) After JM said she hated TD, A1C Day responded "[h]ave someone kill him hahah then we [won't] have to deal anymore. I'll give you half his insurance money." (JA at 55, 76–77.) A1C Day went on to explain that she still had life insurance for TD while they remained legally married. (JA at 77–78.)

On December 15, 2019, the Air Force Office of Special Investigations (AFOSI) interviewed JM and recruited her to participate in a sting operation. (JA at 60.) In a renewed conversation over Facebook Messenger, JM asked "what's up on that hitman? Haha [laughing emoji]." (JA at 60, 116.) After JM asked if A1C Day was serious, A1C Day responded "are you for real[?] You wouldn't even joke about it with me before." (JA at 117.) When JM asked A1C Day's plan, A1C Day explained that "the last thought I had was to drug him but that was just fleeting. There's no way I could do anything . . . . I don't have a way to get anything like that and [I don't know] how to go about any of it so I haven't thought about it since I first ma[d]e the offhanded[] joke." (JA at 118.) The conversation shifted to Snapchat, where JM said she could

obtain "some stuff." (JA at 128.) They discussed the logistics at length. (JA at 126–46.)

The two met in Ruston, Louisiana, on December 18, 2019. (JA at 63.) A1C Day paid JM $100 for "fentanyl," which JM described as "like a tranquilizer." (*Id.*) A1C Day did not know the specific type of controlled substance until that day. (JA at 64.) AFOSI provided the actual substance, which was not fentanyl. (*Id.*) JM instructed A1C Day how to use gloves and a mask to handle the substance, and where to store it. (JA at 64–65.) AFOSI surveilled the transaction and recorded their conversation, then executed a search authorization at A1C Day's home that night, finding the purported fentanyl in her freezer. (JA at 66, 147–51, 203.) AFOSI interviewed A1C Day late into that night, extracting admissions during a more than four-hour interview that stretched until after 0030 hours. (JA at 67–68.) A1C Day's commander placed her in pretrial confinement shortly thereafter. (JA at 68.)

3. Preliminary Hearing and Referral

At the initial preliminary hearing, the Government asked the preliminary hearing officer (PHO) to investigate additional misconduct, to include conspiracy with JM to commit premeditated murder. (JA at

36–37.) The PHO recommended against preferring that charge because there was no agreement between JM and A1C Day, as JM was working for law enforcement at the time. (JA at 36–37, 40.)

The Government instead preferred a charge of *attempted* conspiracy with JM to commit premeditated murder. (JA at 19.) The same PHO was appointed to review the new charges and specifications. (JA at 46.) The PHO found that attempted conspiracy is not an offense under the UCMJ and noted that case law supporting attempted conspiracy predated the establishment of a general solicitation statute. (JA at 42–43.) The Staff Judge Advocate disagreed (without analysis) in his pretrial advice, and the convening authority referred the attempted conspiracy specification. (JA at 47–48.) Just before trial, the Government added a second attempted conspiracy charge, this time with TL. (JA at 21–22.) A1C Day waived the statutory waiting period and her right to a new preliminary hearing. (JA at 163–65.)

4. The Specification of Attempted Conspiracy with TL

TL was A1C Day's friend. (JA at 170.) The attempted conspiracy specification involving TL alleged two overt acts: A1C Day (1) "did agree to pay some amount of money to [TL] for lessons on how to fatally poison

a human with drugs"; and, (2) "did purchase a substance she believed to be Fentanyl which she intended to use to murder [TD]." (JA at 21.) During the *Care* inquiry, A1C Day explained that she set up a payment method and planned to speak with TL about using poison, but that she never actually paid him or met with him. (JA at 170–74.) When asked about the step that was "more than mere preparation," A1C Day responded:

> It went further than just mere preparation because we had set up a payment method options and we had talked about the days and times of when we could be available and we were both willingly, you know, going through with this agreement that we had previously made. We just couldn't find the time, you know, around the holidays we were both busy.

(JA at 174.) A1C Day later explained that she called TL several times around December 16-18, 2019, but she never spoke with him on those days. (JA at 156, 175.)

The military judge was "not persuaded" that the second overt act—that A1C Day "did purchase a substance she believed to be fentanyl which she intended to use to murder [TD]"—was an overt act for "this particular attempt to conspire." (JA at 174.) The military judge ultimately excepted that language from the guilty finding because it

appeared A1C Day's purchase of fake fentanyl was part of a separate plan with JM, and not with TL. (JA at 175–76, 192.)

5. Plea Agreement and Colloquy

A1C Day's plea agreement stated that she agreed:

> To waive all motions that are waivable under current legal precedent and public policy. In accordance with R.C.M. 705(c)(1)(B), however, I understand I am not waiving the right to counsel, the right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to complete sentencing proceedings and complete and effective exercise of post-trial and appellate rights[.]

(JA at 158.) The military judge discussed the plea agreement with A1C Day, stating the following in reference to a "waive all waivable motions" provision:

> [Military Judge]: The plea agreement also states that you waive or give up all waivable motions. I do advise you that certain motions are waived and are given up and actually set forth in some specificity in 2(c) as well. Some of these could be motions to dismiss for lack of jurisdiction or failure to state an offense, those could not be waived. Do you understand that this term of your plea agreement means you give [up] the right to make any motion which by law is given up when you plead guilty?
>
> [A1C Day]: Yes, Your Honor.

(JA at 187.)

A1C Day pleaded guilty to all charges and specifications at her court-martial. (JA at 166.) This included attempted murder of TD, attempted possession of fentanyl, one specification of attempted conspiracy to commit murder with TL and another specification with JM, soliciting JJ to murder TD, and soliciting SP to find someone to commit murder. (JA at 23–25.)

6. The Air Force Court's Opinion

In an unpublished opinion, the Air Force Court affirmed the findings and sentence. (JA at 16.) Relevant to the issues here, the Air Force Court found clear and obvious error when the military judge told A1C Day that she could not waive a motion for failure to state an offense. (JA at 12.) The Air Force Court assumed waiver for the purpose of analysis, and decided to pierce any waiver to address the issue. (*Id.*) It then held that attempted conspiracy is a valid charging mechanism. (*Id.*)

SUMMARY OF THE ARGUMENT

A1C Day stands convicted of attempted conspiracy, "a creature unknown to federal criminal law." *United States v. Yu-Leung*, 51 F.3d 1116, 1122 n.3 (2d Cir. 1995). In its divided opinion in *United States v. Riddle*, this Court recognized attempted conspiracy as an offense under

the UCMJ. 44 M.J. 282, 285 (C.A.A.F. 2016). A key justification was that the Code then lacked a general solicitation statute or a conspiracy statute that embodied the unilateral theory of conspiracy; this Court even cited authority stating attempted conspiracy is *unnecessary* where either exists. *Id.* at 285 n.* (citing Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 91 (1989)). In *United States v. Valigura*, 54 M.J. 187, 190 (C.A.A.F. 2000), this Court rejected the unilateral theory of conspiracy, explicitly following the federal view. However, military law remained divergent from federal practice with regard to "attempted conspiracy." In 2016, after Congress revised Article 82 to become a general solicitation statute, the basis for *Riddle*'s earlier embrace of attempted conspiracy dissolved. This case presents the opportunity to mend the ongoing breach with federal law.

"Attempted conspiracy" is an unnecessary double inchoate offense that yields nothing but confusion. Article 36, UCMJ, infers that the Code should follow a well-established interpretation of a federal criminal statute, absent a reason not do to so. *Valigura*, 54 M.J. at 191. If a reason ever existed, it no longer does today. Federal law, in rejecting the unilateral theory of conspiracy, explicitly rejected conspiracies of one, as

did this Court. The same rationale applies to attempted conspiracy. Beyond synchronizing with federal practice, numerous other reasons support the rejection of attempted conspiracy: the underlying conduct is still subject to sanction under the UCMJ; the "nonsensical" formulation strains the already-challenging intersection of inchoate offenses; and the charging mechanism is dubious in application, as TL's specification indicates.

A1C Day did not waive this issue. The military judge completely misstated R.C.M. 907—telling A1C Day the pre-2016 state of the law—when he informed her that she could not waive a failure to state an offense claim. The Air Force Court held this was clear and obvious error. (JA at 12.) As a result, A1C Day did not intentionally relinquish a known right. Moreover, A1C Day *could not* waive her failure to state an offense claim, the President's interpretation in the Rules for Courts-Martial notwithstanding. While the Supreme Court has stated the omission of elements in an indictment is nonjurisdictional,[3] this is distinct from a specification that states a non-offense.

[3] *United States v. Cotton*, 535 U.S. 625, 631 (2002).

This Honorable Court should hold the issue is not waived and conclude that attempted conspiracy is not an offense under the UCMJ.

ARGUMENT

ATTEMPTED CONSPIRACY, "A CREATURE UNKNOWN TO FEDERAL LAW," IS NOT A VIABLE OFFENSE UNDER THE UCMJ.

Standard of Review

Acceptance of a guilty plea is reviewed for an abuse of discretion, which is found when a military judge accepts a plea without an adequate factual basis. *United States v. Inabinette*, 66 M.J. 320, 321 (C.A.A.F. 2008). However, "the military judge's determinations of questions of law arising during or after the plea inquiry are reviewed de novo." *Id.*

Law

1. Attempt

Article 80, UCMJ, defines an attempted offense as "[a]n act, done with specific intent, to commit an offense . . . amounting to more than mere preparation and tending, even though failing, to effect its commission." The elements include:

(1) That the accused did a certain overt act;

(2) That the act was done with the specific intent to commit a certain offense under the UCMJ;

> (3) That the act amounted to more than mere preparation; and
>
> (4) That the act apparently tended to effect the commission of the intended offense.

MCM, pt. IV, ¶4.b. "More than mere preparation" requires that the accused take a "substantial step" toward committing the crime. *United States v. Payne*, 73 M.J. 19, 24 (C.A.A.F. 2014) (citation omitted). Yet the line between mere preparation and a substantial step is "elusive." *United States v. Winckelmann*, 70 M.J. 403, 407 (C.A.A.F. 2011). Attempt goes beyond "devising or arranging the means or measures necessary for the commission of the offense" and, instead, means engaging in a "direct movement toward the commission after the preparations are made." *United States v. Hale*, 78 M.J. 268, 271–72 (C.A.A.F. 2019) (quoting *United States v. Schoof*, 37 M.J. 96, 103 (C.M.A. 1993)). In *Winckelmann*, this Court explained the contours of a substantial step:

> Federal courts of appeals have defined a "substantial step" as "more than mere preparation, but less than the last act necessary before actual commission of the crime." We have adopted a similar approach. . . . Accordingly, the substantial step must "unequivocally demonstrat[e] that the crime will take place unless interrupted by independent circumstances."

70 M.J. at 407 (citations omitted) (second alteration in original).

2. Conspiracy

Conspiracy rests on the notion that a collective criminal agreement "poses distinct dangers quite apart from those of the substantive offense." *Iannelli v. United States*, 420 U.S. 770, 778 (1975). Yet the "modern crime of conspiracy is so vague that it almost defies definition." *Krulewitch v. United States*, 336 U.S. 440, 446 (1949) (Jackson, J., concurring). While it contains essential elements, it also, "chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid." *Id.* at 446–47. It is always "'predominantly mental in composition' because it consists primarily of a meeting of minds and intent." *Id.* at 447–48.

> Under the UCMJ, conspiracy contains the following elements:
>
> (1) That the accused entered into an agreement with one or more persons to commit an offense under the UCMJ; and
>
> (2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the coconspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

MCM, pt. IV, ¶5.b.(1). The overt act "must be independent of the agreement to commit the offense; must take place at the time of or after the agreement; must be done by one or more of the conspirators, but not

necessarily the accused; and must be done to effectuate the object of the agreement." *Id.* ¶5.b.(4)(a).

A party to the conspiracy who withdraws *before* an overt act is not guilty of conspiracy. *Id.* ¶5.b.(6). A conspirator who withdraws from the conspiracy *after* an overt act remains liable for offenses pursuant to the conspiracy until the moment of withdrawal, but not for offenses committed after withdrawal. *Id.*

3. A Double Inchoate Offense: Attempted Conspiracy

"Attempted conspiracy" is "a creature unknown to federal criminal law." *Yu-Leung*, 51 F.3d at 1122 n.3. Federal courts follow the bilateral approach to conspiracy, which holds that "unless at least two people commit the act of agreeing, no one does." *See United States v. Harris*, 733 F.2d 994, 1005 (2d Cir. 1984).[4] However, years ago in *Riddle*, this Court determined that attempted conspiracy was a viable offense under the UCMJ. 44 M.J. at 285. This Court offered three justifications: (1) Article

[4] *See also Rogers v. United States*, 340 U.S. 367, 375 (1951) ("at least two persons are required to constitute a conspiracy"); *United States v. Vallee*, 807 F.3d 508, 522 (2d Cir. 2015) ("We have taken a bilateral approach to the crime of conspiracy: at least two people must agree."); *United States v. Dumeisi*, 424 F.3d 566, 580 (7th Cir. 2005) ("[T]he elements of the crime of conspiracy are not satisfied unless one conspires with at least one true co-conspirator." (citation and internal punctuation omitted)).

80, UCMJ, uses broad language; (2) no statute or case law precluded application of attempts to conspiracy; and, (3) "conviction of an attempt under Article 80 is particularly appropriate where there is no general solicitation statute in the jurisdiction or a conspiracy statute embodying the unilateral theory of conspiracy." *Id.* Elaborating on the third point in a footnote, this Court stated that "[t]he double inchoate offense of attempt to conspire is unnecessary in those jurisdictions that have adopted either a solicitation statute, a conspiracy statute that embodies the unilateral theory of conspiracy, or both." *Id.* at 285 n.* (citation omitted). *Riddle* observed that "[t]here is no general solicitation statute in the military and this jurisdiction has not as yet adopted a unilateral approach to its conspiracy statute." *Id.* (citations omitted).

This Court later answered the bilateral vs. unilateral question in *Valigura*, 54 M.J. at 191. *Valigura* involved a servicemember who sold drugs to a military investigator. *Id.* at 188. This Court rejected the unilateral theory of conspiracy, opining that "if one person is only feigning a criminal purpose and does not intend to achieve the purported purpose, there is no conspiracy." *Id.* However, this Court affirmed the

conviction as the lesser included offense of attempted conspiracy. *Id.* at 191–92.

Much later, as part of the Military Justice Act of 2016, Congress modified the solicitation statute under Article 82 to become a general solicitation statute, rather than one focused on specific offenses.[5] *See MCM*, App. 17, at A17-1; *compare* Article 82, UCMJ, 10 U.S.C. § 882 (2016) *with* Article 82, UCMJ, 10 U.S.C. § 882 (2019).

Under Article 36(a), UCMJ, 10 U.S.C. § 836(a), the President, in prescribing regulations for procedures and modes of proof, "shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." "Even though Article 36 is principally concerned with 'procedures' and 'rules of evidence,' it can be inferred that, unless there is a reason not to do so, an interpretation of a provision of the [UCMJ] should follow a well-established interpretation of a federal criminal statute concerning the same subject." *Valigura*, 54 M.J. at 191.

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[5] Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5403, 130 Stat. 2000 (2016), *as further amended by* National Defense Authorization Act for Fiscal Year 2018, Pub. Law. No. 115-91, § 1081(c)(1)(M), 131 Stat. 1283 (2017).

4. Waiver

"[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) (citation and internal quotation marks omitted). Before May 2016, failure to state an offense was not subject to waiver even if a defense counsel failed to file a timely motion. R.C.M. 905(b)(2), (e) (2016 *MCM*); *see also United States v. Schweitzer*, 68 M.J. 133, 136 (C.A.A.F. 2009) (a "guilty plea does not waive the defect of a specification that fails to state an offense" (internal quotation marks and citations omitted)), *superseded by rule as stated in United States v. Thomas*, ARMY 20150205, 2016 CCA LEXIS 551 (A. Ct. Crim. App. September 9, 2016) (memorandum opinion). However, in 2016, the President amended R.C.M. 907 to make it explicit that failure to state an offense is nonjurisdictional and waivable. *See* R.C.M. 907(b)(2)(E) (2016 *MCM*); *United States v. Sanchez*, 81 M.J. 501, 504 (A. Ct. Crim. App. 2021).

Analysis

A1C Day stands before this Court convicted of two specifications of attempted conspiracy. These specifications fail to state an offense and this Court should set each aside.

1. Congress's creation of a general solicitation statute undermined the necessity for "attempted conspiracy."

In *Riddle*, this Court recognized attempted conspiracy as an offense under the UCMJ. 44 M.J. at 285. This Court pointed to the breadth of Article 80, the absence of a statute or case barring the application of attempt to conspiracy, and the fact that the UCMJ lacked either a general solicitation statute or a conspiracy statute based on a unilateral theory of conspiracy. *Id.* The first two points only demonstrate the lack of an affirmative bar to attempted conspiracy; they do not answer the question of whether, as a matter of substantive criminal law, it is viable to charge the double inchoate offense of attempted conspiracy. It is the third point, which goes to the necessity of "attempted conspiracy," on which this brief will focus.

Congress's revisions to the solicitation statute have undercut a key rationale for *Riddle*'s holding; in a way, *Riddle* prophesized the demise of attempted conspiracy when it explained the steps to render the offense unnecessary. This Court stated that the "double inchoate offense" of attempted conspiracy is particularly appropriate where a jurisdiction lacks a general solicitation statute or a conspiracy statute based on a unilateral theory of conspiracy. *Riddle*, 44 M.J. at 285 & n.*. It also

noted authority that stated: "The double inchoate offense of attempt to conspire is *unnecessary* in those jurisdictions that have adopted either a solicitation statute, a conspiracy statute that embodies the unilateral theory of conspiracy, or both." *Id.* at n.* (emphasis added) (citing Robbins, 26 HARV. J. ON LEGIS. at 91).

In 1996 (when this Court decided *Riddle*), there was no general solicitation statute and this Court had not decided whether conspiracy under the UCMJ rested on a unilateral or bilateral theory. *Id.* However, in 2000, this Court recognized that conspiracy under the UCMJ requires an actual meeting of the minds and thus operates on a bilateral theory. *Valigura*, 54 M.J. at 190. In so doing, this Court explained that it was following the federal approach. *Id.* at 190–91.

In 2016, Congress modified the solicitation offense under Article 82 to become a general solicitation statute, rather than one focused on specific offenses. *Compare* Article 82, UCMJ, 10 U.S.C. § 882 (2016) *with* Article 82, UCMJ, 10 U.S.C. § 882 (2019).[6] Thus, a key rationale in

[6] Before Congress's revisions to Article 82, solicitation was also a crime under Article 134, UCMJ, 10 U.S.C. § 934 (2016). However, this was also true in 1996 when *Riddle* stated that there was no general solicitation statute. *MCM* (1995 ed.), pt. IV, ¶105; 44 M.J. at 285 n.*. The Article

Riddle for endorsing attempted conspiracy has disappeared. Because *Riddle* stated that attempted conspiracy has diminished appropriateness, or is unnecessary, where a jurisdiction has a general solicitation statute, that case no longer compels the approval of attempted conspiracy. Given this erosion of a key pillar in *Riddle*, the question is not limited to whether attempted conspiracy is "unnecessary"; rather, it is also whether "attempted conspiracy" states an offense under the UCMJ.

2. The UCMJ need not diverge from established federal practice.

Conspiracy is the "darling of the modern prosecutor's nursery." *Harrison v. United States*, 7 F.2d 259, 263 (2d. Cir. 1925) (L. Hand, J.). It "has long been criticized as vague and elastic, fitting whatever a prosecutor needs in a given case." *Ocasio v. United States*, 578 U.S. 282, 316 (2016) (Thomas, J., dissenting) (citing *Krulewitch*, 336 U.S. at 445–57 (Jackson, J., concurring)). Despite the facial clarity of its

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134 offense of solicitation required the terminal element (either disorders and neglects prejudice to good order and discipline or service discrediting conduct), while the new Article 82 does not. A further distinction is that solicitation under Article 134 is a Presidentially-identified offense, while Congress created the new, broader solicitation offense under Article 82.

elements, it is "chameleon-like," taking on a "special coloration from each of the many independent offenses on which it may be overlaid." *Krulewitch*, 336 U.S. at 447 (Jackson, J., concurring). The crime is "predominantly mental." *Id* at 447–48.

The concerning nature of conspiracy's scope begs the question of why the UCMJ diverges from federal practice to embrace the even more amorphous concept of an attempted conspiracy. As noted, attempted conspiracy is a "creature unknown to federal criminal law." *Yu-Leung*, 51 F.3d at 1122 n.3.[7] When this Court explicitly embraced the federal approach of bilateral conspiracy, *Valigura*, 54 M.J. at 190–91, the natural corollary would be to embrace the federal approach barring attempted conspiracy. This Court declined to do so, affirming the lesser-included

[7] Searches for "attempted conspiracy" or "attempt to conspire" yield a very small number of state cases embracing this construction. *See, e.g.*, *State v. Baker*, 250 Neb. 896, 898 (Neb. 1996). Other states have specifically rejected this construction. *See Hutchinson v. State,* 315 So. 2d 546, 549 (Fla. Dist. Ct. App. 1975) (holding Florida law does not recognize a crime of "attempted conspiracy," but rather prohibits such conduct as "solicitation"), *overruled on other grounds by Gentry v. State*, 422 So. 2d 1072 (Fla. Dist. Ct. App. 1982). Given the low number of military cases relative to state and federal court cases, military cases are heavily overrepresented in search results.

offense of attempted conspiracy. Two reasons explain this decision. First, the certified question did not challenge the validity of attempted conspiracy generally. *See id.* at 188.[8] Second, at the time, there remained no general solicitation statute in the military. *Riddle*, 44 M.J. at 298 n.*.

The new solicitation statute means this Court can, consistent with its opinion in *Riddle*, invalidate attempted conspiracy and align military and federal practice. As this Court explained in *Valigura*, Article 36(a) carries with it an inference that, "unless there is a reason not to do so, an interpretation of a provision of the [UCMJ] should follow a well-established interpretation of a federal criminal statute concerning the same subject." 54 M.J. at 191. Now is the opportunity to correct the discrepancy between federal and military law.

Aligning the two makes particular sense in light of this Court's embrace of the bilateral approach to conspiracy.[9] The animating

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[8] *See also United States v. Guinn*, 81 M.J. 195, 205 (C.A.A.F. 2021) (Maggs., J., concurring) (explaining the principal of "party presentation," which requires the parties to raise an issue to a court before that court may consider it).

[9] In the Supplement to the Petition for Grant of Review, Appellant suggested that *Valigura*'s recognition of the bilateral approach undercut *Riddle*'s rationale for attempted conspiracy. (Supplement to Petition for

rationale for the bilateral approach is that "[a] conspiracy is an agreement between two or more people to commit an unlawful act, and there is no real agreement when one 'conspires' to break the law only with government agents or informants."[10] *United States v. Barboa,* 777 F.2d 1420, 1422 (10th Cir. 1985). Another federal circuit, holding that the hearsay exception for co-conspirator statements is inapplicable when "conspiring" with law enforcement, stated that it "join[s] the unanimous lineup of our sister circuits" in holding the exception "is not brought into play by the sound of just one lawbreaker's hand clapping." *Mahkimetas*, 991 F.2d at 383.

Grant of Review at 9, USCA Dkt. No. 22-0122, March 17, 2022.) While embracing the bilateral theory would seemingly strengthen one of *Riddle*'s rationales—the lack of a unilateral theory—A1C Day maintains that adopting the bilateral theory actually cuts *against* attempted conspiracy. This is because, as developed below, the same arguments against "conspiracies of one" that federal courts use to reject the unilateral theory also resonate in rejecting "attempted conspiracy," another variation of the "conspiracy of one."

[10] For specifications involving attempted conspiracy with a law enforcement agent or informer, like JM, there is a "different and significant risk: that of the manufacturing of crime which might occur if the mere presence of government agents could create indictable conspiracies." *United States v. Mahkimetas*, 991 F.2d 379, 383 (7th Cir. 1993) (internal quotation marks and citation omitted).

The concerns regarding conspiracy with law enforcement resonate in all situations with attempted conspiracy: attempted conspiracy should not come into one play by the "sound of just one lawbreaker's hand clapping." *Id.* A key "risk of conspiracy" is "that of concerted action shrouded in secrecy." *Id.* (citing *United States v. Escobar de Bright*, 742 F.2d 1196, 1199–1200 (9th Cir. 1984)). With JM, this risk disappeared because she was actively working for law enforcement. In a similar fashion, the risks of conspiracy diminish when an individual tries, and fails, to enter a conspiracy with an individual outside law enforcement. This failed conspiracy is also a conspiracy of one that does not warrant the manufactured offense of attempted conspiracy. The Government may simply have to charge only the target offense, or the target offense and solicitation. This case demonstrates that the Government has ample charging options, to include solicitation, which it used for other specifications to which A1C Day pleaded guilty. (JA at 23–25.)

Granted, the federal circuits have not spoken with the same clarity about conspiracies with persons unrelated to law enforcement as they

have about conspiracies with agents or informants.[11] But the absence of cases likely results from the blanket refusal to resort to "attempted conspiracy" as a charging theory. The recognition of the bilateral theory necessarily embraces the notion that true agreement is the *sine qua non* of conspiracy. The absence of agreement—either with law enforcement or with a non-willing potential conspirator—means the charge of conspiracy fails. Stated differently, the federal courts have not responded to one-party conspiracies by embracing attempt. This Court should adopt the same approach.

3. The Government may still charge the underlying misconduct without "attempted conspiracy."

Because solicitation is available to capture the same conduct, the fiction of "attempted conspiracy" evaporates. *United States v. Anzalone*, 43 M.J. 322, 326 (C.A.A.F. 1995) (Gierke, J., concurring in the result)

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[11] *See, e.g.*, *United States v. Leal*, 921 F.3d 951, 959 (10th Cir. 2019) ("Although two or more people must agree to form a conspiracy, an informant cannot count toward that requirement: There can be no indictable conspiracy involving only the defendant and government agents or informers." (citation and internal punctuation marks omitted)); *United States v. Garner*, 915 F.3d 167, 170 (3d Cir. 2019) (no liability for conspiring with government informant); *United States v. Wenxia Man*, 891 F.3d 1253, 1265 (11th Cir. 2018) (same); *United States v. Brown*, 879 F.3d 1043, 1048 (9th Cir. 2018) (no liability for conspiring with federal agent or informant).

(citing J. DRESSLER, UNDERSTANDING CRIMINAL LAW § 28.01 at 368 (Matthew Bender 1994 Reprint) ("Solicitation is an attempted conspiracy."); W. LAFAVE AND A. SCOTT, 2 SUBSTANTIVE CRIMINAL LAW § 6.1(b) at 6 (1986) ("Solicitation may, indeed, be thought of as an attempt to conspire.")). In *Valigura*, this Court recognized that, though it disagreed with Judge Gierke on the viability of attempted conspiracy, solicitation would capture the same conduct under his theory. 54 M.J. at 191 n.6. Moreover, even if the evidence failed to suffice for a conspiracy or for solicitation, this in no way undermines the charging of the target offense. Here, A1C Day remains convicted of attempted murder. The question is whether the law supports charging her with the additional offense of attempted conspiracy when a key element—either agreement (JM) or overt act (TL) is absent. It does not.

4. Myriad problems flow from the "nonsensical" formulation of attempted conspiracy.

The intersection of inchoate offenses can require significant mental gymnastics. Indeed, previous members of this Court have questioned the logic behind stacking inchoate offenses. Chief Judge Cox, dissenting in part and concurring in part in *Riddle*, labeled attempted conspiracy "nonsensical" and expressed the problems thusly:

> How does one attempt to conspire? Since the essence of conspiracy is a criminal agreement, is it that one strains to reach an agreement with somebody, but fails? Is that what happened here? And if conspiracy and attempts are both inchoate crimes, but conspiracy "attacks inchoate crime at a far more incipient stage" than attempts, how did attempts suddenly leap ahead of conspiracy again? Does this mean we will soon be seeing charges of conspiring to attempt to conspire to commit an offense--to be followed by attempting to conspire to attempt to conspire to commit an offense, *ad infinitum*[?]

44 M.J. at 288–89 (Cox, C.J., dissenting in part and concurring in part).

Framing the problem slightly differently, if an attempt requires a substantial step towards commission of the offense, what does it mean to take a substantial step towards an overt act? If a substantial step is "more than mere preparation,"[12] but an overt act in furtherance of a conspiracy requires less than a substantial step,[13] the interaction between the two becomes unclear.

Additionally, attempted conspiracy places severe strain on the well-established concept of withdrawal from a conspiracy. The President's guidance for Article 81, UCMJ, 10 U.S.C. § 881, suggests that a "party to the conspiracy who withdraws before an overt act is not guilty of

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[12] *Payne*, 73 M.J. at 24.

[13] *See United States v. Stottlemire*, 28 M.J. 477, 479 (C.M.A. 1989).

conspiracy." *MCM*, pt. IV, ¶5.b.(6). A conspirator who withdraws from the conspiracy *after* an overt act remains liable for offenses pursuant to the conspiracy until the moment of withdrawal, but not for offenses committed after withdrawal. *Id.* If attempted conspiracy is available, can a conspirator withdraw? If all that is required is a substantial step towards the conspiracy, the offense is complete at an incipient stage in the criminal design. This could render withdrawal a dead concept because the Government can simply charge attempted conspiracy to capture the pre-withdrawal conduct. Alternatively, "withdrawal" might flow through the prism of voluntary abandonment under Article 80 attempts. *See MCM*, pt. IV, ¶4.c.(4) (allowing abandonment as a defense if the accused abandons the intended crime "solely because of the person's own sense that it was wrong"). The answers are unclear, and they betray an incongruity between conspiracy, as commonly understood, and the novel double inchoate offense of attempted conspiracy.

This also raises maximum punishment issues. Attempt allows for the same punishment as the target offense, with a cap of 20 years on all offenses except attempted murder. *Id.* ¶4.d. For conspiracy, most offenses carry the same maximum punishment as the target offense. *Id.*

¶5.d.(1). By contrast, the maximum penalty for solicitation is 10 years' confinement, or the maximum punishment for the underlying offense, whichever is less. *Id.* ¶6.d.(3). Presumably, the maximum punishment for attempted conspiracy would be that of the target offense (here attempted murder), as conspiracy itself carries no maximum punishment. By charging attempted conspiracy, instead of solicitation, the Government dramatically increased the available penalties. Notably, A1C Day received the *same* punishment for attempted murder and attempted conspiracy to commit murder (10 years' confinement), which also exceeded the punishments for solicitation to commit murder (8 years' confinement) and solicitation to find someone to commit murder (5 years' confinement). (JA at 23–25.)

In sum, the difficult-to-fathom nature of double inchoate offenses, inconsistency with common principles of conspiracy, and the potential maximum punishment inflation all demonstrate the folly of this charging mechanism.

5. The specification involving TL illustrates the challenges of charging attempted conspiracy.

While A1C Day understands this Court has chosen not to review the providence of her guilty plea to attempted conspiracy with TL, that

specification bears mentioning as it exemplifies the problems that flow from charging attempted conspiracy. The charging mechanism generates confusion about the substantial step and overt act. Unlike JM, who was working for law enforcement, TL actually *could* have conspired with A1C Day to murder TD. The overt act supporting the conspiracy was unclear because the fentanyl purchase related to the *other* conspiracy, leading the military judge to except the fentanyl purchase from the specification. All that remained was the *agreement* to pay TL for what was essentially poisoning lessons.[14]

"The substantial step must unequivocally demonstrat[e] that the crime will take place unless interrupted by independent circumstances." *Winckelmann*, 70 M.J. at 407 (alteration in original) (quotation marks and citation omitted). So what, then, is the substantial step towards conspiracy? Is it only the agreement? If that is true, the offense of attempted conspiracy allows the government to convict an accused with

[14] The overt act taken "in order to effect the object of the conspiracy," after the military judge's exceptions, became the following: that A1C Day did "agree to pay some amount of money to [TL] for lessons on how to fatally poison a human with drugs ~~and did purchase a substance that you believed to be Fentanyl which you intended to use to murder [TD]~~." (*See* JA at 25.)

no overt act, potentially transforming attempted conspiracy into thought crime. (*See* JA at 169 ("[T]he overt act must clearly be independent of the attempted agreement itself, that is, it must be more than merely the act or attempting to enter into the agreement or an act necessary to reach the agreement.").) Because the agreement to pay money was part of the conspiracy itself, it is not "clearly independent of the attempted agreement." Thus, it cannot represent: (1) the overt act required to effectuate the object of the conspiracy; or (2) the substantial step necessary for a provident plea, given that a "substantial step must be *conduct* strongly corroborative of the firmness of the defendant's criminal intent." *United States v. Byrd,* 24 M.J. 286, 290 (C.M.A. 1987) (emphasis added) (citations omitted).

In sum, T.L.'s specification offers a cautionary tale for the imprudence of relying on attempted conspiracy.

6. A1C Day did not waive this issue because the military judge informed her that failure to state an offense "could never be waived."

Under the current iteration of the Rules for Courts-Martial, the President has identified failure to state an offense as a waivable motion. *See* R.C.M. 907(b)(2)(E) (2019 *MCM*); *Sanchez*, 81 M.J. at 504. "Whereas

forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *Gladue*, 67 M.J. at 313 (citation and internal quotation marks omitted).

Here, A1C Day did not intentionally relinquish her right because, as the Air Force Court noted, the military judge committed plain and obvious error by misstating waivable motions under R.C.M. 907. (JA at 12.) During the discussion of waivable motions in her plea agreement, the military judge stated "[s]ome of these could be motions to dismiss for lack of jurisdiction or failure to state an offense, those could not be waived." (JA at 187.) The military judge announced the state of the law prior to 2016.

This Court's predecessor highlighted the critical importance of the military judge's colloquy on plea or pretrial agreements: "[T]he trial judge must shoulder the primary responsibility for assuring on the record that an accused understands the meaning and effect of each condition as well as the sentence limitations imposed by any existing pretrial agreement." *United States v. Green*, 1 M.J. 453, 456 (C.M.A. 1976) (citation omitted) (alteration in original). Finding waiver on these facts renders the military judge's erroneous advisement meaningless. A1C Day did not

articulate, in her own words, what she understood to be the legal parameters of her plea agreement; rather, she merely acknowledged she understood what the military judge told her. His error meant A1C Day's acceptance of that provision of the plea agreement did not waive the failure to state an offense. Consequently, this issue is not waived and plain error is the appropriate standard of review.

7. Despite R.C.M. 907, failure to state an offense is not waivable.

Not only did A1C Day not waive the issue, she *could not* waive the issue. Under Article 18(a), UCMJ, 10 U.S.C. § 818(a), a general court-martial has jurisdiction to try persons for offenses "made punishable by this chapter." If, as A1C Day asserts, the crime of "attempted conspiracy" does not exist under the UCMJ, her court-martial had no jurisdiction to convict her of that offense. "Assuming no constraints or limitations grounded in the Constitution are implicated, it is for Congress to determine the subject-matter jurisdiction of federal courts." *United States v. Denedo*, 556 U.S. 904, 912 (2009). The President's promulgation of R.C.M. 907, which purports to allow such waiver, exceeded his power under Article 36(a), UCMJ.

"Subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived," *Cotton*, 535 U.S. at 630, thus A1C Day raises the waivability of failure to state an offense for the first time before this Court. In *Cotton*, the indictment identified the amount of a drug as a "detectable amount," which fell below the threshold for the enhanced penalties he ultimately received. *Id.* at 627–28. The Supreme Court held that some omissions from the indictment that render it defective are nonjurisdictional and, thus, waivable. *Id.* at 630–31. But this principle applies to omitted elements of a specification, not a specification that fails to state *any* offense. This Court has essentially stated this point. *United States v. Humphries*, 71 M.J. 209, 213 (C.A.A.F. 2012) ("Moreover, the Supreme Court overtly reversed itself with respect to the effect on jurisdiction of indictments *that are defective because they fail to allege elements*." (emphasis added) (citing *Cotton*, 535 U.S. at 631–32)).

In *United States v. St. Hubert*, the United States Court of Appeals for the Eleventh Circuit addressed an appellant who challenged his guilty plea to a "non-offense" for the first time on appeal. 909 F. 3d 335, 340 (11th Cir. 2018). The Eleventh Circuit drew a distinction between

defective indictments—like in *Cotton*—and non-offenses. *Id.* at 343 (citing *United States v. Peter*, 310 F.3d 709, 715 (11th Cir. 2002)). As further support, the court noted the Supreme Court's "suggest[ion], albeit in dicta, that a claim that the facts alleged in the indictment and admitted by the defendant do not constitute a crime at all cannot be waived by a defendant's guilty plea because that kind of claim challenges the district court's power to act." *St. Hubert*, 909 F.3d at 343–44 (citing *United States v. Class*, 138 S. Ct. 798, 804–05 (2018)). Thus, the court concluded the failure to charge an offense was jurisdictional and non-waivable. *Id.* at 343.[15]

This Court, too, should view A1C Day's conviction for a non-offense as a non-waivable, jurisdictional defect. This case is much more like *St. Hubert*, where the appellant challenged his conviction for a non-offense for the first time on appeal, than *Cotton*, where the absence of a sentence-enhancing element did not strip the court of jurisdiction.

[15] Other circuits have criticized this reading of *Cotton*. *See, e.g.*, *United States v. De Vaughn*, 694 F.3d 1141, 1148 (10th Cir. 2012).

In sum, A1C Day did not waive the failure to state an offense issue during the plea colloquy. In fact, consistent with *Cotton* and *St. Hubert*, she could not.

8. Conclusion

The military judge's affirmative misstatement of the law means A1C Day did not intentionally relinquish or abandon a known right. *See Gladue*, 67 M.J. at 313. While conspiracy captures incipient criminal collaboration at an early stage, "attempted conspiracy" adds complexity through a double inchoate offense, diverges from federal law, and represents an unnecessary charging mechanism when solicitation is available, as noted by this Court in *Riddle* 26 years ago. A1C Day pleaded guilty to two specifications of attempted conspiracy that are no longer viable offenses under the UCMJ. This Honorable Court should dismiss each.

WHEREFORE, A1C Day respectfully requests this Honorable Court set aside and dismiss the Specification of the Additional Charge and the Specification of the Second Additional Charge.

Respectfully submitted,

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