August 1, 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

APPELLANT'S REPLY BRIEF

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 W. Perimeter Rd, Ste 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
U.S.C.A.A.F. Bar No. 36470
matthew.blyth@us.af.mil

Counsel for Appellant

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Pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, Airman First Class (A1C) Katelyn L. Day, the Appellant, hereby replies to the Government's Answer (Ans.) concerning the granted issue, filed on July 22, 2022.

ARGUMENT

The Government seeks resolution of this case through waiver or, alternatively, through the ostensibly plain language of Articles 80 and 81, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 880, 881. Following the first path requires this Court to ignore meaningful errors in the military judge's plea colloquy with A1C Day. Following the second requires this Court to ignore substantive criminal law on attempt and conspiracy. For the reasons expressed below, this Court should hold attempted conspiracy does not state an offense under the UCMJ.

1. The standard of review requires clarification.

A1C Day and the Government agree that this Court applies *de novo* review of whether a specification fails to state an offense. (Ans. at 14.) However, the Government asks this Court to view "defective specifications 'with maximum liberality'" when challenged for the first time on appeal. (Ans. at 14 (citing *United States v. Watkins*, 21 M.J. 208,

210 (C.M.A. 1986)).) *Watkins* involved absence without leave—"one of the simplest of all military offenses"—where the specification omitted the required language "without authority." 21 M.J. at 209–10 (citation omitted). The appellant pleaded guilty before a military judge, who correctly explained to him all the elements of the offense. *Id.* at 210. The Court of Military Appeals (CMA) explained its skepticism of such challenges raised for the first time on appeal. *Id.* It restated the prevailing federal rule, which required "substantial prejudice to the accused -- such as a showing that the indictment is 'so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had.'" *Id.* (quoting *United States v. Thompson*, 356 F.2d 216, 226 (2d Cir. 1965)[1]).

This Court recently discussed the scope of *Watkins* in *United States v. Turner*, 79 M.J. 401 (C.A.A.F. 2020). In *Turner*, this Court applied *Watkins* to "liberally construe" an attempted murder specification that used the term "kill" instead of "unlawfully kill" or "murder." 79 M.J. at 403, 406. This Court held: (1) the unlawfulness element was alleged by

[1] *Thompson*, like *Watkins*, involved the omission of an element from the specification. *Thompson*, 356 F.2d at 226 (discussing the omission of "intent to steal," which rendered the indictment defective).

necessary implication; and (2) that the record of trial made it clear there was no prejudice from any omission in the specification. *Id.* at 407.

While *Watkins* and *Turner* involve missing or incorrect language in the specification, A1C Day's case involves much more: no liberal construction of the specifications can transform attempted conspiracy into an offense. The Government elides this distinction in asking this Court to liberally construe the specification. A1C Day's point is that such liberal construction makes no difference where the specification, under any construction, charges a crime that does not exist under the UCMJ.

Watkins and *Turner* are further distinguishable on prejudice. Whether through a guilty plea (*Watkins*, 21 M.J. at 210) or through a litigated trial (*Turner*, 79 M.J. at 407), it was evident that the appellant understood the specification, despite the "technical" violation. By comparison, A1C Day can demonstrate substantial prejudice: she stands before this Court convicted of two non-offenses.

2. The Government's waiver analysis focuses on the plea agreement, but the military judge's misstatement of the law is the central issue.

The Government focuses extensively on the unconditional guilty plea and the "waive all waivable motions" provision of the plea

agreement. (Ans. at 16–21.) It highlights the importance of plea agreements to military justice. (Ans. at 17 (citing *United States v. Chin*, 75 M.J. 220, 226 (C.A.A.F. 2016) (Stucky, J., dissenting)).) A1C Day agrees with the Government on the value of plea agreements.

But plea agreements are not self-executing. The Government repeatedly claims the issue is waived "by operation of law." (Ans. at 18.) Yet this trivializes the important role the military judge plays. The CMA made clear that the military judge "must shoulder the primary responsibility for assuring on the record that an accused understands the meaning and effect of *each* condition . . . ." *United States v. Green*, 1 M.J. 453, 456 (C.M.A. 1976) (emphasis in original) (citation omitted).

The Government instead points out that R.C.M. 910 does not expressly require the military judge to advise an accused that an unconditional guilty plea waives all non-jurisdictional matters. (Ans. at 19 (citing *United States v. Hardee*, 2017 CCA LEXIS 263 at *25–26 (A.F. Ct. Crim. App. April 17, 2017) (unpublished)).) In *Hardee*, the appellant claimed the military judge should have inquired about whether he understood that his guilty plea waived a motion to suppress. 2017 CCA LEXIS 263, at *25–26. The Air Force Court held R.C.M. 910 did not

require such advice, and that the military judge did not abuse her discretion in failing to so inquire. *Id.* at *25–28.

Yet this holding is inapposite. Here, the military judge *did* advise A1C Day about waivable and non-waivable motions, and expressly told her that failure to state an offense was *not* waivable. (JA at 187.) Thus, the question here is the effect of the military judge's error upon the waiver analysis, not whether the military judge was required to inquire at all. To accept the Government's position requires this Court to find the military judge's erroneous advisement meaningless.

A second point is that the record fails to support the Government's image of A1C Day as a sophisticated negotiator of trial right waivers. The Government describes how A1C Day "enticed" the government into a deal by "shrewdly" negotiating an agreement that would waive the failure to state an offense. (Ans. at 17–18.) Yet the Government cannot point to specifics. The record contains *no* specificity about a failure to state an offense motion—other than the military judge's misstatement of the law. The Government layers presumption upon presumption to argue that A1C Day must have understood the scope of her plea agreement. (Answer at 17–19.) It highlights that A1C Day

acknowledged her understanding of the plea agreement. (*Id.*) But this came *after* the military judge's error, where he specifically referenced the relevant paragraph of the plea agreement and told A1C Day that failure to state an offense was not waivable. (*Id.* at 20; JA at 187.) The military judge's erroneous interpretation of the law formulated A1C Day's understanding. A1C Day never articulated, 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—"Yes, Your Honor." (JA at 187.)

The Government makes several more efforts to stretch the plea agreement. First, it repeats the "maxim" that a guilty plea "admit[s] guilt of a substantive crime." (Answer at 17 (citing *United States v. Hardy*, 77 M.J. 438, 442 (C.A.A.F. 2018)).) But the point of the granted issue is that attempted conspiracy is *not* a substantive crime. Second, the Government states that the plea agreement outlined motions that A1C Day could not give up. (Ans. at 20.) That is not quite true—the plea agreement lists rights, not specific motions. (JA at 158.) Regarding motions, the plea agreement only indicated that A1C Day waived motions "waivable under current legal precedent and public policy." (*Id.*)

A1C Day could be forgiven for trusting the military judge to inform her of waivable motions "under current legal precedent and public policy." Indeed, it is unrealistic that A1C Day would ignore what the military judge said. He was an experienced military judge—whose instructions this Court affirmed in *United States v. Talkington*, 73 M.J. 212, 212, 218 (C.A.A.F. 2014)—and has served as a judge on the Air Force Court. *See, e.g.*, *United States v. Chisum*, 75 M.J. 943 (A.F. Ct. Crim. App. 2016) (opinion authored by the same).

The Government also claims that A1C Day cannot claim prejudice from this error. (Ans. at 19 (citing *United States v. Felder*, 59 M.J. 444, 446 (C.A.A.F. 2004)).) Reliance on *Felder* is misplaced for several reasons. First, the threshold question for this Court is waiver; it is unclear why prejudice plays into a waiver analysis. Second, and relatedly, *Felder* is a case about the military judge's failure to inquire into the appellant's "Article 13 and restriction tantamount to confinement waiver." 59 M.J. at 445 (internal quotation marks omitted). This Court recognized that the military judge failed in his responsibility to inquire under R.C.M. 910—which cuts against the Government's broader argument about the unimportance of the military judge's

inquiry. *Id.* Ultimately, this Court resolved the issue on prejudice, as the appellant "neither averred or demonstrated any prejudice from the error." *Id.* at 446. By contrast, and as noted above, A1C Day stands convicted of non-offenses.

The Government also points to the trial defense counsel's failure to either raise a failure to state an offense motion, or to mention such a motion when the military judge asked which motions the Defense would have raised (but for the plea agreement). (Ans. at 20.) First, this cannot overcome the military judge's misstatement of the law. Second, this does not play a role in the waiver analysis. *Cf. United States v. Gladue*, 67 M.J. 311, 313–14 (C.A.A.F. 2009) (finding waiver of unreasonable multiplication of charges and multiplicity, despite trial defense counsel's failure to mention that motion when discussing possible motions, because, in part, the military judge conducted a "detailed, careful, and searching examination of [a]ppellant to ensure that he understood the effect of the [pretrial agreement] provision"). Third, it was clear the military judge asked about specific motions to ensure A1C Day understood what she waived under the plea agreement. He asked trial defense counsel if there were any motions:

> [T]hat you believe[ ] are waived so that I can ensure that the accused is aware of those motions and you have had an opportunity to advise as to the strength and weaknesses of the motion so that I can ensure that she is making an intelligent decision regarding whether or not giving up those motions are worth whatever benefit she is getting out of this the plea agreement?

(JA at 187.) At that point, the military judge had already advised A1C Day she could not waive a motion for failure to state an offense. (*Id.*)

In sum, A1C Day's misunderstanding of the consequences of her plea was "induced by the trial judge's comments during the providence inquiry." *See Hardee*, 2017 CCA LEXIS 263, at *27–28 (quoting *United States v. Pena*, 64 M.J. 259, 267 (C.A.A.F. 2007)). Therefore, this misstatement of the law means that A1C Day cannot have "intentionally relinquish[ed] or abandon[ed] a known right" because she did not believe she *could* intentionally relinquish the right to contest whether each specification stated an offense. *See Gladue*, 67 M.J. at 313.

3. A specification that states no offense at all—as opposed to a specification that omits or misstates an element—is a jurisdictional, non-waivable issue.

The Government claims the Supreme Court has long held that federal courts maintain jurisdiction even in "a case in which the

indictment charges an offense not punishable criminally according to the law of the land." (Ans. at 22 (citing *Ex parte Watkins*, 28 U.S. 193, 203 (1830)).) Yet *Ex parte Watkins* was a habeas case where Chief Judge Marshall opined that the Supreme Court was bound by the lower court's finding that it had jurisdiction. 28 U.S. at 203, 207. Drawing a direct parallel to this case stretches *Ex parte Watkins* too far. Moreover, the Supreme Court quite recently questioned Chief Judge Marshall's sweeping language, highlighting the important exception that "[a] habeas court could grant relief if the court of conviction lacked jurisdiction over the defendant or his offense." *Brown v. Davenport*, 142 S. Ct. 1510, 1521 (2022) (citing *Ex parte Watkins*, 28 U.S. at 202–03). *Ex parte Watkins* cannot answer the question here.

The Government correctly notes that three Courts of Criminal Appeals (CCAs) have found waiver of failure to state an offense based on the President's 2016 Amendment to R.C.M. 907(b)(2)(E). (Ans. at 22 (citing *United States v. Macko*, 82 M.J. 501, 504 (N-M. Ct. Crim. App. 2021); *United States v. Sanchez*, 81 M.J. 501, 502 (A. Ct. Crim. App. 2021); *United States v. Seeto*, ACM 39247 (reh), 2021 CCA LEXIS 185, *24 (A.F. Ct. Crim. App. April 21, 2021) (unpublished)).) But the key

distinction, as identified above, is that errors and omissions in the specification are distinct from charging an offense that does not exist. None of the cited cases address a situation where the appellant was convicted of a non-offense.[2]

And this distinction—omission versus stating a non-offense—is precisely what the United States Circuit Court of Appeals for the Eleventh Circuit highlighted in *United States v. St. Hubert*, 909 F.3d 335 (11th Cir. 2018), *abrogated on other grounds by United States v. Taylor*, 142 S. Ct. 2015 (2022). The Government asserts that the majority of federal circuits have interpreted *United States v. Cotton*, 535 U.S. 625 (2002) to hold that unconditional guilty pleas affirmatively waive *any* claims of failure to state an offense.[3] While A1C Day acknowledges the

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[2] *Sanchez* involved an abusive sexual contact specification that did not allege an actual touching; the appellant admitted to the touching as part of the guilty plea. 81 M.J. at 503, 507. In *Macko*, a child pornography specification omitted the words "knowingly and wrongfully." 82 M.J. at 503. Similarly, the appellant in the stipulation of fact and plea inquiry confirmed he met the properly-stated offense. *Id.* at 506. In *Seeto*, appellant pleaded guilty to an Article 133, UCMJ, specification that omitted "words of criminality." 2021 CCA LEXIS 185, at *24–25. The Air Force Court noted that the appellant affirmed his guilt of the conduct during his guilty plea. *Id.* at *27.

[3] Ans. at 23 (citing *United States v. Munoz Miranda*, 780 F.3d 1185, 1188 (D.C. Cir. 2015); *United States v. Urbina-Robles*, 817 F.3d 838, 842 (1st

circuits are divided, the Government's string citation mostly refers to cases that dealt with omissions and facial defects on the indictments.[4]

A1C Day maintains that *Cotton* does not extend beyond waiver of defects to the indictment (as opposed to stating non-offenses). *Cotton* involved the narrow question of the omission of a quantity of drugs—a sentence enhancement factor—from the indictment. 535 U.S. at 627–28. In its holding, the Court did not address more than a defective indictment. *Id.* at 629–31. *St. Hubert*'s distinction is thus faithful to the holding in *Cotton*.

Cir. 2016); *United States v. Rubin*, 743 F.3d 31, 39 (2d Cir. 2014); *United States v. Medel-Guadalupe*, 979 F.3d 1019, 1024 (5th Cir. 2020); *United States v. George*, 403 F.3d 470, 472 (7th Cir. 2005); *United States v. Todd*, 521 F.3d 891, 895 (8th Cir. 2008); *United States v. DeVaughn*, 694 F.3d 1141, 1149 (10th Cir. 2012)).

[4] Notably, *Munoz Miranda* did consider an unpreserved claim that the district court lacked jurisdiction because the relevant statute applied to "vessels subject to the jurisdiction of the United States," thus it had to resolve this question to confirm jurisdiction. 780 F.3d at 1191–96. In so doing, it used a "compare" citation to differentiate the case from *Cotton*. *Id.* at 1194 (citing *Cotton*, 535 U.S. at 629–31.) *Urbina-Robles* related to an indictment that omitted the words "the person or presence." 817 F.3d at 842. *Medel-Guadalupe* involved duplicative charging. 979 F.3d at 1024. *George* involved a post-trial motion challenging whether the events narrated in the indictment met the requirements of the statute. 403 F.3d at 472. And *Todd* related to an indictment that conflated two alternative offenses. 521 F.3d at 894–95. Admittedly, *Rubin*, 743 F.3d at 39, and *DeVaughn*, 694 F.3d at 1149 are directly contrary to *St. Hubert*.

The Government argues the contrary, focusing on *Lamar v. United States*, 240 U.S. 60 (1916), a case *Cotton* cited. 535 U.S. at 630–31. In *Lamar*, the appellant challenged a federal district court's jurisdiction to try him for falsely pretending to be an officer of the Government of the United States, namely, a member of the House of Representatives. 240 U.S. at 64. The Supreme Court wrote that "the objection that the indictment does not charge a crime against the United States goes only to the merits of the case." *Id.* at 65. But this broad language cannot do the work the Government requires. *Lamar* addressed the question—a merits question—of whether "officer" fell within the meaning of the Criminal Code of March 4, 1909, c. 21, § 32. *Id.* There was an actual statute that the offense could fall under, and it was up to the Court to determine whether he met the elements of the offense. Here, by contrast, attempted conspiracy is not a substantive criminal offense. Say, for instance, that Lamar was charged with attempted conspiracy to violate § 32. In that case, the Court would reach a different result because no statute authorized the fictional offense of attempted conspiracy.

In sum, there is a meaningful distinction between errors in the way a case is charged, and charging an offense that does not exist. Facially

defective indictments or specifications are waivable where they do not prejudice an accused. The same cannot be said for an accused, like A1C Day, who stands convicted of an offense that does not exist under the UCMJ.

4. Statutory analysis need not leave substantive criminal law behind.

The Government invites this Court to resolve the case with a simple syllogism: Article 80, UCMJ, authorizes prosecution of attempts to commit any offense punishable under the UCMJ. Article 81, UCMJ, is an offense. Therefore, attempted conspiracy is permissible. (Ans. at 25.) But the question is not so simple as the Government implies.

First, this Court need not leave the body of substantive criminal law behind when interpreting the punitive articles. The relevant portions of each Article are quite short: 63 words for Article 80 and 44 words for Article 81. This Court should reject the reductive view that short text of the statute itself can answer the issue presented. The inchoate offenses of attempt and conspiracy carry with them a long history of development, both under the UCMJ and Article III Courts. Interpreting the permissibility of "attempted conspiracy" cannot ignore substantive criminal law.

Second, the President's enumeration of attempts not charged under Article 80 does not resolve the question. (Ans. at 25–26.) The President's guidance simply notes that each of those seven attempts are specifically covered within other articles, thus they should not be charged under Article 80, UCMJ. *MCM*, pt. IV, ¶ 4.c.(6). It does not suggest that inchoate offense stacking is permissible. By the Government's logic, there is no limit to inchoate offense stacking. Attempt to attempt to commit larceny? Fine. Conspiracy to attempt to solicit to malinger? Permissible. This cannot be. *See United States v. Riddle*, 44 M.J. 282, 288–89 (C.A.A.F. 1996) (Cox, C.J., dissenting in part and concurring in part) ("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*[?]").

Third, the Government declines to grapple with the key thrust of the issue presented: the conflict between the utter absence of "attempted conspiracy" in federal law and this Court's previous embrace of the offense. Most telling is the Government's failure to address this Court's statement in *United States v. Valigura* that, in applying Article 36, UCMJ, "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. The Government fails to advance a singular reason why attempted conspiracy exists under the UCMJ but not under the remainder of federal law. Despite the untold number of criminal laws Congress has written, it has not embraced the attempted conspiracy construction. Why would it be different here?

Fourth, the Government dismisses problems with its interpretation as "academic hypotheticals." (Ans. at 28.) Specifically, it claims that any issues with a conflict between withdrawal from conspiracy and voluntary abandonment of attempt are not ripe because they were not raised below. (*Id.*) This is both true and beside the point. A1C Day raised this point to underscore the incompatibility of the established principal of withdrawal from conspiracy with the new, manufactured offense of attempted conspiracy. This informs this Court's decision on whether Congress authorized the charging of attempted conspiracy.

5. The Government's embrace of attempted conspiracy in this case underscores the offense's shaky foundation.

A1C Day agrees with the Government that it enjoys broad discretion in its charging decisions. (Ans. at 32.) But this discretion is

not boundless, and it falls far short of the fictional offense of "attempted conspiracy." Nonetheless, the Government contends attempted conspiracy was appropriate here. It acknowledges that A1C Day could not conspire with JM, thus, it argues, attempt was appropriate. (Ans. at 33.) This issue of conspiracy with law enforcement has long existed, yet federal law has never responded the way the Government does here: charging attempted conspiracy. (*See* Brief on Behalf of Appellant at 21–26.)

As for the "attempted conspiracy" with TL, the Government similarly claims attempted conspiracy was the proper charging mechanism. (Ans. at 33–34.) In making this claim, the Government does not wrestle with the deeply problematic nature of her conviction: A1C Day stands convicted of attempted conspiracy where she failed to perform an overt act in furtherance of the conspiracy. This subverts a fundamental principal of conspiracy—the overt act requirement—by stacking attempt onto conspiracy.

6. Conclusion

This Court may squarely address the merits of the issue presented either because the military judge's misstatement of the law meant she

did not waive the issue, or because the charging of a non-offense is an unwaivable, jurisdictional flaw. As to the merits, the Government asks this Court to bless the continued validity 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). The plain language alone cannot resolve a complex question of substantive criminal law, and the UCMJ should follow the well-established principal in federal law that attempted conspiracy is not an offense.

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36470
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Rd, Ste. 1100
Joint Base Andrews NAF, MD 20762
240-612-4770
matthew.blyth@us.af.mil

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MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36470
AF/JAJA
1500 West Perimeter Rd, Ste. 1100
Joint Base Andrews NAF, MD 20762
240-612-4770
matthew.blyth@us.af.mil

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I certify that an electronic copy of the foregoing was sent via electronic mail to the Court and served on the Government Appellate Division on August 1, 2022.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36470
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Rd, Ste. 1100
Joint Base Andrews NAF, MD 20762
240-612-4770
matthew.blyth@us.af.mil