IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	BRIEF ON BEHALF OF THE UNITED STATES
v.	)	Crim. App. Dkt. No. 39962
Airman First Class (E-3), KATELYN L. DAY, USAF, *Appellant.*	)	USCA Dkt. No. 22-0122/AF 22 July 2022

BRIEF ON BEHALF OF THE UNITED STATES

MORGAN R. CHRISTIE, Maj, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 36170

MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellant Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34088

THOMAS J. ALFORD, Lt Col, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34441

NAOMI P. DENNIS, Colonel, USAF
Chief
Government Trial and
Appellate Operations
United States Air Force
1500 W. Perimeter, Rd. Ste. 1190
Joint Base Andrews, MD 20762
(240 612-4800
Court Bar. No. 32987

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TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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 (AFCCA) reviewed this case under Article 66(d), UCMJ[1]. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's Statement of the Case is correct.

[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].

STATEMENT OF FACTS

Appellant met the Victim, T.D., in May 2017. (JA at 053.) Shortly thereafter, they began a romantic relationship. (Id.) Unbeknownst to Appellant, T.D. was also in a romantic relationship with J.M. (Id.) On 14 July 2017, approximately two months after they met, Appellant and T.D. got married. (Id.) Two weeks after marrying, Appellant discovered that J.M. was pregnant with T.D.'s child. (JA at 054.) Even so, Appellant decided to stay married to T.D. (Id.) J.M. gave birth to T.D.'s child in late July 2017. (JA at 003.) After marrying T.D., Appellant secured a $100,000 life insurance policy on him through the Family Service Member's Group Life Insurance (FSGLI) program[2]. (JA at 054.) In March of 2018, Appellant found out she was pregnant with T.D.'s baby. (JA at 054.) In December 2018, Appellant gave birth to her and T.D.'s only child. (JA at 003.) Three months later, in March 2019, Appellant and T.D. separated, but remained legally married. (Id.)

Sometime after, Appellant and J.M. began to bond on Facebook over their complaints with T.D.—namely T.D.'s failure to pay them both child support. (JA at 055.) Appellant and J.M. regularly discussed their hatred of T.D. over private Facebook messages. (Id.) During the course of those messages, Appellant

[2] FSGLI is only available while a military member is legally married to the spouse. If a servicemember divorces her spouse, she is no longer entitled to hold life insurance over the former spouse through FSGLI. (JA at 054.)

broached the subject of killing T.D., collecting the life insurance money, and then splitting half the money with J.M. if she helped. (Id.) When Appellant initially brought up the idea of killing T.D., J.M. was not interested in helping. (Id.)

On 19 November 2019, Appellant contacted S.P., her former boyfriend, on Facebook Messenger. (JA at 056.) Appellant asked him if he could either find a hitman to kill T.D. or provide "support." (Id.) S.P. refused to help. (Id.)

Additional Charge II, Specification 1 –
Solicitation of J.J. to Commit Murder

Sometime in November 2019, Appellant began discussing her issues with her husband with J.J., a civilian co-worker in her unit. (Id.) During one of these encounters, Appellant asked J.J. to kill her husband for half of the insurance money Appellant would receive from his death. (JA at 057.) J.J. refused, but recommended hiring "illegal immigrants" from a nearby farm since, J.J. believed that person would be more likely to get away with it. (Id.) Appellant asked J.J. to think more about her request. (Id.)

During another encounter, Appellant told J.J. that her husband needed to be killed quickly before the couple's divorce was finalized. (Id.) J.J. again refused to help Appellant and told her that Appellant would have to do it herself "because no one else [would]." (Id.) Later, Appellant asked J.J. to purchase livestock de-wormer. (Id.) J.J. believed that Appellant wanted the de-wormer to kill her husband because they had an earlier conversation where J.J. told her that the

de-wormer could be used as a poison. (Id.) But, J.J. refused to purchase the de-wormer. (Id.)

Appellant and J.J. also frequently conversed via text message. (Id.) The two discussed J.J. "trimming the bush" in front of Appellant's house, but the sub-text of that conversation was actually about murdering Appellant's husband. (JA at 057-58.) J.J. asked, "You aren't really going to trim that shrub?" to which Appellant responded, "I am. I'm trying to find someone to do it or I'll have to do it myself." (JA at 058.) J.J. then text messaged, "I am going to talk you out of it." (Id.) Appellant asked, "Why? You weren't before." (Id.) J.J. replied, "I thought you were just mad. Didn't think you would." Appellant responded with, "I mean I don't like the bush. It'd be better if it weren't there anymore for me, my son and everyone else to walk by the house or live there. It's a horrible, toxic bush." (Id.) Appellant then messaged J.J. that she had "a plan for the bush." (Id.) J.J. told her that he would call the police to report her. (Id.) Appellant said, "Oh wow. That's a real change in position. I won't talk to you anymore then." (Id.) J.J. called the Bossier Parish Sheriff's Office. (Id.)

The Specification of the Second Additional Charge –
Attempt to Conspire with T.L. to Murder T.D.

On 30 November 2019, Appellant contacted her friend T.L., and asked him to help her murder her husband. (JA at 059.) Appellant told T.L. she was "thinking of putting a bunch of muscle relaxers ad [sic] pain pills in a drink of his."

(Id.) T.L. told Appellant that he would teach her how to "overload the system for failure" and "how the body works." (Id.) Appellant and T.L. agreed that Appellant would pay T.L. $100 per month to teach her ways to kill her husband. (Id.) During her guilty plea Care[3] Inquiry, Appellant told the military judge she specifically called T.L. on 16, 17, and 18 December 2019 to receive these kill lessons. (JA at 175.)

The Specification of Additional Charge I –
Attempt to conspire with J.M. to commit premeditated murder of T.D.

The Office of Special Investigations (OSI) began to investigate Appellant after J.J. called the police and reported Appellant's plan. (JA at 060.) OSI agents recruited J.M. to assist in their investigation as a confidential informant. (Id.) As a result, J.M. continued to communicate with Appellant over Facebook Messenger, but feigned a desire to be a part of Appellant's plan to murder her husband. (Id.) As soon as Appellant believed that J.M. was serious about killing T.D., she switched their conversations to SnapChat.[4] (JA at 061.) Over SnapChat, Appellant suggested adding muscle relaxers and pain killers into T.D.'s drink before he planned to drive. (Id.) Appellant then asked J.M., "What do you think

[3] United States v. Care, 18 C.M.A. 535 (1969).

[4] SnapChat is a social media application that automatically deletes messages sent in a one-on-one chat after both individuals have opened and left the chat. (JA at 061.) Settings can be changed to delete messages after 24 hours, as opposed to immediately. (Id.)

would work?" (Id.) J.M. replied, "Well, I am from here. I can prolyl [sic] get my hand on some stuff." (Id.) When Appellant asked, "How are you going to make him do it?" J.M. responded, "It would only make sense for me to get the stuff and you put it in the drink because you're around him more than me." (Id.)

Appellant and J.M. agreed to meet in Ruston, Louisiana, at the Walmart Supercenter at 1430 on 18 December 2019. (JA at 063.) J.M. would provide Appellant with "the stuff" to kill T.D. and, in return, Appellant would provide J.M. with $100 in cash. (JA at 061.) Appellant then explained her plan to kill her husband, "I'll see him Saturday[.] And I have cash already so I'll just give it to you when we meet[.] I'm going to go off base to get him 'snacks for the road' and "Im going to wear gloves so that my prints won't be on anything[.]" (Id.) Appellant asked J.M., "is there a certain drink it should go in? I was thinking a body armor? He likes those[.]" (JA at 062.) Appellant and J.M. then discussed all the financial benefits of T.D.'s death: no longer paying a lawyer to fight T.D. for child custody and using the money from T.D.'s life insurance to buy a new car, washer, and dryer, as well as saving a portion for her son's future. (JA at 063.) Appellant messaged J.M., "Less than a week dude and hopefully it'll be the last time we have to deal with any of it." (JA at 143.)

At 1430 on 18 December 2019, at the Ruston Walmart Supercenter, Appellant and J.M. met and Appellant paid $100 in exchange for a substance she

believed to be fentanyl.[5] (JA at 064.) She also told J.M. that she was "for sure" going to go through with murdering her husband because she spent $100 on the fentanyl, which was originally meant to be "Christmas money" to be "spent on [her child.]" (JA at 065.) She also said that she was ready "after talking to [her] lawyer and him telling [her] that the best they can do is joint custody." (Id.) Appellant showed J.M. the plastic gloves she planned to use to handle the drink and snacks she would use to poison T.D. (JA at 064.) Appellant then stated that she would soon purchase the drink and snacks. (Id.)

Later that evening, OSI executed a search warrant at Appellant's home. (JA at 066.) During that search, they discovered the "fentanyl" taped to the bottom of an ice tray in Appellant's freezer. (Id.) OSI agents also discovered rubber gloves in Appellant's home. (Id.) When OSI interviewed Appellant, she admitted that she planned to murder her husband using the fentanyl. (JA at 068.) She stated that she believed that his death would lead to a positive effect on his children. (Id.)

The Plea Agreement

On 16 July 2021, Appellant and her trial defense counsel made an offer for a plea agreement, which the convening authority accepted. (JA at 157.) In that plea agreement, Appellant agreed to "waive all motions that are waivable under current

[5] After the exchange, J.M. told Appellant that the substance was fentanyl and described it "like a tranquilizer" and mentioned a popular rapper died by ingesting it. (JA at 064.) But the substance Appellant bought was not fentanyl; it was provided by OSI to J.M. and made to look like fentanyl. (Id.)

legal precedent and public policy." (JA at 158.) However, Appellant retained the following six benefits:

> 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.

(Id.)

Appellant's counsel fully advised her of the "meaning, effect, and consequences of this plea." (JA at 159.) Appellant was satisfied with her defense counsel's advice. (Id.) During the plea agreement inquiry, the military judge reviewed all the terms of the agreement with Appellant. (JA at 185.) In doing so, the military judge partially misstated the law regarding waiver:

> 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 . . . Some of these could be motions to dismiss for lack of jurisdiction o*r failure to state an offense, those could not be waived*.

(JA at 187) (emphasis added.)

The military judge clarified, "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?" (Id.) Appellant agreed. (Id.) She had no questions. (Id.) The military judge then asked Appellant's counsel what motions Appellant believed were waived "that [she] would otherwise raise in this case for this plea

agreement?" (JA at 188.) Appellant's counsel then discussed motions she had considered raising; none of them involved failure to state an offense. (Id.) After the military judge accepted Appellant's plea agreement, Appellant again conveyed that she was satisfied with her defense counsel and their advice. (R. at 134.)

The Care Inquiry pertaining to Specification 1 of the Additional Charge I – Attempt to conspire with J.M. to commit premeditated murder

During the Care Inquiry, the military judge explained the elements of Specification 1 of the Additional Charge I, attempted conspiracy to murder the victim. (JA at 177-78.) After the military judge explained the elements of the offense to which Appellant pleaded guilty, Appellant described why she was legally and factually guilty as charged. (JA at 180.) Appellant detailed her plan with J.M. to kill T.D., which included placing fentanyl in T.D.'s drink during a planned visit with his son. (Id.) She discussed meeting with J.M. on 18 December 2021 at the Walmart Supercenter where she exchanged $100 for a substance she believed to be fentanyl. (Id.) The military judge ultimately accepted Appellant's plea of guilty to attempted conspiracy with J.M. (JA at 192.)

The Care Inquiry pertaining to the Specification of the Second Additional Charge – Attempt to conspire with T.L. to commit premeditated murder

During the Care Inquiry, the military judge explained the elements of the Specification of the Second Additional Charge, another specification alleging attempted conspiracy to murder the victim. (JA at 167-68.) After the military judge explained the elements of the offense to which Appellant pleaded guilty, he

asked Appellant why she believed she was guilty. (JA at 170-71.) Appellant described her efforts to receive lessons on how to kill the victim:

> Your Honor, while in the state of Louisiana, on 16 November 2019, I reached out to a friend, [T.L.], and asked if he knew a hitman. I told him I would offer some of the insurance money I would receive if [T.D.] died. On 30 November, I reached out to [T.L.] again and asked if he could still help me with killing [T.D.]. We arranged – we agreed that in exchange for $100 a month he would give me lessons on how to use controlled substances to poison a person and cause their death. I specifically intended for the knowledge I received in these conversations to assist in the murder to [T.D.]. On 18 November, while – I am sorry. On 18 December, while the agreement still existed, I purchased what I believed was fentanyl with the intent to use it to poison [T.D.].

(JA at 170.)

Appellant also explained that her agreement with T.L. went further than just mere preparation. (Id.) The agreement involved setting up payment method options, discussing days and times they could be available for the lessons, and the fact that both Appellant and T.L. were willing to go through with the agreement they had previously made. (Id.) Still, the military judge found Appellant's action of purchasing the fentanyl to be separate from her agreement with T.L. to receive lessons on how to murder a human. (JA at 172.) As a result, the military judge would not allow Appellant's act of purchasing the fentanyl to be considered an overt act toward her agreement with T.L. (Id.)

But, during the Care Inquiry, Appellant admitted she called T.L. on 16, 17, and 18 December 2019 with the sole purpose of receiving "kill" lessons. (JA at 175.) Appellant explained that when she repeatedly called T.L., "the agreement was still in place for [them] to be able to try and – for him to give [her] the lessons on how to overload a system and poison or find a way to help with that." (Id.)

The military judge ultimately found there was enough evidence to meet the elements of attempted conspiracy with T.L. to commit the murder of T.D. Accordingly, the military judge accepted Appellant's plea of guilty to attempted conspiracy with T.L. (JA at 192.)

SUMMARY OF ARGUMENT

Waiver

Appellant waived this issue as a matter of law. An unconditional guilty plea is, by definition, an affirmative waiver of a "failure to state an offense" claim for the pleaded-to offense. United States v. Sanchez, 81 M.J. 501, 504 (A. Ct. Crim. App. 2021). But Appellant did not just expressly enter an unconditional guilty plea, she did so pursuant to a favorable plea agreement that she negotiated and signed. Appellant offered to waive all motions "that are waivable under current legal precedent and public policy." (JA at 158.) She did so freely and voluntarily. (JA at 160.) At the time of Appellant's court-martial, the plain language of R.C.M. 907 made "failure to state an offense" a waivable motion. R.C.M. 907(b)(2)(E).

In her offer for plea agreement, Appellant itemized each motion she specifically did not agree to waive. (JA at 158.) Failure to state an offense was not one of them. (Id.) Appellant then confirmed to the military judge that she discussed the waiver of motions with her defense counsel and entered into the agreement in order to receive its benefits. (JA at 147.) Since R.C.M. 907(b)(2)(E) made failure to state an offense a waivable motion at the time of her plea agreement, Appellant knowingly and intentionally waived the issue she now asserts as error.

A military judge's erroneous advice on waiver does not alchemize a non-jurisdictional claim into a jurisdictional one. Nor does it reanimate on appeal a valid "waive all waivable motions" provision in a plea agreement thoroughly explained by counsel and understood by Appellant. To find that a military judge's passing inaccurate statement regarding waiver overrides an appellant's express acknowledgments to the contrary would amount to an undeserved windfall for Appellant based on a mere technicality. This is especially true when Appellant has not claimed that the military judge's incorrect statement caused her to plead guilty when she would not have done so otherwise.

The Attempted Conspiracy Specifications

The plain language of Articles 80 and 81, UCMJ, is unmistakable: "attempted conspiracy" is an offense under the UCMJ. Article 80, UCMJ, allows prosecution of anyone "who attempts to commit *any offense* punishable by this

chapter . . . unless otherwise specifically prescribed." Article 80(a), UCMJ (emphasis added). And Article 81, UCMJ, lists "conspiracy" as an offense. Nowhere in the Code did Congress prohibit the confluence of "attempt" under Article 80, UMCJ, and "conspiracy" under Article 81, UCMJ. Had Congress intended to prohibit prosecution of "attempted conspiracy," it would have "specifically prescribed" Article 81, UCMJ, as an offense that could not be charged under Article 80, UCMJ. Congress chose not to do so. The statutes are unambiguous and their meaning is plain. Furthermore, this Court expressly recognized attempted conspiracy as an offense under the UCMJ in United States v. Riddle. 44 M.J. 282 (C.A.A.F. 1996). Yet Appellant relies entirely on dicta in Riddle in an effort to circumvent Congressional intent. (App. Br. at 19-20.) The Riddle quote Appellant cites in support of her argument that the passage of a general solicitation statute, Article 82, UCMJ, statutorily abrogated the holding in Riddle is based on dicta. (Id.) This Court should follow *stare decisis* and find that Riddle is still good law that conclusively decides the granted issue. Since attempted conspiracy is a recognizable offense under the UCMJ, the Court should affirm the decision of the Air Force Court.

ARGUMENT

ATTEMPTED CONSPIRACY IS A VIABLE OFFENSE UNDER THE UCMJ, AND APPELLANT WAIVED ANY CHALLENGE TO WHETHER THE PLEADED-TO SPECIFICATIONS STATED AN OFFENSE.

Standard of Review

Whether a specification fails to state an offense is a question of law that is normally reviewed *de novo*. United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006). Yet an unconditional guilty plea waives all non-jurisdictional claims. United States v. Joseph, 11 M.J. 333, 335 (C.M.A. 1981). *See also* R.C.M. 907(b)(2)(E) (stating that failure to state an offense claim is non-jurisdictional and therefore waivable).

This Court views defective specifications "with maximum liberality" in favor of validity when an accused pleads guilty to the offense and only challenges the specification for the first time on appeal. *See* United States v. Watkins, 21 M.J. 208, 210 (C.M.A. 1986) ("we view standing to challenge a specification on appeal as considerably less where an accused knowingly and voluntarily pleads guilty to the offense."). Upon such a challenge, Appellant must show substantial prejudice, demonstrating that the charge was "so obviously defective that by no reasonable construction can it be said to charge the offense for which the convicted was had." Id. (quoting United States v. Thompson, 356 F.2d 216, 226 (2d Cir. 1965), *cert denied*, 384 U.S. 964 (1966)).

If a specification fails to state an offense, the appropriate remedy is dismissal of that specification unless the Government can demonstrate that the error was harmless beyond a reasonable doubt. United States v. Humphries, 71 M.J. 209, 213 n.5 (C.A.A.F. 2012).

Law

In 2016, the President amended R.C.M. 907(b), making failure to state an offense "waivable." Exec. Order No. 13730, 81 Fed. Reg. 102, 33,336 (26 May 2016).

Article 80, UCMJ, defines an attempt as "[a]n act, done with specific intent, to commit an offense under this chapter 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 code; (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.

United States v. Payne, 73 M.J. 19, 24 (C.A.A.F. 2014) (citation omitted).

The MCM lists seven specific attempt-type offenses that should be charged outside of Article 80, UCMJ:

(a) Article 85—Desertion
(b) Article 94—Mutiny or sedition
(c) Article 100—Subordinate compelling surrender
(d) Article 103a—Espionage
(e) Article 103b—Aiding the enemy
(f) Article 119a—Death or injury of an unborn child

(g) Article 128—Assault

Article 80c(6), UCMJ.

Article 81, UCMJ, defines conspiracy as "any person . . . who conspires with any other person to commit an offense . . . , if one or more of the conspirators does an act to effect the object of the conspiracy . . ." The elements include:

> (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 co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

MCM, Part IV, para. 5.b.(1), (2019 ed.).

Analysis

A. By unconditionally pleading guilty and agreeing to waive all waivable motions, Appellant waived any claim that the conspiracy specifications failed to state an offense.

Although the Courts of Criminal Appeals have plenary authority to review cases despite an appellant's waiver of all waivable motions and unconditionally guilty plea, this Court does not. United States v. Chin, 75 M.J. 220, 222-23 (C.A.A.F. 2016). Appellant knowingly, voluntarily, and intelligently waived the issue of failure to state an offense in two ways: (1) by unconditionally pleading guilty; and (2) by agreeing to waive all waivable motions in her plea agreement.

An "unconditional plea of guilty waives all non-jurisdictional defects at earlier stages in the proceeding." Joseph, 11 M.J. at 335. The Supreme Court has

long recognized this maxim: "By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime." United States v. Hardy, 77 M.J. 438, 442 (C.A.A.F. 2018) (quoting United States v. Broce, 488 U.S. 563, 570 (1989)).

But Appellant did not just unconditionally plead guilty. She also negotiated a reduced sentence by giving up some of her constitutional and statutory rights. In exchange for a favorable limit on confinement, Appellant leveraged waiver as one of her most important bargaining chips:

> Plea agreements play a crucial role in the military justice system. They afford an accused the opportunity to negotiate for reduced charges, a reduced sentence, or both by pleading guilty and giving up some of his constitutional and statutory rights. The finality and enforceability of the waiver is one of the accused's most important bargaining chips in negotiating a plea agreement. Without it, the government has less incentive to engage in such negotiations.

Chin, 75 M.J. at 226.

There is no evidence that Appellant misunderstood the terms of her agreement, that the operation of any term was frustrated, or that Appellant's participation in the plea agreement was anything other than wholly voluntary. United States v. Felder, 59 M.J. 444, 446 (C.A.A.F. 2004). On the contrary, with the advice of two competent defense counsel, Appellant incentivized the government to reduce her confinement exposure, from life without the possibility of parole, to ten years confinement. (*Compare* R. at 120 *with* JA at 158-59.) She

enticed the government to give her this benefit by intelligently relinquishing her right to challenge whether two specifications stated an offense. Appellant cannot now claim that she was in any way misled by the military judge's misstatement of the pre-2016 law when she shrewdly negotiated a plea agreement she believed was in her "best interest" that gave up the very right she now tries to assert. (JA at 159.)

The plea agreement listed all non-waivable issues as: "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, and the right to complete sentencing proceedings and effective exercise of post-trial and appellate rights."[6] (JA at 158.) This list did not include failure to state an offense. (Id.) Therefore, by operation of law, Appellant's guilty plea and R.C.M. 907(b)(2)(E)[7] waived any claim that the conspiracy specifications failed to state an offense.

Yet still, Appellant argues that she could not have intentionally relinquished her right because the military judge misstated the law. (App. Br. at 11.) But not every misstatement mandates relief. Appellant cites no law in support of her argument that the judge somehow resurrected an issue that, by operation of law, was waived when Appellant pleaded guilty, failed to bring the motion, and waived

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[6] This language follows R.C.M. 705(c)(1)(B)—rights that cannot be waived in a plea agreement.

[7] R.C.M. 907(b)(2)(E) lists failure to state an offense as a waivable motion.

all waivable motions in her plea agreement. Indeed, a military judge need not advise an accused that an unconditional guilty plea waives all non-jurisdictional matters. R.C.M. 910, for example, does not expressly require a military judge to advise an accused that an unconditional guilty plea waives all non-jurisdictional matters. *See also* United States v. Hardee, ACM S32360, 2017 CCA LEXIS 263, at *25-26 (A.F. Ct. Crim. App. 17 April 2017) (unpub. op.) ("Even though there is not an express requirement[,] military judges, as a matter of course, provide an advisement that a guilty plea waives all non[-]jurisdictional matters, [but] counsel are presumed to know this . . . ").

While R.C.M. 910(f) requires a meaningful inquiry into the provisions of every pretrial agreement, even when a military judge fails to inquire into certain provisions of a plea agreement, this Court has not relieved an appellant of his burden under Article 59(a), UCMJ, to demonstrate material prejudice to a substantial right. Felder, 59 M.J. at 446 ("Thus while the military judge's failure to inquire into the 'Article 13 and restriction tantamount to confinement' provision of Appellant's pretrial agreement was error, Appellant has neither averred nor demonstrated any prejudice resulting from this error.")

The crux of Appellant's claim hinges on her supposed ignorance that her plea agreement waived any motion to dismiss based upon failure to state an offense. Yet the plain language of the plea agreement—which Appellant thoroughly reviewed with her counsel— contradicts her supposed ignorance. The

plea agreement plainly provided for waiving all waivable motions and her counsel properly advised her of the full "ramifications" when she signed the agreement. (JA at 157.) Moreover, the plea agreement expressly enumerated which motions Appellant would *not* waive. Appellant never expressed any doubt about the meaning of these words or the agreement itself. And when asked by the military judge if she understood the meaning of "waive all motions that may be waived," Appellant indicated that she did. (JA at 187.) Appellant also did not express any issue with her attorneys' performance in explaining the ramifications of the terms of her plea agreement. In fact, Appellant revealed both on the record and in her plea agreement that "[she was] satisfied with [her] defense counsels . . . who advised [her] with respect to this offer." (JA at 159.) In sum, the term "waive all motions that may be waived" therefore placed Appellant on notice that her ability to raise an issue of failure to state an offense would be impacted by her guilty plea.

Moreover, Appellant has not demonstrated that she ever harbored a mistaken belief that appellate review of a hypothetical motion to dismiss for failure to state an offense was preserved. In fact, Appellant never even considered filing such a motion. (JA at 187.) Nor was she confused when the military judge misspoke. Even now on appeal, she does not argue that the military judge's comments during the providence inquiry induced her to enter into the plea agreement.

So while the military judge committed plain error by misstating the existing state of the law with respect to waiver, it did was not prejudicial. Appellant has

never claimed that the military judge's incorrect advice caused her to plead guilty when she would not have otherwise. Nor has she claimed that she only pleaded guilty because she believed she would be able to preserve the claim she now raises on appeal. The military judge's misstatement did not trump the advice of defense counsel or contravene the plain language of the plea agreement Appellant signed. Nor did it induce Appellant to plead guilty – she made that decision well before the military judge's erroneous advice. Then, she successfully completed an exhaustive Care inquiry, and her guilty pleas were accepted as provident.

"Securing a favorable pretrial agreement via a guilty plea, and then on appeal attacking the facial legality of one of the specifications, is inconsistent with the fair and efficient administration of justice." It is unfair to allow Appellant to admit "guilt of a substantive crime" at trial and then impeach that guilt on appeal while simultaneously maintaining the benefit of a favorable agreement. Hardy, 77 M.J. at 442. This undermines the "finality and enforceability of the waiver" and should not be allowed. Chin, 75 M.J. at 226.

i. Failure to state an offense is a non-jurisdictional claim.

Appellant argues that, despite the plain language of R.C.M. 907, failure to state an offense is not waivable. (App. Br. at 34.) She further argues the President exceeded his power under Article 36(a), UCMJ, when he amended R.C.M. 907 and made failure to state an offense a waivable objection. (Id.)

But every CCA that has addressed the President's 2016 amendment to R.C.M. 907(b)(2)(E), has found waiver when an appellant unconditionally pleads guilty pursuant to a plea agreement with a "waive all waivable motions" provision. *See, e.g.*, United States v. Seeto, ACM 39247 (reh), 2021 CCA LEXIS 185, *24 (A.F. Ct. Crim. App. 21 April 2021) (unpub. op.) ("The failure of a specification to state an offense is a non-jurisdictional, waivable basis for a motion to dismiss."); United States v. Macko, 82 M.J. 501, 504 (N-M. Ct. Crim. App. 2021) ("As R.C.M. 907(b)(2)(E) made failure to state an offense a waivable motion at the time of both his plea agreement and his trial, we find that Appellant knowingly and intentionally waived the issue he now asserts as error"); Sanchez, 81 M.J. at 502 ("we hold that an unconditional guilty plea waives a later claim that the plead-to specification fails to state an offense."). And a valid waiver at trial leaves no error to correct on appeal. *See* United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009) (holding that a valid trial waiver extinguishes error).

Appellant argues that a failure to state an offense claim involves this Court's power to hear a case and so can never be waived. (App. Br. at 35.) But as early as 1830, the Supreme Court rejected the suggestion that a federal court is deprived of jurisdiction in "a case in which the indictment charges an offense not punishable criminally according to the law of the land." Ex Parte Watkins, 28 U.S. 193, 203 (1830). The Court has "repeatedly reaffirmed that proposition." Class v. United States, 138 S. Ct. 798, 816 (2018).

In United States v. Cotton, the Supreme Court clarified that "a defective indictment does not deprive a court of jurisdiction." 535 U.S. 625, 627 (2002). Since Cotton was decided, the majority of federal circuits have found an unconditional guilty plea affirmatively waives any "failure to state an offense" claim. 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 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).

Despite binding Supreme Court precedent on jurisdiction, Appellant likens her case to United States v. St. Hubert, 909 F.3d 335 (11th Cir. 2018), a case from the Eleventh Circuit. (App. Br. at 36.) In St. Hubert, the Eleventh Circuit held that if an indictment fails to charge an offense against the laws of the United States, a district court lacks jurisdiction. 909 F.3d at 344. Therefore, even though the appellant in St. Hubert unconditionally pleaded guilty, he could still raise the issue of whether his conviction stated an offense for the first time on appeal since the Eleventh Circuit found it implicated jurisdiction. Id. But the Eleventh Circuit is in the minority of circuits in its view. In fact, St. Hubert was based on a previous Eleventh Circuit case, United States v. Peter, 310 F.3d 709, 715 (11th Cir. 2002). Peter sought to distinguish Cotton and limit its holding, but Peter has been squarely

criticized by other circuits. *See, e.g.*, DeVaughn, 694 F.3d at 1149 ("We are not persuaded by Peter's overly narrow reading of Cotton."); United States v. Scruggs, 714 F.3d 258, 264 (5th Cir. 2013) ("[W]e join the Tenth Circuit in holding that Peter was wrongly decided and cannot be squared with Cotton.") And for good reason. Peter overlooks the long litany of cases Cotton relied on it for its holding, including Lamar v. United States, 240 U.S. 60 (1916).

In Lamar, the appellant was convicted of falsely pretending to be an officer of the United States Government by impersonating a member of the House of Representatives. Id. at 64. On appeal, the appellant argued that the indictment did not charge a crime against the United States and so, the trial court had no jurisdiction. Id. Appellant's theory was that a State Representative is not an "officer of the United States." Id. In rejecting this argument, the Supreme Court Court held that "the objection that the indictment does not charge a crime against the United States goes only to the merits of the case." Id. Accordingly, the Court found jurisdiction. Id. Thus, the fact that a crime does not state an offense does not deprive the trial court of jurisdiction. Id.

Since failure to state an offense has been a non-jurisdictional issue since 1830, the President did not exceed the scope of his authority under Article 36, UCMJ, when he amended R.C.M. 907. Thus, this Court is "duty-bound to accord [the RCM] full weight." United States v. Zachary, 61 M.J. 663, 667 (C.A.A.F. 2005) (citing United States v. Villasenor, 19 C.M.R. 129 (U.S.C.M.A. 1955).

B. The plain language of Article 80, UCMJ, allows for an attempted conspiracy charge.

In interpreting a statute, the Court "should always turn first to one, cardinal canon before all others." Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992). The Supreme Court "has repeatedly emphasized" that the plain language of a statute controls, unless the plain language would lead to an absurd result. United States v. McNutt, 62 M.J. 16, 20 (C.A.A.F. 2005) (citations omitted). The Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." Id. Military courts use well-established principles of statutory construction to construe provisions in the MCM. United States v. Lewis, 65 M.J. 85, 88 (C.A.A.F. 2007). It is well established that "when the statute's language is plain, the sole function of the courts…is to enforce it according to its terms." Lamie v. United States Trustee, 540 U.S. 526, 534 (2004) (citations omitted).

Here, the language of Article 80, UCMJ, is plain: it allows prosecution of anyone "who attempts to commit *any offense* punishable by this chapter . . . unless otherwise specifically prescribed." Article 80(a), UCMJ (emphasis added). And Article 81, UCMJ, lists "conspiracy" as an offense. This should end the Court's analysis.

But if this Court moves beyond the plain language of the statute, even the President's guidance regarding attempts in the MCM contemplates allowing an

attempted conspiracy charge to proceed. The MCM counsels that seven specific types of attempts, addressed by other articles, not be charged under Article 80, UCMJ. Conspiracy is not one of them. This Court should presume the President intended to not include conspiracy on the list. *See* United States v. Fetrow, 76 M.J. 181, 185-86 (C.A.A.F. 2017) (rules of statutory construction are helpful in analyzing provisions of the MCM). *Expresio unius est exclusio alterius*, or "the expression of one thing is the exclusion of another," is a canon of interpretation that applies to the Code. *See* United States v. McPherson, 81 M.J. 372, 386 (C.A.A.F. 2021). The fact that the President included seven different crimes that should not be charged as an attempt under Article 80, UCMJ, and excluded conspiracy is "strong evidence" that he intended Article 80 to allow for attempted conspiracy. Elonis v. United States, 575 U.S. 723, 733 (2015). Furthermore, the list the President provided is exhaustive. There is no "residual clause or other language indicating that [the] enumerated list is nonexhaustive." McPherson, 81 M.J. at 386. Accordingly, this Court is not "at liberty to simply add to a list that [the President] created." Id.

Importantly, Appellant does not argue that applying the plain language of Article 80, UCMJ, produces an absurd result. In fact, she does not invoke the absurdity doctrine at all. Therefore, this is not a "rare and exceptional" circumstance where the absurdity doctrine justifies deviating from the literal reading of the statute. United States v. Mooney, 77 M.J. 252, 257 n.4 (C.A.A.F.

2018). The issue before this Court is not whether Appellant "*ought* to be triable for these offenses, but only whether [s]he *can* be tried for them." McPherson, 81 M.J. at 383 (emphasis in original). The plain meaning of the statute allowed the government to try Appellant for attempted conspiracy to commit murder.

i. This Court should decline Appellant's invitation to arrogate to itself the policy-making prerogative that belongs to Congress.

Appellant advances various policy arguments to buttress her assertions that an attempted conspiracy charge is "nonsensical," (App. Br. at 27), that it "generates confusion," (App. Br. at 11), and that it is "dubious in application." (App. Br. at 31). But as the Supreme Court has long recognized, "Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd, or otherwise objectionable." McPherson, 81 M.J. at 374 (quoting Crooks v. Harrelson, 282 U.S. 55, 60 (1930)). And as members of this Court recently recognized, "Congress has the constitutional prerogative to pass legislation that courts may deem poorly reasoned or ill-advised." McPherson, 81 M.J. at 388 (Ohlson, CJ. and Sparks, J. dissenting). This Court is "not empowered to ignore the plain language of a statute" even if the law is "unwise, illogical, or even harmful." Id. That power lies with Congress.

Congress enjoys wide latitude in determining what constitutes a crime. *See, e.g.*, Staples v. United States, 511 U.S. 600, 604 (1994) (noting that the "definition of the elements of a criminal offense is entrusted to the legislature, particularly in

the case of federal crimes, which are solely creatures of statute."). So "[r]egardless of how opaque the rationale for a statute might be, the plain language meaning must be enforced and is rebutted only in 'rare and exceptional circumstances.'" Mooney, 77 M.J. at 257 n.4. Following that rationale, even if some commentators might argue there no need for an attempted conspiracy offense in the military, that opinion certainly does not overcome the plain language of Articles 80 and 81.

Appellant also raises several academic hypotheticals regarding the "strain" attempted conspiracy could place on the defense of withdrawal from the conspiracy and the "potential [for] maximum punishment inflation." (App. Br. at 28-30.) But Appellant did not raise a withdrawal defense in this case. On the contrary, she pleaded guilty, specifically disclaiming any legal defenses or justifications for her crimes. Furthermore, her plea agreement significantly reduced the maximum possible punishment she faced. (JA at 158-59.) Reducing the sentence from life without the possibility of parole to 10 years confinement was a significant benefit for anyone, but especially someone like Appellant in her twenties. (*See* R. at 157-158.) Therefore, these theoretical arguments rest on "contingent future events that may not occur as anticipated, or indeed may not occur at all." United States v. Wall, 79 M.J. 456, 463 (C.A.A.F. 2020) (quoting Texas v. United States, 523 U.S. 296, 300 (1998)). Accordingly, the claim is not ripe. Id. Thus, this Court should decline to issue an advisory opinion on how

attempted conspiracy could affect future cases with such a defense or an inflated maximum punishment. Id.

Appellant argues that since Article 82, UCMJ, now includes solicitation for any enumerated offense, there can never be an offense of "attempted conspiracy." (App. Br. at 10.) But Appellant ignores the fact that when Congress passed the general solicitation statute in 2016, it chose not to amend Article 81, UCMJ, to eliminate "attempted conspiracy" from the Code. Where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Rodriguez v. United States, 480 U.S. 522, 525 (1987) (internal quotation marks omitted) (citation omitted). The passage of a general solicitation statute in Article 82, UCMJ, did not repeal by implication any part of Article 80, UCMJ.

ii. This Court's prior case law recognizes "attempted conspiracy" as an offense.

Appellant's argument rephrases in new terms old claims that this Court has consistently rejected since 1995. In United States v. Anzalone, this Court held that the UCMJ does not prohibit a charge of attempted conspiracy where there is a purported agreement between a servicemember and an undercover government agent to commit an offense. 43 M.J. 322, 323 (C.A.A.F. 1995). While the majority did not agree as to the legal basis for such a conclusion, Judge Sullivan

asserted in his concurring opinion that "[a] plain reading of the applicable statutes furnishes the answer in this case." Id. at 327 (Sullivan, J., concurring). He observed that Article 80 prohibits attempts to commit any offense punishable under the code and, since conspiracy is an offense punishable under Article 81, attempted conspiracy is therefore an offense prohibited by operation of Article 80, UCMJ. Id.

This observation was further advanced in United States v. Riddle when Judge Sullivan incorporated his rationale into the majority opinion. Further refining his argument in Anzalone, he offered three points to support his conclusion that attempted conspiracy is an offense under military law:

> Clearly, the language of [Article 80, UCMJ] is broad and makes no distinction between a conspiracy or other inchoate offense and any other type of military offense as the lawful subject of an attempt offense. In addition, no other statute of case law from this court precludes application of Article 80 to a conspiracy offense as prohibited in Article 81. Finally, conviction of an attempt under Article 80 is particularly appropriate where there is no general solicitation statute in the jurisdiction of a conspiracy statute embodying the unilateral theory of conspiracy. Accordingly, we reject appellant's argument that he was not found guilty of a crime under the Uniform Code of Military Justice.

Riddle, 44 M.J. at 285.

Despite Judge Sullivan's focus on the plain language interpretation of Articles 80 and 81, Appellant relies entirely on dicta. (App. Br. at 19.) Specifically, Appellant hinges her argument on the passage that states, "conviction

of an attempt under Article 80 is *particularly appropriate* where there is no general solicitation statute in the jurisdiction." Id. at 285 (emphasis added). Appellant argues that "attempted conspiracy" can no longer be an offense because when this Court decided Riddle it presupposed "attempted conspiracy" could not exist alongside a general solicitation statute. (App. Br. at 10.) But, in no uncertain terms did Riddle state that "attempted conspiracy" could not exist alongside "solicitation." Instead, this Court used the equivocal language of "particularly appropriate." 44 M.J. at 285.

In fact, at the time when Riddle acknowledged "attempted conspiracy" as an offense, solicitation was an offense under Article 134, UCMJ. MCM, pt. IV, ¶105 (1995 ed.); 44 M.J. at 285 n.*. Ultimately Riddle acknowledged "attempted conspiracy" as an offense because "the language of [Article 80, UCMJ]" is broad and makes no distinction between a conspiracy or other inchoate offense" and "no other statute or case law for this Court precludes application of Article 80 to a conspiracy offense." 44 M.J. at 285. The same rings true today.

Most recently, in United States v. Roeseler, this Court again affirmed a guilty plea to attempted conspiracy to commit murder. 55 M.J. 286 (C.A.A.F. 2001). Citing Riddle, this Court again recognized that attempted conspiracy is a viable offense under the Code. Roeseler, 55 M.J. at 287. Appellant's citation to federal circuit case law, which analyzes different statutes, does not override prior decisions from this Court, which faithfully apply the plain language of the UCMJ.

iii. Appellant's misconduct was best captured by an attempted conspiracy charging scheme.

Appellant argues that because the government could have charged her with solicitation for the same underlying misconduct, the "fiction of 'attempted conspiracy' evaporates." (App. Br. at 26.) But, just because the government could have hypothetically charged Appellant under a different article does not invalidate its chosen charging scheme. The government enjoys "broad discretion" in its charging decisions. United States v. Goodwin, 457 U.S. 368, 380 n.11 (1982). "[W]hat charge to file or bring before a grand jury, generally rests entirely in [the prosecutor]'s discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978). Even if solicitation had been a more appropriate charge, the government was not prohibited from charging "attempted conspiracy." United States v. Elespuru, 73 M.J. 326, 329 (C.A.A.F. 2014) ("It is hardly a novel situation that the available evidence in a particular case might meet the elements of multiple offenses, affording the Government some discretion in its charging decisions."); *see also* Anzalone, 43 M.J. at 325 ("Our rules should not be so rigidly drawn that prosecutors are placed in a dilemma in determining what offense should be charged.").

Moreover, attempted conspiracy was the appropriate charge to capture Appellant's misconduct. Regarding Specification 1 of the Additional Charge (the attempt to conspire with J.M. to murder T.D.), Appellant developed a plan with

J.M. and believed J.M. would help her acquire a drug to murder her husband. This conduct could not be charged as conspiracy since J.M. was an undercover government agent. And "there can be no conspiracy when a supposed participant merely feigns acquiescence with another's criminal proposal in order to secure his detection and apprehension by proper authorities." United States v. Valigura, 54 M.J. 187, 189 (C.A.A.F. 2000) (holding conspiracy as defined by Article 81, UCMJ, requires a bilateral theory meaning more than one other person must agree on the criminal goal). *See also* Roeseler, 55 M.J. at 286 (affirming an appellant's conviction for attempted conspiracy where he had agreed to assist in the murder of two named individuals who were, unbeknownst to the appellant, fictitious). Since it was legally impossible for Appellant to commit the offense of conspiracy under a unilateral conspiracy theory with a confidential informant, attempt was the appropriate charging strategy. *See* United States v. Simpson, 77 M.J. 279, 285 (C.A.A.F. 2018) ("A person who purposely engages in conduct which would constitute the offense if the attendant circumstances were as that person believed them to be is guilty of an attempt.").

As it relates to the Specification of the Second Additional Charge (the attempt to conspire with T.L. to murder T.D.), Appellant planned with T.L. to procure lessons on how to kill her husband. Like Specification 1 of the Additional Charge, this was not a situation in which Appellant asked T.L. to murder her husband, which would have met the definition of solicitation. Instead, Appellant

asked T.L. to provide her with lessons on how to fatally poison a person, in exchange for money. Providing lessons on how to fatally poison someone, without more, is not an "offense under the UCMJ." Article 82b.(1), UCMJ. It is not ordinarily a crime. Had Appellant paid T.L., or if T.L. had actually provided Appellant with the lessons, the elements of conspiracy would have been met. But neither occurred, so charging attempted conspiracy was appropriate. Thus, the government's decision to charge the Specification of the Second Additional Charge as attempted conspiracy was likewise proper.

This Court should presume that Congress said in Article 80 what it meant and meant in Article 80 what it said: attempted conspiracy is a viable offense under the Code. Germain, 503 U.S. at 254. Appellant cannot show that the specifications she pleaded guilty to were "so obviously defective that by no reasonable construction can it be said to charge [an] offense." Watkins, 21 M.J. at 210. Viewing the attempted conspiracy specifications "with maximum liberality," they stated an offense based on the unambiguous plain language of the statute. Id. This is especially so when Appellant admitted guilt of a substantive crime of attempted conspiracy to commit premeditated murder. Hardy, 77 M.J. at 442.

CONCLUSION

WHEREFORE the United States respectfully requests this Honorable Court deny Appellant's requested relief and affirm the decision of Air Force Court of Criminal Appeals.

MORGAN R. CHRISTIE, Maj, USAF
Appellate Government Counsel
Government Trial
and Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4812
Court Bar No. 36170

MARY ELLEN PAYNE
Associate Chief, Government Trial
and Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4812
Court Bar No. 34088

THOMAS J. ALFORD, Lt Col, USAF
Director of Operations, Government Trial
and Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4812
Court Bar No. 34441

NAOMI P. DENNIS, Colonel, USAF
Chief, Government Trial
and Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4812
Court Bar No. 32987

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 22 July 2022.

MORGAN R. CHRISTIE, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 36170

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/s/ _____

MORGAN R. CHRISTIE, Maj, USAF

Attorney for USAF, Government Trial and Appellate Counsel Division

Date: 22 July 2022

APPENDIX

Cited Unpublished Opinions

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1. *United States v. Hardee, 2017 CCA LEXIS 263*
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United States v. Hardee

United States Air Force Court of Criminal Appeals

April 17, 2017, Decided

No. ACM S32360

Reporter
2017 CCA LEXIS 263 *

UNITED STATES, Appellee v. Brandon M. HARDEE, Senior Airman (E-4), U.S. Air Force, Appellant

Notice: THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL PUBLICATION.
THIS IS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER AFCCA RULE OF PRACTICE AND PROCEDURE 18.4.

Subsequent History: Motion granted by *United States v. Hardee, 2017 CAAF LEXIS 687 (C.A.A.F., June 14, 2017)*

Affirmed without opinion by, in part *United States v. Hardee, 2017 CAAF LEXIS 888 (C.A.A.F., Aug. 31, 2017)*

Prior History: **[*1]** Appeal from the United States Air Force Trial Judiciary. Military Judge: Shelly W. Schools. Approved sentence: Bad-conduct discharge, confinement for six months, forfeiture of $1301.00 pay per month for six months, and re-duction to E-1. Sentence adjudged 15 October 2015 by SpCM convened at Little Rock Air Force Base, Arkansas.

Core Terms

military, guilty plea, waived, motion to suppress, reliability, pretrial, informant, cocaine, appellate review, probable cause, totality of the circumstances, confidential source, cocaine use, authorization, suppress, urine, drug use, unconditional, ineffective, abuse of discretion, text message, circumstances, intentionally, specification, preserved, phone, unconditional plea, cellular phone, misunderstanding, sentence

Case Summary

Overview

HOLDINGS: [1]-A servicemember who pled guilty to wrongful use of cocaine and anabolic steroids on divers occasions, in violation of UCMJ art. 112a, *10 U.S.C.S. § 912a*, was not entitled to relief because his counsel negotiated an unconditional plea and did not tell the servicemember that he was waiving his right to appeal the judge's order denying his motion to suppress the results of searches the Government conducted of his urine and cell phone; [2]-Although the servicemember's attorneys admitted that they failed to take steps that were required to effectuate a conditional plea, the servicemember was not prejudiced by the error because there was no valid basis for challenging a magistrate's decision authorizing the searches, and the military judge did not have a duty to inform the servicemember that he was waiving his right to appeal her order denying his motion.

Outcome
The court affirmed the findings and sentence.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1[] **Criminal Process, Assistance of Counsel**

The United States Air Force Court of Criminal Appeals ("AFCCA") reviews a claim of ineffective assistance of counsel de novo. The court undertakes a two-part inquiry informed by the United States Supreme Court's decision in Strickland v. Washington. To prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that the deficiency resulted in prejudice. In reviewing for ineffectiveness, the AFCCA looks at the questions of deficient performance and prejudice de novo.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pleas

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Pleas

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN2[] Criminal Process, Assistance of Counsel

In the guilty plea context, the first part of the Strickland test remains the same—whether counsel's performance fell below a standard of objective reasonableness expected of all attorneys. The second prong is modified to focus on whether counsel's ineffective performance affected the outcome of the plea process. It is not necessary to decide the issue of deficient performance when it is apparent that the alleged deficiency has not caused prejudice. To satisfy the "prejudice" requirement, an appellant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. A reasonable probability is a probability sufficient to undermine confidence in the outcome. That requires a substantial, not just conceivable, likelihood of a different result. When an appellant argues that counsel was ineffective for erroneously waiving a motion, it makes sense to deny the claim if the appellant would not be entitled to relief on the erroneously waived motion, because the accused cannot show he was harmed by not preserving the issue.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Motions > Suppression

HN3[] Judicial Review, Standards of Review

The United States Air Force Court of Criminal Appeals ("AFCCA") reviews a military judge's ruling on a motion to suppress for abuse of discretion. The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous. An abuse of discretion occurs when a judge's findings of fact are clearly erroneous or a judge's conclusions of law are based on an erroneous view of the law. As such, the findings of fact are reviewed under the clearly erroneous standard and conclusions of law are reviewed de novo. On questions of fact, the AFCCA asks whether a judge's decision is reasonable; on questions of law, it asks whether the decision is correct.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

Criminal Law & Procedure > ... > Search Warrants > Probable Cause > Totality of Circumstances Test

Military & Veterans Law > Military Justice > Search & Seizure > Searches Requiring Probable Cause

HN4[] Search & Seizure, Probable Cause

The United States Supreme Court, in Illinois v. Gates, made it clear that a totality of the circumstances analysis informs probable cause determinations. The Court abandoned the more rigid two-pronged test of its prior decisions that strictly required information be provided a magistrate to establish the reliability of an informant. In Gates, the Court stated that the task of an issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that a magistrate had a substantial basis for concluding that probable cause existed. The two-pronged test the Supreme Court

adopted in Aguilar v. Texas that required an affidavit adequately reveal the "basis of knowledge" and "veracity" of an affiant's informant was recast "as relevant considerations in the totality-of-the-circumstances analysis that traditionally has guided probable-cause determinations: a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability."

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

Criminal Law & Procedure > ... > Search Warrants > Probable Cause > Totality of Circumstances Test

Military & Veterans Law > Military Justice > Search & Seizure > Searches Requiring Probable Cause

HN5[] **Search & Seizure, Probable Cause**

In United States v. Bethea, the United States Court of Appeals for the Armed Forces ("CAAF") reiterated the "totality of the circumstances" test to determine whether there is a substantial basis for probable cause and summarized United States Supreme Court decisions describing what probable cause actually requires in terms of a level of proof. The CAAF noted that the Supreme Court had emphasized that probable cause is a flexible, common sense standard. A probable cause determination merely requires that a person of "reasonable caution" could believe that a search may reveal evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. So even though people often use "probable" to mean "more likely than not," probable cause does not require a showing that an event is more than 50% likely.

Military & Veterans Law > Military Justice > Search & Seizure > Searches Requiring Probable Cause

HN6[] **Search & Seizure, Searches Requiring Probable Cause**

When Mil. R. Evid. 315(f)(2), Manual Courts-Martial ("MCM") was promulgated along with the Military Rules of Evidence in the 1984 Manual for Courts-Martial, the entirety of the second sentence from MCM, ch. 27, para. 152 (1969) was deleted and replaced based on the United States Supreme Court's decision in Illinois v. Gates. MCM, app. 21 at A21-84 (1984). So while "basis of knowledge" and "veracity" are relevant considerations to those deciding the existence of probable cause, it is not an exclusive test.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

Criminal Law & Procedure > ... > Search Warrants > Probable Cause > Totality of Circumstances Test

Military & Veterans Law > Military Justice > Search & Seizure > Searches Requiring Probable Cause

HN7[] **Search & Seizure, Probable Cause**

In United States v. Tipton, one of the earliest military cases citing the United States Supreme Court's decision in Illinois v. Gates, the United States Court of Military Appeals (now the United States Court of Appeals for the Armed Forces) applied the "totality of circumstances" test in a case where the reliability of an informant was at issue. Noting there exists a degree of accountability in a military environment that is unparalleled in civilian society, and that servicemembers are in a poor position to fabricate with impunity, the court advanced military accountability as a factor to be considered in the totality of the circumstances. The court also recognized the unique "truth-telling effect" of an identified servicemember's giving information in the presence of a superior officer, and that this same salutary effect is present when the authority is a military police officer. In Tipton, the court found that in the totality of the circumstances, the informant's accountability was sufficient to overcome his lack of proven reliability.

Military & Veterans Law > Military Justice > Search & Seizure > Searches Requiring Probable Cause

HN8[] **Search & Seizure, Searches Requiring Probable Cause**

While the degree of military accountability is diminished for a reservist in a civilian as compared to active status, the "truth-telling effect" for military members, active and reserve, is not so easily donned and doffed as one's uniform.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Warrants

Criminal Law & Procedure > ... > Search Warrants > Affirmations & Oaths > Sufficiency Challenges

Military & Veterans Law > Military Justice > Search & Seizure > Searches Requiring Probable Cause

Evidence > Burdens of Proof > Preponderance of Evidence

HN9 **Search & Seizure, Warrants**

In Franks v. Delaware, the United States Supreme Court held that where a defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by an affiant in a warrant affidavit, and if the allegedly false statement was necessary to finding probable cause, the *Fourth Amendment* requires that a hearing be held at the defendant's request. In the event that at that hearing an allegation of perjury or reckless disregard is established by a defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. The rule the Supreme Court adopted in Franks is codified in Mil. R. Evid. 311(d)(4)(B), Manual Courts-Martial.

Military & Veterans Law > ... > Trial Procedures > Pleas > Providence Inquiries

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN10 **Pleas, Providence Inquiries**

The standard for reviewing a military judge's decision to accept a plea of guilty is an abuse of discretion. A military judge abuses her discretion if she accepts a guilty plea without an adequate factual basis to support the plea. In contrast, a military judge's determinations of questions of law arising during or after a plea inquiry are reviewed de novo. In reviewing a military judge's acceptance of a plea for an abuse of discretion, appellate courts apply a substantial basis test: Does the record as a whole show a substantial basis in law and fact for questioning the guilty plea?

Military & Veterans Law > ... > Trial Procedures > Pleas > Providence Inquiries

HN11 **Pleas, Providence Inquiries**

R.C.M. 910, Manual Courts-Martial is one source for the duties of a military judge as it regards mandatory advice to an accused in the context of a guilty plea and details a number of specific requirements. R.C.M. 910 does not expressly require a military judge to advise an accused that an unconditional guilty plea waives all nonjurisdictional matters. In United States v. Benavides, the United States Air Force Court of Criminal Appeals observed that although military judges do not typically warn an accused that an unconditional plea waives all nonjurisdictional matters, that is well known to military counsel. Indeed, waiver of nonjurisdictional defects by an unconditional plea of guilty is a long-standing feature of both federal and military criminal procedure. R.C.M. 910(j) plainly and concisely states that a plea of guilty which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offenses to which the plea was made.

Military & Veterans Law > ... > Trial Procedures > Pleas > Providence Inquiries

HN12 **Pleas, Providence Inquiries**

Even though there is not an express requirement that military judges, as a matter of course, provide an advisement that a guilty plea waives all nonjurisdictional matters, and that counsel are presumed to know this, there are circumstances where a judicial advisement may be appropriate. In United States v. Pena, the United States Court of Appeals for the Armed Forces stated that when a challenge concerns an appellant's claimed misunderstanding of the collateral consequences of a court-martial, such as an early release program, an appellant must demonstrate that the collateral consequences are major and the appellant's misunderstanding of the consequences: (a) results foreseeably and almost inexorably from the language of a pretrial agreement; (b) was induced by the trial judge's comments during the providence inquiry; or (c) was made readily apparent to the judge, who nonetheless failed to correct that misunderstanding. In

short, chief reliance must be placed on defense counsel to inform an accused about the collateral consequences of a court-martial conviction and to ascertain his willingness to accept those consequences.

Counsel: For Appellant: Major Johnathan D. Legg, USAF.

For Appellee: Major J. Ronald Steelman III, USAF; Gerald R. Bruce, Esquire.

Judges: Before MAYBERRY, HARDING, and C. BROWN, Appellate Military Judges. Judge HARDING delivered the opinion of the Court, in which Senior Judge MAYBERRY and Judge C. BROWN joined.

Opinion by: HARDING

Opinion

HARDING, Judge:

Consistent with his pleas pursuant to a pretrial agreement, Appellant was convicted by a military judge sitting alone of one specification of wrongful use of cocaine on divers occasions, and one specification of wrongful use of anabolic steroids on divers occasions, both in violation of *Article 112a, Uniform Code of Military Justice (UCMJ)*, *10 U.S.C. § 912a*. A specification of assault and battery in violation of *Article 128, UCMJ*, *10 U.S.C. § 928*, was dismissed in accordance with the pretrial agreement. Appellant was sentenced to a bad-conduct discharge, confinement for six months, **[*2]** forfeiture of $1301.00 pay per month for six months, and reduction to E-1. The convening authority approved the sentence as adjudged.

Appellant raises two issues on appeal, both predicated on his asserted lack of knowledge that his guilty plea waived appellate review of a suppression motion concerning the results of a search of his urine and cellular phone. First, Appellant claims his counsel were ineffective when they advised him to enter into a pretrial agreement and plead guilty without informing him that an unconditional guilty plea waived appellate review of the motion. Second, he argues the military judge abused her discretion in accepting his guilty plea without discussing on the record that an unconditional plea waived appellate review of the same motion to suppress. As we find no error materially prejudices a substantial right of this Appellant, we now affirm.

I. Background

On 15 February 2015, after receiving information from a confidential source that Appellant had used cocaine two days earlier on 13 February 2015, Air Force Office of Special Investigations (AFOSI) Special Agent (SA) HT sought and obtained an oral search authorization from the Little Rock Air Force Base military **[*3]** magistrate. Specifically, SA HT informed the magistrate that the confidential source directly observed Appellant possess and use some amount of cocaine in a nightclub restroom. Appellant, after snorting the cocaine, wiped the cocaine residue with his finger and placed it in the source's mouth.[1]

SA HT also informed the magistrate that the source overheard Appellant make the following statements in late January 2015: (1) "I feel like doing coke right now and I do coke when I am drunk," and (2) "I have been doing coke since I have been in the military." SA HT further relayed information the source provided regarding Appellant's text messages describing potential drug transactions. The source reported observation of Appellant's text messages to his dealer requesting a purchase of cocaine and described text messages sent to the source's phone from Appellant about purchasing cocaine.

In addition to the information provided by this confidential source, SA HT also informed the magistrate of a statement made by Appellant's girlfriend in January 2015 implicating Appellant in cocaine use. The girlfriend's statement was that Appellant no longer drank alcohol because it made him angry but now ingested **[*4]** cocaine. This statement was overheard and reported by a witness independent of the confidential source, a staff sergeant assigned to the security forces squadron. In fact, this reported statement preceded the information provided by the source and resulted in the initiation of the investigation of wrongful drug use by Appellant.

At the conclusion of the telephonic discussion with SA HT, the military magistrate authorized SA HT to search Appellant's phone for evidence of drug use and to obtain urine and blood samples from Appellant for drug testing.

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[1] This action by Appellant was the basis for a single charge and specification of assault and battery in violation of *Article 128, UCMJ*, *10 U.S.C. § 128*. This charge and its specification were dismissed pursuant to Appellant's pretrial agreement with the convening authority.

By the time of the suppression motion hearing, wherein Appellant challenged the sufficiency of the probable cause for the searches, the military magistrate did not specifically recall all the details about the source provided by SA HT in support of the oral search authorization. He did, however, describe that his standard procedure prior to issuing authorizations based on information from a confidential source was to ask questions about the source's reliability and trustworthiness. SA HT testified that he provided details about the source to the magistrate upon which he could draw an independent conclusion about the source's reliability.

The **[*5]** source was later disclosed to be Senior Airman (SrA) JG, a reservist attached to a unit at Little Rock Air Force Base. When the investigation began SrA JG was on active duty orders to attend Airman Leadership School. The magistrate was told she came forward voluntarily to AFOSI to report what she overheard Appellant say about his cocaine use in late January and to report the content of his text messages as it concerned his use and attempted purchase of cocaine. AFOSI conducted a criminal background check on SrA JG which disclosed no derogatory information or reason for them to question her reliability or motives. This information was also provided to the magistrate. By mid-February, when SrA JG reported Appellant's cocaine use in the rest-room, her orders to active duty had expired.

After considering the information SA HT told him over the phone on 15 February 2015, both the basis of the source's knowledge and information about the source herself, along with Appellant's girlfriend's statement about his cocaine use, the military magistrate gave oral authorization for the seizure and search of Appellant's urine, blood, and cellular phone. The search of Appellant's cellular phone revealed **[*6]** incriminating text messages concerning Appellant's use of cocaine and steroids. Appellant's urine sample tested positive for a metabolite of cocaine.

On 16 February 2015, the military magistrate followed up on the oral authorization and executed the written authorization for the search and seizure. On 17 February 2015, SA HT executed the supporting probable cause affidavit for the authorization. The affidavit contained a summary of the information he provided to the magistrate orally two days earlier. As a means of protecting SrA JG's identity, SA HT used the word "sources" in the affidavit when referring to information provided by SrA JG.

At trial, Appellant made a motion to suppress the search results arguing there was "no substantial basis for probable cause in the affidavit" and that the "affidavit [was] intentionally misleading." The military judge denied the motion to suppress. The court recessed and by the next day a pretrial agreement had been executed between Appellant and the convening authority.

In the pretrial agreement, the convening authority agreed to withdraw and dismiss the assault and battery charge and not to approve confinement in excess of six months. Appellant offered **[*7]** to: (1) plead guilty to the two specifications of wrongful drug use; (2) elect trial by judge alone; (3) cooperate with law enforcement investigations of wrongful drug use by other servicemembers; (4) testify in any future judicial proceedings against certain named individuals and any other servicemember about whom the Appellant had information; (5) not request production of any additional witnesses at government expense; and (6) enter into a reasonable stipulation of fact.

Although a term requiring Appellant to "waive all waivable motions" appeared in an earlier draft of the agreement, Appellant's counsel successfully had this term deleted from the final pretrial agreement. The pretrial agreement, however, did not provide that Appellant's offer to plead guilty was conditioned on preservation of appellate review of the motion to suppress or any other motion.

In an affidavit executed by Appellant and attached to the record in conjunction with his assignment of errors, Appellant made the following declaration:

> I have no memory that any of my trial defense counsel explained to me the meaning of an "unconditional plea" of guilt. In fact, it is my belief that I was advised by my defense counsel **[*8]** that I would be able to raise on appeal the motion to suppress that was litigated at trial prior to my plea of guilt. If I had known that I would be giving up the motion to suppress, I would have attempted to negotiate for a conditional plea that reserved the right to raise this motion on appeal. If a conditional plea could not be negotiated, I would have plead not guilty in order to preserve this motion for appeal.

Appellant's lead trial defense counsel, QM, provided in his affidavit that Appellant's "recollection that we specifically discussed him being able to appeal the denial of the motion to suppress is accurate." QM's affidavit also provides more context to the significance

that the trial defense team attached to the absence of the "waive all waivable motions" term in the pretrial agreement. His affidavit states that the defense team discussed internally, and with Appellant, "that this [waive all waivable motions] provision had to be removed with government counsel's approval, and that the judge would then have to approve the [pretrial agreement] in order to preserve [Appellant's] right to appeal the denied motion to suppress." As highlighted above, the "waive all waivable motions" **[*9]** term was not included in the signed pretrial agreement.

In accordance with the pretrial agreement, Appellant elected the forum of trial by judge alone and entered pleas of guilty to the specifications of wrongful use of cocaine and anabolic steroids, both on divers occasions. The military judge subsequently conducted guilty plea and pretrial agreement inquiries. There was no discussion on the record that the guilty plea was unconditional or that the guilty plea waived Appellant's motion to suppress. Nor did Appellant or his counsel assert their apparent belief that the absence of the "waive all waivable motions" provision had the effect of preserving the litigated motion to suppress for appellate review. Unaware of any mistaken belief by Appellant that the motion to suppress was preserved for appellate review, the military judge approved the pretrial agreement, found Appellant's guilty plea provident, and accepted Appellant's plea of guilty. After the announcement of the sentence, the military judge ensured the assault and battery charge and specification was withdrawn and dismissed prior to adjourning the court.

II. Discussion

A. Ineffective Assistance of Counsel

Appellant claims his **[*10]** counsel were ineffective when they negotiated the pre-trial agreement without advising him that an unconditional guilty plea waived appellate review of the motion to suppress the results of the searches of his urine and cellular phone. Finding no deficiency in counsel's performance that resulted in prejudice, we deny Appellant's claim of ineffective assistance of counsel.[2]

[2] The affidavits provided by all three trial defense counsel unanimously support that it was their intention to negotiate a conditional plea. However, they did not take the necessary steps in accordance with Rule for Courts-Martial 910(a)(2) to effectuate a conditional plea. Accordingly, their actions were deficient, but we find no prejudice.

1. The *Strickland* Test as Applied to a Guilty Plea

HN1[] This court reviews a claim of ineffective assistance of counsel de novo. *United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011)*. We undertake a two-part inquiry informed by the Supreme Court's decision in *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. "To prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green, 68 M.J. 360, 361-62 (C.A.A.F. 2010)* (citing *Strickland, 466 U.S. at 687*). In reviewing for ineffectiveness, the court "looks at the questions of deficient performance and prejudice de novo." *United States v. Gutierrez, 66 M.J. 329, 330-31 (C.A.A.F. 2008)*.

HN2[] In the guilty plea context, the first part of the *Strickland* test remains the same—whether counsel's performance fell below a standard of objective reasonableness expected of all attorneys. *Hill v. Lockhart, 474 U.S. 52, 56-58, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)*. The second prong is modified to focus on whether the "ineffective performance affected the outcome of **[*11]** the plea process." *Id. at 59*; *see also Lafler v. Cooper, 566 U.S. 156, 163, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012)*. It is not necessary to decide the issue of deficient performance when it is apparent that the alleged deficiency has not caused prejudice. *See Loving v. United States, 68 M.J. 1, 2 (C.A.A.F. 2009)*.

"[T]o satisfy the 'prejudice' requirement, [Appellant] must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill, 474 U.S. at 59*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome. That requires a substantial, not just conceivable, likelihood of a different result." *Cullen v. Pinholster, 563 U.S. 170, 189, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011)* (citations and quotation marks omitted). "When an appellant argues that counsel was ineffective for erroneously waiving a motion, it makes sense to deny the claim if the appellant would not be entitled to relief on the erroneously waived motion, because the accused cannot show he was harmed by not preserving the issue." *United States v. Bradley, 71 M.J. 13, 17 (C.A.A.F. 2012)*.

In this case, Appellant asserts that he was harmed or prejudiced by losing the opportunity to appeal the military judge's ruling. Implicitly, Appellant argues that had his pretrial motion been successful in suppressing the results of the search of his phone and the urinalysis, he would have pleaded not guilty **[*12]** to and contested the wrongful drug use specifications. Therefore, after losing the motion at trial, Appellant asserts that had he understood that an unconditional guilty plea waived the suppression issue he would not have entered such a plea. He claims he would have either entered a conditional guilty plea or a plea of not guilty to preserve the suppression issue. Applying the harmless erroneous waiver approach of *Bradley* to this case, if Appellant would not be entitled to relief on an appeal of the motion to suppress, then there is no prejudice and the claim of ineffective assistance of counsel fails. Therefore, to assess the viability of his claim of ineffective assistance of counsel, we now conduct review of the very issue that was waived by Appellant's unconditional guilty plea.

2. Motion to Suppress Drug Test Results and Cellular Phone Contents

Appellant's motion at trial to suppress the search results rested on two separate, but related, grounds focused on the confidential source. Appellant argued the there was "no substantial basis for probable cause in the affidavit" because SA HT's affidavit provided inadequate indicia of reliability for the confidential source and also that **[*13]** the "affidavit [was] intentionally misleading" about the number of sources. We disagree with Appellant on both counts and conclude that he would not have been entitled to relief on appeal.

HN3[↑] This court reviews a military judge's ruling on a motion to suppress for abuse of discretion. *United States v. Cote, 72 M.J. 41, 44 (C.A.A.F 2013)*; *see also United States v. White, 69 M.J. 236, 239 (C.A.A.F. 2010)*. "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *White, 69 M.J. at 239* (quoting *United States v. Lloyd, 69 M.J. 95, 99 (C.A.A.F. 2010)*). An abuse of discretion occurs when the findings of fact are clearly erroneous or the conclusions of law are based on an erroneous view of the law. *United States v. Hollis, 57 M.J. 74, 79 (C.A.A.F. 2002)*. As such, the findings of fact are reviewed under the clearly erroneous standard and conclusions of law are reviewed de novo. *Cote, 72 M.J. at 44*. "On questions of fact, [we ask] whether the decision is *reasonable*; on questions of law, [we ask] whether the decision is correct." *United States v. Baldwin, 54 M.J. 551, 553 (A.F. Ct. Crim. App. 2000)* (en banc) (alterations in original) (citation omitted), *aff'd*, *54 M.J. 464 (C.A.A.F. 2001)*.

The fundamental question raised in Appellant's motion to suppress was whether, based on the information orally provided to the magistrate by SA HT, probable cause existed to support the oral authorization to seize and search **[*14]** Appellant's cellular phone, blood, and urine. Appellant's primary argument was that probable cause was lacking due to insufficient evidence provided to the military magistrate of the confidential source's reliability.

HN4[↑] The Supreme Court, in *Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)*, made clear that a totality of the circumstances analysis informs probable cause determinations. The Court abandoned the more rigid "two-pronged test" of their prior decisions that strictly required information be provided the magistrate to establish the reliability of an informant. *See Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723, (1964)*; *Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637, (1969))*. In *Gates*, they stated:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . [concluding]" that probable cause existed.

Gates, 462 U.S. at 238 (quoting *Jones v. United States, 362 U.S. 257, 271, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960))* (alterations in original).

The *Aguilar* two-pronged test that required an affidavit adequately reveal the "basis of knowledge" **[*15]** and "veracity" of the affiant's informant was recast "as relevant considerations in the totality-of-the-circumstances analysis that traditionally has guided probable-cause determinations: a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Id. at 233*.

HN5[] In United States v. Bethea, 61 M.J. 184 (C.A.A.F. 2005), the Court of Appeals for the Armed Forces (CAAF) reiterated the totality of the circumstances test to determine whether these is a substantial basis for probable cause and also summarized Supreme Court decisions describing what probable cause actually requires in terms of a level of proof.

> The Supreme Court has emphasized that "probable cause is a flexible, common sense standard." A probable cause determination merely requires that a person of "reasonable caution" could believe that the search may reveal evidence of a crime; "*it does not demand any showing that such a belief be correct or more likely true than false*." So even though "people often use 'probable' to mean 'more likely than not,' probable cause does not require a showing that an event is more than 50% likely."

Bethea, 61 M.J. at 187 (footnotes omitted).

In his written motion at trial, **[*16]** while acknowledging that *Gates* had abandoned a strict requirement to demonstrate the reliability of an informant, Appellant nonetheless cited United States v. Edie, 5 M.J. 647 (A.F.C.M.R. 1978), a pre-*Gates* decision of this court for the proposition "that in Air Force cases the reliability of the informant *must* be established in the affidavit." (Emphasis added). To the extent that Appellant asserts *Edie* compels a strict reliability requirement for his case, we disagree. The opinion in *Edie* merely restated what the Supreme Court had held in *Aguilar* prior to its decision in *Gates* and reflected how *Aguilar* had been incorporated into the 1969 *Manual for Courts-Martial* (*MCM*). The 1969 *MCM* provided:

> Probable cause for ordering a search exists when there is reason to believe that items of the kind indicated above as being properly the subject of a search are located in the place or on the person to be searched. Such a reasonable belief may be based on information which the authority requesting permission to search has received from another if the authority ordering the search has been apprised of some of the underlying circumstances from which the informant concluded that the items in question were where he claimed they were and *some of the* ***[*17]*** *underlying circumstances from which the authority requesting permission to search concluded that the informant, whose identity need not be disclosed, was credible or his information reliable*.

MCM, United States, Ch. 27, ¶ 152 (1969 ed.) (emphasis added).

HN6[] When Military Rule of Evidence 315(f)(2)[3] was promulgated along with the Military Rules of Evidence in the 1984 *MCM*, the entirety of the second sentence from the 1969 *MCM* rule was deleted and replaced based on *Gates*. *MCM*, app. 21 at A21-84 (1984 ed.). So while "basis of knowledge" and "veracity" are relevant considerations to those deciding the existence of probable cause, it is not an exclusive test.

HN7[] In United States v. Tipton, 16 M.J. 283 (C.M.A. 1983), one of the earliest military cases citing *Gates*, the court applied the totality of circumstances test in a case where the reliability of the informant was at issue. Noting there exists "a degree of accountability **[*18]** in a military environment that is unparalleled in civilian society" and that as such servicemembers are "in a poor position to fabricate with impunity," the court advanced military accountability as a factor to be considered in the totality of the circumstances. *Id. at 287*. They also "recognized the unique 'truth-telling effect' of an identified servicemember's giving information in the presence of a superior officer," *id.* (citing United States v. Land, 10 M.J. 103, 105, 107 (C.M.A. 1980)), and that "this same salutary effect is present when the authority is a military police officer," *id.* (citing United States v. Harris, 403 U.S. 573, 593, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971)). In *Tipton*, the court found that "in the totality of the circumstances that [the informant's] 'accountability' was sufficient to overcome his lack of proven reliability." *Id.*

The military judge in this case found that in the totality of the circumstances, the information orally provided to the

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[3] *Probable cause determination*. Probable cause to search exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. A search authorization may be based upon hearsay evidence in whole or in part. A determination of probable cause under this rule shall be based upon any or all of the following:

> (A) Written statements communicated to the authorizing officer;
>
> (B) Oral statements communicated to the authorizing official in person, via telephone, or by other appropriate means of communication; or
>
> (C) Such information as may be known by the authorizing official that would not preclude the officer from acting in an impartial fashion.

military magistrate established probable cause to search and seize Appellant's urine, blood, and cell phone for evidence of drug use. We agree.

In further explaining her rationale, the military judged stated that "[b]ecause the key information did come from a single confidential source, [SA HT] was required to establish the source's reliability before [the magistrate] granted **[*19]** authorization." To the extent she imposed a strict reliability requirement reminiscent of *Aguilar* and *Edie*, she erred in favor of Appellant. However, her ruling could be construed to simply state what was required given the totality of the circumstances in this particular case. On this point, the military judge did find "by a totality of the circumstances that there is sufficient information regarding the reliability of the informant in this case." In reaching this conclusion she noted: (1) that the military magistrate's practice was to ask questions about the reliability of confidential informants; (2) that SA HT told the magistrate that the source had been working with AFOSI throughout the investigation; (3) that the source came forward of her own volition; and (4) that SA HT told the magistrate that the source had no motive to lie. The record also established that SA HT had informed the military magistrate that a criminal background check disclosed no derogatory data on the source. Additionally, Appellant's girlfriend's statement about his cocaine use, overheard by another witness, provided independent corroboration of the source's information that Appellant used cocaine. As noted **[*20]** above, the source's information about Appellant's cocaine use included his past oral statements she heard, his past text messages she saw, and direct observation of his use two days earlier.

Having considered the totality of the circumstances to include the information regarding the reliability of the source, the basis of source's knowledge, and the girlfriend's statement, we independently find there was probable cause to search and seize Appellant's urine, blood, and cell phone for evidence of drug use.

Appellant also attacks the military judge's reliance on the holding in *Tipton* that "an informant's accountability as a military member was sufficient to overcome lack of proven reliability" as a buttress to her ruling. Appellant, relying on the expiration of the confidential source's active duty orders prior to her report of Appellant's cocaine use, construes the military judge's reliance on *Tipton* as erroneous and an abuse of discretion. Appellant essentially argues that the military accountability switch was clicked off due to the source returning to her reserve status and therefore statements made by her during that timeframe were not imbued with reliability. As to this argument, **[*21]** we note that the information that the source initially provided with regard to Appellant's oral statements and text messages were provided while she was still on active duty orders and subject to military accountability. Further, HN8[↑] while we recognize the degree of military accountability is diminished for a reservist in a civilian as compared to active status, the "truth-telling effect" for military members, active and reserve, is not so easily donned and doffed as one's uniform. To the extent that the full measure of reliability was not realized due to her reverting to reserve status, we still find that in the totality of the circumstances, even absent considerations of strict military accountability to reinforce the finding of reliability, there was probable cause to search and seize Appellant's urine, blood, and cell phone for evidence of drug use.

Finally, as noted above, Appellant also argued the "affidavit [was] intentionally misleading." To support the claim that the affidavit was intentionally misleading, Appellant took issue with SA HT's repeated use of the word "sources" in the affidavit when, in fact, only one source had observed the actions of Appellant. Appellant argues that **[*22]** using "sources" in the affidavit intentionally misled the military magistrate to believe that there were at least two witnesses to his cocaine use. Appellant requested the military judge conduct a *Franks*[4] hearing on the matter.

In her findings of fact, the military judge found that during the telephone call on 15 February 2015, SA HT

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[4] HN9[↑] In *Franks v. Delaware, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1987)*, the Supreme Court held,

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to finding the probable cause, the *Fourth Amendment* requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

This rule is codified in Military Rule Evidence 311(d)(4)(B).

informed the military magistrate of the details summarized in the affidavit and **[*23]** also told him that the confidential source was just one person. She further found that: (1) "there is no evidence, direct or circumstantial, that [SA HT] intentionally withheld relevant information from the magistrate, or misled him;" and (2) "[t]he use of the words [sic] 'sources' was simply a way to mask the identity of the confidential informant and it is permissible." None of the military judge's findings of fact are clearly erroneous and instead are fully supported by the record. Further, based on our review we agree with her legal conclusion that the affiant did not include a false statement in the affidavit knowingly and intentionally or with a reckless disregard for the truth.

We, therefore, conclude that had Appellant's motion to suppress been preserved for appeal either by a plea of not guilty or by conditional guilty plea, Appellant would not have been entitled to relief upon appellate review. Therefore, he was not prejudiced by an erroneous waiver of the motion to suppress. As Appellant cannot show that he was harmed by the alleged deficient performance of his counsel, his claim of ineffective assistance of counsel is denied.

B. Acceptance of Appellant's Guilty Pleas

Appellant **[*24]** also avers that the military judge abused her discretion in accepting his plea of guilty without an inquiry on the record that Appellate understood he had entered an unconditional plea that waived appellate review of the motion to suppress. Specifically, Appellant argues that the military judge had an obligation to advise him that his plea of guilty was unconditional and waived appellate review of the motion to suppress. We disagree.

Assuming *arguendo* that the military judge abused her discretion by: (1) not specifically advising Appellant that his guilty plea was unconditional and waived the suppression issue, (2) not ensuring that he understood this effect of his guilty plea, and (3) not confirming that Appellant, understanding his suppression was waived by a plea of guilty, still wanted to plead guilty, we find any error by the military judge harmless.

HN10[↑] The standard for reviewing a military judge's decision to accept a plea of guilty is an abuse of discretion. *United States v. Inabinette, 66 M.J. 320 (C.A.A.F. 2008)*. A military judge abuses her discretion if she accepts a guilty plea without an adequate factual basis to support the plea. *Id.* In contrast, the military judge's determinations of questions of law arising during or after the **[*25]** plea inquiry are reviewed de novo. *Id.* In reviewing a military judge's acceptance of a plea for an abuse of discretion, appellate courts apply a substantial basis test: Does the record as a whole show "'a substantial basis' in law and fact for questioning the guilty plea." *Id.* (quoting *United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991)*).

As Appellant has raised an issue with legal aspects of the military judge's duties during the plea and pretrial agreement inquiries, and not with the adequacy of the factual inquiry, it is appropriate to apply a de novo standard. Appellant claims that "[g]iven that the [pre-trial agreement] was negotiated following the denial of substantial litigation on a motion to suppress, the military judge should have inquired whether [Appellant] understood he was entering into an unconditional plea that waived his motion to suppress." The question raised then is whether the military judge had such a duty in this case.

HN11[↑] Rule for Courts-Martial (R.C.M.) 910 is one source for the duties of a military judge as it regards mandatory advice to an accused in the context of a guilty plea and details a number of specific requirements. R.C.M. 910 does not expressly require a military judge to advise an accused that an unconditional guilty plea waives all nonjurisdictional matters. **[*26]**

In *United States v. Benavides, 57 M.J. 550, 553 (A.F. Ct. Crim. App. 2002)*, this court observed, "Although military judges do not typically warn an accused that an unconditional plea waives all nonjurisdictional matters, this is well known to military counsel." Indeed, waiver of nonjurisdictional defects by an unconditional plea of guilty is a long-standing feature of both federal and military criminal procedure. *United States v. Joseph, 11 M.J. 333, 335 (C.M.A. 1981)*; *United States v. Lopez, 20 C.M.A. 76, 42 C.M.R. 268, 270 (1970)*; *United States v. Rehorn, 9 C.M.A. 487, 26 C.M.R. 267, 268-69 (1958)*; *United States v. Daughenbaugh, 549 F.3d 1010, 1012 (5th Cir. 2008)*. R.C.M. 910(j) plainly and concisely states that "a plea of guilty which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made."

HN12[↑] Even though there is not an express requirement that military judges, as a matter of course,

provide an advisement that a guilty plea waives all nonjurisdictional matters, and that counsel are presumed to know this, there are circumstances where a judicial advisement may be appropriate.[5] In *United States v. Pena, 64 M.J. 259 (C.A.A.F. 2007)*, the appellant claimed misunderstanding of a collateral consequence of an early release program as the basis for challenging the providency of his plea. The CAAF stated, "As a general matter, the military judge does not have an affirmative obligation to initiate an inquiry into early release programs **[*27]** as part of the plea inquiry" and articulated what circumstances an appellant must demonstrate to confer upon a military judge a duty to inquire. *Id. at 267*. While the nonjurisdictional defects directly waived by a guilty plea are categorically different than the collateral consequences of a court-martial, the approach applied in *Pena* provides a helpful framework in identifying circumstances where failure by a military judge to inquire may be an abuse of discretion. The CAAF stated:

> When the challenge concerns an appellant's claimed misunderstanding of the collateral consequences of a court-martial, such as an early release program, an appellant must demonstrate that the collateral consequences are major and the appellant's misunderstanding of the consequences (a) results foreseeably and almost inexorably from the language of a pretrial agreement; (b) is induced by the trial judge's comments during the providence inquiry; or (c) is made readily apparent to the judge, who nonetheless fails to correct that misunderstanding. In short, chief reliance must be placed on defense counsel to inform an accused about the collateral consequences of a courtmartial conviction and to ascertain his willingness **[*28]** to accept those consequences.

Id. (quoting *United States v. Bedania, 12 M.J. 373, 376 (C.M.A. 1982)*).

Applying the approach in *Pena* to this case, Appellant would have to demonstrate that his mistaken belief that appellate review of the motion to suppress was preserved: (a) resulted foreseeably and almost inexorably from the language of a pretrial agreement; (b) was induced by the military judge's comments during the providence inquiry; or (c) was made readily apparent to the military judge, who nonetheless failed to correct that misunderstanding. Neither the text of the plea agreement nor the record of the military judge's plea inquiry contains any language that would have placed an obligation on the military judge to address the waiver of the motion to suppress. Further, there is no indication in the record that Appellant's misunderstanding was made readily apparent to the military judge. Under the circumstances of this case, Appellant has not demonstrated that the military judge abused her discretion.

Finally, even if the military judge did abuse her discretion, Appellant was not prejudiced. Applying the same approach used above for the ineffective assistance of counsel claim to the asserted abuse of discretion by the military judge, **[*29]** "it makes sense" to deny relief because Appellant cannot show he was harmed by not preserving the issue. *United States v. Bradley, 71 M.J. 13 (C.A.A.F. 2012)*. As Appellant cannot show harm, we find any error by the military judge harmless.

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. *Articles 59(a)* and *66(c), UCMJ*, *10 U.S.C. §§ 859(a)*, *866(c)*. Accordingly, the findings and the sentence are **AFFIRMED**.

End of Document

[5] In footnote 3 of *Benavides*, we offered that "[j]udges might want to begin including a general statement during the guilty plea inquiry that informs an accused that an unconditional guilty plea waives nonjurisdictional issues and that the accused understands this general principle." *United States v. Benavides, 57 M.J. 550, 554 n.3 (A.F. Ct. Crim. App. 2002)*. We now further offer that when nonjurisdictional defense motions are litigated, denied, and then followed by a guilty plea, judges might want to specifically inform an accused that an unconditional guilty plea waives appellate review of those motions, and inquire if understanding that, the accused still desires to plead guilty.

User Name: Morgan CHRISTIE
Date and Time: Friday, July 22, 2022 2:59:00 PM CDT
Job Number: 175847974

Document (1)

1. *United States v. Seeto, 2021 CCA LEXIS 185*

Client/Matter: -None-
Search Terms: 2021 CCA LEXIS 185
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	Court: Federal > Military Justice

United States v. Seeto

United States Air Force Court of Criminal Appeals

April 21, 2021, Decided

No. ACM 39247 (reh)

Reporter
2021 CCA LEXIS 185 *; 2021 WL 1566809

UNITED STATES, Appellee v. Ryne M. SEETO, Captain (O-3), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by United States v. Seeto, 2021 CAAF LEXIS 546, 2021 WL 2941788 (C.A.A.F., June 14, 2021)

Motion granted by United States v. Seeto, 2021 CAAF LEXIS 555, 2021 WL 2978687 (C.A.A.F., June 17, 2021)

Review denied by United States v. Seeto, 2021 CAAF LEXIS 722 (C.A.A.F., Aug. 3, 2021)

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Wesley A. Braun (arraignment); Bryon T. Gleisner. Approved sentence: No punishment. Sentence adjudged 26 June 2019 by GCM convened at Robins Air Force Base, Georgia.

United States v. Seeto, 2018 CCA LEXIS 518, 2018 WL 5623638 (A.F.C.C.A., Oct. 26, 2018)

Core Terms

military, guilty plea, specification, court-martial, convening, waive, sentence, charges, referral, trial defense counsel, motions, pretrial, conduct unbecoming, fail to state, ineffective, recommendation, circumstances, motion to dismiss, appellate review, allegations, legs, defense counsel, declarations, gentleman, asserts, pleas, defense motion, de novo, nonjurisdictional, substitutions

Case Summary

Overview

HOLDINGS: [1]-The military judge did not abuse his discretion in accepting the service member's guilty plea because the military judge's inquiry regarding the providence of the service member's guilty plea was commendably thorough. At no point did the service member express a mistaken belief that any motion he had raised or wanted to raise would be preserved following his guilty plea, that he was otherwise confused or mistaken about the effect of his pretrial agreement and guilty plea, or that his plea was less than fully informed, voluntary, and factually accurate; [2]-Trial defense counsel were not ineffective because counsel's mutually supporting declarations were plausible in light of the entire record and the pretrial agreement was very favorable to the service member in ways that trial defense counsel credibly assert were particularly important to the service member.

Outcome
Findings and sentence affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Military & Veterans Law > ... > Trial Procedures > Pleas > Providence Inquiries

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Guilty Pleas

Criminal Law & Procedure > ... > Entry of Pleas > Role of Court > Factual Basis

HN1[] Standards of Review, Abuse of Discretion

An appellate court reviews a military judge's decision to accept the accused's guilty plea for an abuse of discretion. 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.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Allocution & Colloquy

Military & Veterans Law > ... > Trial Procedures > Pleas > Pretrial Agreements

Military & Veterans Law > ... > Trial Procedures > Pleas > Providence Inquiries

Criminal Law & Procedure > ... > Guilty Pleas > Allocution & Colloquy > Waiver of Defenses

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Waivers & Withdrawals of Appeals

HN2[] Guilty Pleas, Allocution & Colloquy

It is a general principle of criminal law that an unconditional guilty plea waives all nonjurisdictional defects at earlier stages of the proceedings. The military judge must ensure there is a basis in law and fact to support the plea to the offense charged. In addition, the military judge must ensure the accused understands and agrees to the terms of any pretrial agreement in order to ensure that the accused is making a fully informed decision as to whether or not to plead guilty.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > ... > Defendant's Rights > Right to Counsel > Effective Assistance of Counsel

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Right to Counsel

HN3[] Criminal Process, Assistance of Counsel

The *Sixth Amendment*, *U.S. Const. amend. VI*, guarantees an accused the right to effective assistance of counsel. In assessing the effectiveness of counsel, the appellate court applies the standard in and begin with a presumption of competent representation. The appellate court will not second-guess reasonable strategic or tactical decisions by trial defense counsel. The appellate court reviews allegations of ineffective assistance de novo.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pleas

Military & Veterans Law > Military Justice > Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN4[] Effective Assistance of Counsel, Pleas

An appellate court utilizes the following three-part test to determine whether the presumption of competence has been overcome: (1) are appellant's allegations true, and if so, is there a reasonable explanation for counsel's actions; (2) if the allegations are true, did defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers; and (3) if defense counsel was ineffective, is there a reasonable probability that, absent the errors, there would have been a different result? The burden is on the appellant to demonstrate both deficient performance and prejudice. An appellant in a guilty plea case establishes prejudice by showing that, but for counsel's deficient performance, there is a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial.

Criminal Law & Procedure > ... > Guilty Pleas > Allocution & Colloquy > Waiver of Defenses

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Charges &

Specifications

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Waivers & Withdrawals of Appeals

Military & Veterans Law > ... > Courts Martial > Motions > Dismissals

Military & Veterans Law > Military Justice > Jurisdiction > Double & Former Jeopardy

HN5[] Allocution & Colloquy, Waiver of Defenses

A specification states an offense if it alleges, either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy. Whether a specification fails to state an offense is a question of law that appellate courts ordinarily review de novo. However, an unconditional guilty plea waives all nonjurisdictional defects at earlier stages of the proceedings. The failure of a specification to state an offense is a nonjurisdictional, waivable basis for a motion to dismiss. R.C.M. 907(b)(2)(E), Manual Courts-Martial. Whether an issue has been waived is a question of law that the appellate court reviews de novo.

Military & Veterans Law > Military Offenses > Assault

Military & Veterans Law > Military Offenses > Conduct Unbecoming Officers

Military & Veterans Law > Military Offenses > Larceny & Wrongful Appropriation

Military & Veterans Law > Military Offenses > Categories of Offenses > Service Discrediting Conduct

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

HN6[] Military Offenses, Assault

The elements of the offense of conduct unbecoming an officer and a gentleman in violation of Unif. Code Mil. Justice art. 133 include: (1) That the accused did or omitted to do a certain act; and (2) That, under the circumstances, the act or omission constituted conduct unbecoming an officer and gentleman. Manual Courts-Martial pt. IV, para. 59.b. Conduct unbecoming an officer in violation of Unif. Code Mil. Justice art. 133 is a general intent offense.

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Charges & Specifications

Military & Veterans Law > Military Justice > Jurisdiction > In Personam Jurisdiction

Military & Veterans Law > Military Justice > Jurisdiction > Subject Matter Jurisdiction

Military & Veterans Law > Military Justice > Jurisdiction > Lack of Jurisdiction

HN7[] Jurisdiction & Venue, Jurisdiction

A defect in the language of the specification does not deprive the court-martial of jurisdiction over the offense itself.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

HN8[] Imposition of Sentence, Factors

An appellate court has statutory responsibility to affirm only such findings of guilty and so much of the sentence as it finds are correct and should be approved. *10 U.S.C.S. § 866(d)(1)*. This includes the authority to address errors raised for the first time on appeal despite waiver of those errors at trial.

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Guilty Pleas

HN9[] Entry of Pleas, Guilty Pleas

By entering a plea of guilty, an accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > ... > Courts Martial > Sentences > Impeachment & Reconsideration

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN10 **Trial Procedures, Burdens of Proof**

Allegations of unlawful command influence (UCI) are reviewed de novo. On appeal, the accused bears the initial burden of raising UCI.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > ... > Courts Martial > Sentences > Impeachment & Reconsideration

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > Military Justice > Military Commissions & Tribunals

HN11 **Trial Procedures, Burdens of Proof**

Two types of unlawful command influence (UCI) can arise in the military justice system: actual UCI and the appearance of UCI. Actual UCI is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case. In order to demonstrate actual UCI, the appellant must show: (1) facts, which if true, constitute UCI; (2) that the proceedings were unfair; and (3) that the UCI was the cause of the unfairness. The initial burden of showing potential UCI is low, but is more than mere allegation or speculation. Once the appellant makes an initial showing of some evidence, the burden shifts to the Government to persuade the Court beyond a reasonable doubt that (1) the predicate facts do not exist; (2) the facts do not constitute UCI; or (3) the UCI did not affect the findings or sentence.

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > ... > Courts Martial > Sentences > Impeachment & Reconsideration

HN12 **Burdens of Proof, Prosecution**

Unlike actual unlawful command influence (UCI), a meritorious claim of an appearance of UCI does not require prejudice to an accused. When an appellant asserts there was an appearance of UCI, the appellant initially must show some evidence that UCI occurred. Once an appellant presents some evidence, the burden then shifts to the Government to prove beyond a reasonable doubt that either the predicate facts proffered by the appellant do not exist, or the facts as presented do not constitute UCI. If the Government fails to rebut the appellant's factual showing, it may still prevail if it proves beyond a reasonable doubt that the UCI did not place an intolerable strain upon the public's perception of the military justice system and that an objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of the proceeding.

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > ... > Trial Procedures > Pleas > Pretrial Agreements

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Waivers & Withdrawals of Appeals

Military & Veterans Law > ... > Courts Martial > Motions > Procedures

Military & Veterans Law > ... > Courts Martial > Sentences > Impeachment & Reconsideration

HN13 **Courts Martial, Convening Authority**

Whether an accused has waived an issue is a question of law the appellate court reviews de novo. Waiver is the intentional relinquishment or abandonment of a known right. Whether a particular right is waivable; whether the accused must participate personally in the waiver; whether certain procedures are required for waiver; and whether the accused's choice must be particularly informed or voluntary, all depend on the right at stake. Unlawful command influence (UCI) in the adjudicative stage of a court-martial generally may not be waived. However, where the suggestion for a pretrial agreement (PTA) and waiver originates with the accused and his counsel, an accused may affirmatively and knowingly waive an allegation of UCI in the preferral of charges in order to obtain the benefits of a favorable PTA. In general, an unconditional guilty plea waives all nonjurisdictional defects at earlier stages of the proceedings.

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Charges & Specifications

Military & Veterans Law > ... > Trial Procedures > Pleas > Pretrial Agreements

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > ... > Courts Martial > Sentences > Impeachment & Reconsideration

Military & Veterans Law > ... > Trial Procedures > Pleas > Providence Inquiries

HN14 **Pretrial Proceedings, Charges & Specifications**

Unlawful command influence (UCI) is the mortal enemy of military justice, and it is against public policy to require an accused to withdraw an issue of UCI in order to obtain a pretrial agreement. However, an accused may knowingly and intelligently waive a known UCI issue in the preferral of charges in order to secure a favorable pretrial agreement (PTA) initiated by the defense. A known UCI issue in the referral of charges may similarly be knowingly and intelligently waived.

Counsel: For Appellant: Major Benjamin H. DeYoung, USAF.

For Appellee: Lieutenant Colonel Brian C. Mason, USAF; Lieutenant Colonel Matthew J. Neil, USAF; Major John P. Patera, USAF; Mary Ellen Payne, Esquire.

Judges: Before J. JOHNSON, LEWIS, and KEY, Appellate Military Judges. Chief Judge J. JOHNSON delivered the opinion of the court, in which Senior Judge LEWIS and Judge KEY joined.

Opinion by: J. JOHNSON

Opinion

J. JOHNSON, Chief Judge:

At Appellant's original trial in July 2016, a military judge found Appellant guilty, in accordance with his pleas by exceptions and substitutions, of one specification of conduct unbecoming an officer and a gentleman in violation of Article 133, Uniform Code of Military Justice (UCMJ), *10 U.S.C. § 933*.[1] A general court-martial composed of officer members found Appellant guilty, contrary to his pleas, of one specification of indecent conduct in violation of Article 134, UCMJ, *10 U.S.C. § 934*.[2] The court-martial sentenced Appellant to a dismissal and confinement for ten months. The convening **[*2]** authority approved the adjudged sentence.

Upon review, this court set aside the findings of guilt and the sentence because there were substantial omissions from the transcript and the Government could not rebut the presumption of prejudice. *United States v. Seeto, No. ACM 39247, 2018 CCA LEXIS 518, at *35* (A.F. Ct. Crim. App. 26 Oct. 2018) (unpub. op.). In addition, this court found the 277-day delay between sentencing and convening authority action violated Appellant's due process right to timely post-trial processing and review; accordingly, we held "[i]n the event [ ] a rehearing results in a finding of guilt, the

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[1] All references to the punitive articles of the Uniform Code of Military Justice (UCMJ) are to the *Manual for Courts-Martial, United States* (2012 ed.).

[2] The court-martial found Appellant not guilty of one specification of attempted rape, one specification of aggravated sexual contact, and one specification of assault consummated by a battery in violation of *Articles 80*, *120*, and *128, UCMJ*, *10 U.S.C. §§ 880*, *920*, *928*.

convening authority may approve no sentence of confinement greater than 99 days." *Id.* This court authorized a rehearing and returned the record of trial to The Judge Advocate General for remand to the convening authority. *Id.*

The convening authority directed a rehearing by general court-martial on the set-aside charges and specifications. At separate hearings, Appellant was arraigned and the trial judge received several defense motions. After the military judge ruled on the motions, Appellant entered into a pretrial agreement (PTA) with the convening authority. Pursuant to the PTA, Appellant elected **[*3]** trial by a military judge alone and pleaded guilty by exceptions and substitutions to the charge and specification of conduct unbecoming an officer and a gentleman in violation of *Article 133, UCMJ*. In accordance with the PTA, the Government withdrew the excepted language as well as the charge and specification alleging indecent conduct in violation of *Article 134, UCMJ*. The military judge sentenced Appellant to a dismissal, confinement for four months, and forfeiture of $2,250.00 pay per month for four months. In accordance with the PTA, the convening authority dismissed without prejudice the withdrawn excepted language of the conduct unbecoming specification and the charge and specification of indecent conduct. In addition, in accordance with the PTA, the convening authority approved a sentence of no punishment[3] and credited Appellant with 235 days of confinement served pursuant to the sentence imposed by the original court-martial.

Appellant now raises five issues on appeal from his rehearing: (1) whether Appellant's guilty plea was improvident; (2) whether Appellant received ineffective assistance of counsel because trial defense counsel failed to advise him of the effect of his **[*4]** guilty plea with regard to waiver of appellate issues; (3) whether the charge and specification fail to state an offense; (4) whether the military judge erred in identifying the most similar analogous offense for *Article 133, UCMJ*, for sentencing purposes; and (5) whether the military judge erred in failing to grant a defense motion to dismiss for improper referral and unlawful command influence (UCI).[4] We have carefully considered issue (4) and we find it warrants neither further discussion nor relief. *See United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987)*. With regard to the remaining issues, we find no error that materially prejudiced Appellant's substantial rights, and we affirm the findings and sentence.

I. BACKGROUND

A. The Offense

In November 2014, Appellant was a married Air Force captain (O-3) stationed at Robins Air Force Base, Georgia. Using a pseudonym, Appellant made contact with a civilian woman, BV, through a social media application used for dating. Appellant and BV chatted with each other for a few days through the application before exchanging phone numbers and continuing their dialog via text messages. Appellant did not reveal his real name to BV, nor the fact that he was married.

Appellant and BV arranged to meet at **[*5]** a club in Warner Robins, Georgia, on 27 December 2014; Appellant's spouse was out of town at the time. Appellant and BV drove separately to the club. They soon decided to go to a different club in Macon, Georgia, driving together in Appellant's vehicle. They left BV's vehicle at the first club with the understanding Appellant would bring BV back to it later that night. At the second club, BV spent some time dancing and socializing with Appellant, but also spent some time socializing with friends of hers she saw there. Eventually, at approximately 0200 on 28 December 2014, Appellant and BV left the club together.

On the drive back to Warner Robins, BV indicated she was tired and hungry. Appellant stopped to buy food for her. Afterward, Appellant invited BV to his house. BV declined, but Appellant told her that he was going to stop there anyway. When they arrived, Appellant parked in the garage and went inside the house. BV waited in the vehicle for "a few minutes" for Appellant to return; when he did not, she went inside. She found Appellant sitting on a couch, where he invited her to join him.

According to the stipulation of fact admitted at the

[3] We retain jurisdiction over Appellant's rehearing notwithstanding his approved sentence of no punishment; once a Court of Criminal Appeals has jurisdiction of a case, "no action by a lower court or convening authority will diminish it." *United States v. Johnson, 45 M.J. 88, 90 (C.A.A.F. 1996)* (quoting *United States v. Boudreaux, 35 M.J. 291, 295 (C.M.A. 1992))* (internal quotation marks and additional citation omitted).

[4] Appellant personally asserts issues (4) and (5) pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*.

rehearing:

> While spooning on the couch, **[*6]** [Appellant], slid his pants down, rolled on top of [BV] and attempted to kiss her, but she turned her head away. [BV] asked, "what are you doing?" [Appellant] replied, "I thought we were going to have sex." [Appellant] then stood up, adjusted the lights down, and returned to the couch. [BV later] told the [Sexual Assault Nurse Examiner] that, at this time, [Appellant] told her the two of them weren't leaving the home until they had sex. As he returned to the couch . . . [Appellant] got on top of [BV] and pulled her pants and underwear down. [BV] said, "no," and physically resisted [Appellant's] advances by pushing him away. [Appellant] ignored her and forced his legs between her legs. [Appellant] positioned himself on top of her, between her legs, holding her down with his hands and his legs. [BV] attempted to get up, but [Appellant] continued to hold her down with his legs while also pinning her down by her wrists. In a subsequent interview with [civilian police] officers . . . [Appellant] admitted to Detective [W] that he "lost control.". . .
>
> . . . While [Appellant] was on top of [BV], holding her down without her consent, [Appellant] stimulated himself and ejaculated on her stomach **[*7]** and she began to cry. [Appellant] also admitted to Detective [W] that, "I could tell that she was scared and . . . that kind of brought me back down to earth." When describing his actions, [Appellant] stated to Detective [W], "I just finished myself off-it's so humiliating to say-on her."

After Appellant attempted to clean BV's stomach, BV pulled up her pants and asked Appellant to take her back to her car. During the drive, BV asked Appellant if he knew what he had just done, to which Appellant replied that he would make it up to her. Once she returned to her vehicle, BV texted Appellant: "I think it's best if I call the cops about this while I can tonight." Appellant responded, "I think you have the wrong number." Shortly thereafter, BV called the civilian police.

While the investigation was in progress, Appellant sent an email to Detective W in which he described his actions with BV as "disgusting, despicable and intolerable" and "wrong, very very wrong;" accepted responsibility for his "disgraceful act;" stated that he had "let down his family, the United States Air Force, and the soldiers that would unexpectedly have to fill his [scheduled] deployment;" and declared that he "will **[*8]** forever repent and live in shame."

B. Procedural History on Remand

On 26 January 2019, the convening authority signed a document entitled "General Court-Martial Order No. 3." The document noted this court had set aside the findings of guilty and sentence from the first trial. The convening authority continued, "[a] rehearing is hereby ordered before another court-martial to be hereinafter designated." The same day, by a separate memorandum the convening authority informed Appellant he was no longer on appellate leave and was to report to Robins Air Force Base as soon as possible but not later than 11 February 2019.

On 30 January 2019, the 78th Air Base Wing Staff Judge Advocate (78 ABW/SJA) signed a memorandum providing advice to the Commander, 78th Air Base Wing (78 ABW/CC), the special court-martial convening authority. The 78 ABW/SJA summarized the factual and procedural background of the case and recommended the 78 ABW/CC "forward" the *Article 133* and *Article 134*, UCMJ, charges and specifications to the convening authority "with a recommendation that these charges be re-referred to trial by a general court-martial." On 5 February 2019, the 78 ABW/CC signed a memorandum for the convening **[*9]** authority purporting to "forward" the charges and specifications and recommending that they be referred to a general court-martial for a rehearing, as authorized by this court. Among other attachments, the 78 ABW/CC also provided a list of court member nominees with their personal data.

On 8 February 2019, the convening authority's staff judge advocate (SJA) signed a pretrial advice memorandum for the convening authority with regard to Appellant's case. *Inter alia*, the SJA recommended the convening authority "refer the Article 133 and 134 charges and specifications to a trial by general court-martial."

On 14 February 2019, the convening authority convened a general court-martial by Special Order A-9. The same day, the SJA annotated and signed the charge sheet to reflect the convening authority referred the charges and specifications to the general court-martial convened by Special Order A-9, "[f]or a rehearing on findings and sentence, as ordered by General Court-Martial Order No. 3, this headquarters, dated 26 January 2019." Appellant was arraigned on 12 March 2019; a motions hearing took place on 22 May 2019; and the rehearing concluded on 26 June 2019.

As originally charged, the specification **[*10]** alleging violation of Article 133, UCMJ, stated that Appellant,

> a married man, did at or near Warner Robins, Georgia, on or about 28 December 2014, wrongfully engage in sexual contact with [BV], a woman not his wife, to wit: touching her genitalia and breasts with his hand and ejaculating upon her stomach, which acts, under the circumstances, constituted conduct unbecoming an officer and a gentleman.

As modified by Appellant's exceptions and substitutions, the specification to which Appellant pleaded and of which he was found guilty alleged he

> did, at or near Warner Robins, Georgia, on or about 28 December 2014, grab and hold [BV's] body with his hands and legs without her express consent, which acts, under the circumstances, constituted conduct unbecoming an officer and a gentleman.

II. Discussion

A. Military Judge's Acceptance of Appellant's Guilty Plea

Appellant contends his guilty plea was not provident because he "was not advised" of and did not understand the legal effect of his PTA and guilty plea on his ability to raise issues on appeal, and if he had understood these effects he would not have pleaded guilty. Here we consider whether the military judge abused his discretion in accepting **[*11]** Appellant's guilty plea; whether trial defense counsel were ineffective by failing to adequately explain the effect of Appellant's PTA and guilty plea is a distinct issue we consider below.

1. Law

HN1[] We review a military judge's decision to accept the accused's guilty plea for an abuse of discretion. *United States v. Riley, 72 M.J. 115, 119 (C.A.A.F. 2013)* (quoting *United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008)*. "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 *Inabinette, 66 M.J. at 322*).

HN2[] It is a "general principle of criminal law that an 'unconditional guilty plea waives all nonjurisdictional defects at earlier stages of the proceedings.'" *United States v. Hardy, 77 M.J. 438, 442 (C.A.A.F. 2018)* (quoting *United States v. Lee, 73 M.J. 166, 167 (C.A.A.F. 2014))*.

"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). In addition, the military judge must ensure the accused understands and agrees to the terms of any PTA in order "to ensure that [the] accused is making a fully informed decision as to whether or not to plead guilty." *Id.* (citing *United States v. King, 3 M.J. 458, 458-59 (C.M.A. 1977))* (additional citation omitted).

2. Analysis

The relevant questions include whether the military judge adequately established **[*12]** the providence of Appellant's guilty pleas, including the factual basis for the pleas and Appellant's understanding of his PTA, and whether anything *in the record* raised a substantial question in law or fact as to the providence of the pleas. *See Riley, 72 M.J. at 119* (citation omitted). We find the military judge appropriately ensured Appellant's pleas were provident, and nothing in the record raised a substantial doubt as to their providence.

As to the factual basis for the plea, pursuant to the PTA the parties agreed to a stipulation of fact which the Government introduced as a prosecution exhibit. The stipulation recited the factual circumstances of the offense as described above, and included every factual assertion in the specification to which Appellant pleaded guilty. The military judge read the entire narrative portion of the stipulation aloud to Appellant, and secured Appellant's agreement that it was all true and that Appellant wished to admit it was true. The military judge then secured Appellant's agreement that the six attachments to the stipulation were admissible for all relevant purposes. In addition, after the military judge explained the elements of the offense to Appellant, the military **[*13]** judge had Appellant explain in his own words why he was guilty of the offense; Appellant did so, confirming not only his actions but their "shameful" and "unbecoming" nature that "seriously diminished [his] capacity as an officer." The military judge asked follow-up questions to ensure Appellant agreed the elements of the offense had been established, that Appellant agreed his actions were intentional and unlawful under the circumstances, and that counsel for both parties agreed no further inquiry was required.

As to Appellant's understanding of the PTA, the military judge questioned Appellant to ensure he had not only freely and voluntarily signed the agreement, but had thoroughly read and understood it. The military judge explained the significance of the PTA, and then reviewed the text of the PTA on the record with Appellant to ensure Appellant understood it. This colloquy included the following:

> [Military Judge] MJ: Paragraph 2.g. states that you agree to waive all motions which may be waived under the Rules for Courts-Martial. So Captain Seeto, I did want to talk with you about some of the motions that were actually previously filed in this very case.
>
> So do you understand that a **[*14]** guilty plea ordinarily waives all motions that have been ruled upon adversely to you? Do you understand that?
> [Appellant] ACC: Yes, sir.
> MJ: So specifically in this case, I ruled on the following [seven] motions: . . . a motion for alleging improper referral and unlawful command influence; . . . a motion to dismiss [the Article 134, UCMJ, specification] for failure to state an offense due to preemption; . . . .
> So some of those rulings were adverse to you, Captain Seeto. So do you understand that the appellate court will not be able to review my decisions to see if my rulings were correct?
> ACC: Yes, sir.
> MJ: So do you understand that you are giving up all potential relief you could have received if the appellate court disagreed with my rulings?
> ACC: Yes, sir.
> MJ: And Defense Counsel, were there any other motions that you are not making, pursuant to this provision of the [PTA]?
> MJ: And Captain Seeto, I understand your defense counsel said there weren't any other motions planned anyway but I do want to ask you, do you understand that this term of your [PTA] means that you give up the right to make any motion which by law is given up when you plead guilty?
> ACC: Yes, sir.
>
> MJ: And do you also understand **[*15]** that this term of your [PTA] means that you give up the right to make a motion which is given up if not raised during the trial?
> ACC: Yes, sir.
> MJ: And in particular, do you understand that this term of your [PTA] precludes this court or any appellate court from having the opportunity to determine if you are entitled to any relief based on those motions?
> ACC: Yes, sir.
> MJ: And when you elected to give up the right to litigate any other motions that might be out there, did your defense counsel explain this term of your [PTA] and the consequences to you?
> ACC: Yes, sir.

Appellant further agreed no one had forced him to agree and that he "freely and voluntarily agree[d] to this term . . . in order to receive what he believe[d] to be a beneficial [PTA]," and that he understood and voluntarily agreed to this term and all the PTA terms. Civilian trial defense counsel (CDC) advised the military judge that the motion waiver provision originated with the Defense.

As to Appellant's overall willingness to plead guilty in accordance with the PTA, Appellant averred that he was pleading guilty with full knowledge of the meaning and effect of his plea, that he did so voluntarily, and that he had no questions **[*16]** about the effect of his plea. Appellant further averred, and the CDC agreed, that he had had adequate time to consult with his defense counsel, and that he was satisfied with his defense counsel. Accordingly, the military judge accepted Appellant's guilty plea to the Article 133 charge and specification, as modified by Appellant's exceptions and substitutions.

We further note that, in light of the Government's possession of highly incriminating admissions Appellant made after the offense, as described in the background above, the PTA was very favorable to Appellant in multiple respects. First, it resulted in dismissal of the separate Article 134, UCMJ, charge and specification. Second, it bound the convening authority to approve a sentence of no punishment when a dismissal was a very real possibility, as evidenced by the sentence subsequently imposed by the military judge. Third, it removed the language indicative of sexual misconduct from the specification, permitting Appellant to plead to an offense analogous to an assault consummated by battery, thereby presumably greatly decreasing the likelihood Appellant would be required to register as a sexual offender. These advantages rendered **[*17]** Appellant's willingness to enter the PTA and forego appellate review of various motions all the more plausible.

In summary, the military judge's inquiry regarding the providence of Appellant's guilty plea was commendably thorough. At no point did Appellant express a mistaken belief that any motion he had raised or wanted to raise

would be preserved following his guilty plea, that he was otherwise confused or mistaken about the effect of his PTA and guilty plea, or that his plea was less than fully informed, voluntary, and factually accurate. Finding no substantial basis in law or fact to question Appellant's guilty plea appearing in the record of the court-martial proceedings, we find the military judge did not abuse his discretion by finding Appellant guilty in accordance with his plea.

B. Ineffective Assistance of Counsel

1. Additional Background

At no point prior to or during Appellant's rehearing did the Defense move to dismiss the Article 133, UCMJ, charge and specification for failure to state an offense.[5]

On appeal, Appellant submitted a sworn declaration in support of his claim of ineffective assistance of counsel. Appellant asserts, *inter alia*, that his trial defense counsel **[*18]** failed to advise him that the term in his PTA whereby he agreed to "waive all waivable motions" would cause him to lose the right to appeal all non-jurisdictional issues. To the contrary, Appellant asserts trial defense counsel advised him more than once that he "would not lose [his] right to fully litigate any legal issues on appeal." Appellant asserts he was "never counseled in any substantive way that by accepting the PTA [he] would not be able to raise many substantive issues, especially the issue of failure to state an offense, on appeal." Appellant avers that "[t]hroughout [his] plea [i]nquiry [he] did not believe that [he] could be charged with something that wasn't an offense, offered a deal to plead guilty to it, and would thereby be forced to give up [his] right to appeal whether what [he] was charged with and plead[ed] guilty to was even an offense in the first place." Appellant asserts that if he had been properly advised of the effect of his PTA, he "unequivocally and vehemently" would not have accepted the PTA or pleaded guilty.

This court received sworn declarations from Appellant's three trial defense counsel responsive to Appellant's claims of ineffective assistance. **[*19]** The three declarations are generally consistent. They portray Appellant as very engaged and thoughtful regarding his case, to the point of doing his own legal research. Appellant was frustrated by some of the adverse motion rulings by the military judge, and had mixed feelings regarding the PTA and guilty plea. However, avoiding a punitive discharge and sex offender registration were two of Appellant's priorities. According to Appellant's CDC who served as lead counsel, Appellant was "acutely aware" that the modified Article 133, UCMJ, specification to which he agreed to plead guilty was "potentially legally insufficient;" however, "[a]fter extensive discussions it was decided that any potential legal insufficiency was to his benefit because it made it even less likely that a civilian jurisdiction or licensing board would penalize him for his conviction." Ultimately, according to the CDC, Appellant made a "calculated and strategic" decision to enter the PTA, in accord with the unanimous recommendation of his counsel, "based on his keen knowledge and understanding of the benefits of his plea and despite the limitations of his ability to challenge his conviction on appeal."

2. Law

HN3[↑] The **[*20]** *Sixth Amendment*[6] guarantees an accused the right to effective assistance of counsel. *United States v. Gilley, 56 M.J. 113, 124 (C.A.A.F. 2001)*. In assessing the effectiveness of counsel, we apply the standard in *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, and begin with a presumption of competent representation. *See Gilley, 56 M.J. at 124* (citations omitted). We will not second-guess reasonable strategic or tactical decisions by trial defense counsel. *United States v. Mazza, 67 M.J. 470, 475 (C.A.A.F. 2009)* (citation omitted). We review allegations of ineffective assistance de novo. *United States v. Akbar, 74 M.J. 364, 379 (C.A.A.F. 2015)* (citation omitted).

HN4[↑] We utilize the following three-part test to determine whether the presumption of competence has been overcome: (1) are appellant's allegations true, and if so, "is there a reasonable explanation for counsel's actions;" (2) if the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance . . . [ordinarily expected] of fallible lawyers;" and (3) if defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result? *United States*

[5] The Defense did unsuccessfully move, *inter alia*, to dismiss the Article 134, UCMJ, charge and specification of indecent conduct for failure to state an offense, and to dismiss both charges and specifications for double jeopardy.

[6] *U.S. Const. amend. VI*.

v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (alteration in original) (quoting United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)). The burden is on the appellant to demonstrate both deficient performance and prejudice. United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012) (citation omitted). "[A]n appellant in a guilty plea case establishes prejudice by showing that, but for counsel's deficient performance, **[*21]** there is a 'reasonable probability' that 'he would not have pleaded guilty and would have insisted on going to trial.'" United States v. Rose, 71 M.J. 138, 143 (C.A.A.F. 2012) (quoting United States v. Tippit, 65 M.J. 69, 76 (C.A.A.F. 2007)).

3. Analysis

Appellant contends his trial defense counsel were ineffective because they failed to advise him his guilty plea would waive appellate review of legal issues, particularly the failure of the specification for which he was convicted to state an offense. He asserts that but for the deficient performance of his trial defense counsel, he would not have pleaded guilty. We are not persuaded.

We acknowledge the factual dispute between Appellant's declaration, which indicates he was misled to believe he would be able to challenge the specification on appeal despite his guilty plea, and the declarations of his trial defense counsel, who indicate Appellant was not misled and his decision was fully informed.[7] We have considered whether a post-trial proceeding is required to resolve this dispute, and we are convinced such a proceeding is not required. *See 10 U.S.C. § 866(f)(3)*; United States v. Ginn, 47 M.J. 236, 248 (C.A.A.F. 1997). In this case, "the appellate filings and the record as a whole 'compellingly demonstrate' the improbability" of Appellant's assertion. *See* Ginn, 47 M.J. at 248. Multiple considerations lead us to this conclusion.

First, **[*22]** we find trial defense counsel's mutually supporting declarations to be plausible in light of the entire record before this court. Although, standing alone, this may not be sufficient cause to reject Appellant's allegations, it is a foundation upon which to add the following additional considerations.

Second, as described above, the military judge engaged in a thorough inquiry of the providence of Appellant's guilty plea. Of particular note, the military judge advised Appellant that his PTA and guilty plea would waive his right to appellate review of the rulings on the motions previously filed by the Defense—which the military judge expressly noted included, *inter alia*, a motion to dismiss for failure to state an offense. In addition, the military judge warned Appellant that he would waive any other waivable motion that had not been previously filed by the Defense. On appeal, apart from his assertion that trial defense counsel misled him, Appellant does not explain why he believed his guilty plea would not waive his ability to assert a challenge on appeal to the Article 133, UCMJ, specification after he had an on-the-record discussion with the military judge about how his guilty plea **[*23]** would waive his motion to dismiss the Article 134, UCMJ, specification brought under a similar legal theory.

Third, the PTA was very favorable to Appellant in ways that trial defense counsel credibly assert were particularly important to Appellant. In addition to securing the dismissal of the Article 134, UCMJ, charge and specification, the PTA permitted Appellant to avoid conviction for an explicitly sexual offense, and to avoid a punitive discharge.[8]

Fourth, and relatedly, we have considered the strength of the Government's evidence. The fact that Appellant had been convicted of both the conduct unbecoming and the indecent conduct specifications at his original trial is some measure of the likelihood that he would be convicted again in a litigated trial. In particular, the Government possessed Appellant's highly damaging admissions that his treatment of BV had been "disgusting," "despicable," "intolerable," and "disgraceful." The circumstances of the offense made not only a conviction but a sentence including a dismissal a very real possibility, as suggested by the sentence imposed by the original court-martial.

[7] We considered the declarations to resolve this issue, which we find to be raised by the record. *See* United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020) (holding Courts of Criminal Appeals may consider affidavits when doing so is necessary for resolving issues raised by materials in the record).

[8] We note that although the trial transcript reflects no concern on Appellant's part regarding the waiver of motions, Appellant did pause to consult with his counsel when the military judge advised him, "[T]here is no guarantee or promise being made to you that some state won't require you to register as a sex offender." After conferring with trial defense counsel, Appellant responded, "Yes, sir. I understand the Air Force is --the Air Force cannot make me a sex offender. That is up to the state."

For the foregoing reasons, we find Appellant cannot prevail on his ineffective **[*24]** assistance of counsel claim because he has failed to carry his burden to show his allegations about his trial defense counsel are true, and to show that but for the alleged deficient performance he would not have pleaded guilty.

C. Failure to State an Offense

1. Law

HN5[] "A specification states an offense if it alleges, either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006)* (citation omitted).

Whether a specification fails to state an offense is a question of law that appellate courts ordinarily review de novo. *United States v. Turner, 79 M.J. 401, 404 (C.A.A.F. 2020)* (citing *Crafter, 64 M.J. at 211*). However, an unconditional guilty plea waives all nonjurisdictional defects at earlier stages of the proceedings. *Hardy, 77 M.J. at 442* (quoting *Lee, 73 M.J. at 167*); *cf*. R.C.M. 910(a)(2) (providing that a conditional guilty plea must specify a pretrial motion for which the adverse determination is subject to further review, and requiring the approval of the military judge and consent of the Government). The failure of a specification to state an offense is a nonjurisdictional, waivable basis for a motion to dismiss. *See* R.C.M. 907(b)(2)(E). Whether an issue has been waived is a question of law that we review de novo. *United States v. Haynes, 79 M.J. 17, 19 (C.A.A.F. 2019)* (citation omitted).

HN6[] The elements of the offense **[*25]** of conduct unbecoming an officer and a gentleman in violation of *Article 133, UCMJ*, include: "(1) That the accused did or omitted to do a certain act; and (2) That, under the circumstances, the act or omission constituted conduct unbecoming an officer and gentleman." *Manual for Courts-Martial, United States* (2012 ed.), pt. IV, ¶ 59.b. Conduct unbecoming an officer in violation of Article 133, UCMJ, is a general intent offense. *United States v. Voorhees, 79 M.J. 5, 15-17 (C.A.A.F. 2019)*.

2. Analysis

Appellant contends the Article 133, UCMJ, specification to which he pleaded guilty and of which he was convicted contains "no words of criminality" and therefore fails to state an offense.

We agree with the Government that Appellant waived this issue by his unconditional guilty plea. *See* R.C.M. 907(b)(2)(E); *Hardy, 77 M.J. at 442* (citation omitted). Appellant argues that failure of a specification to state an offense is in fact a jurisdictional issue, reasoning that a court-martial has no jurisdiction unless the offense(s) in question are subject to court-martial jurisdiction. *See* R.C.M. 201(b)(5). However, Appellant's reasoning is flawed. ***HN7***[] A defect in the language of the specification does not deprive the court-martial of jurisdiction over the offense itself. In any event, the plain meaning of R.C.M. 907(b)(2)(E), which expressly **[*26]** lists failure to state an offense as "waivable grounds" for a motion to dismiss, is inescapable.

Our finding of waiver does not end our analysis. ***HN8***[] We recognize our unique statutory responsibility to affirm only such findings of guilty and so much of the sentence as we find are correct and "should be approved." *10 U.S.C. § 866(d)(1)*. This includes the authority to address errors raised for the first time on appeal despite waiver of those errors at trial. *See Hardy, 77 M.J. at 442-43*. Accordingly, we have considered whether to pierce Appellant's waiver in order to correct a legal error or deficiency. We find no cause to do so.

First, we note that Appellant's own plea of guilty by exceptions and substitutions created the specification of which he now complains. ***HN9***[] "By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime." *United States v. Broce, 488 U.S. 563, 570, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989)*; *see also Hardy, 77 M.J. at 442* (quoting *Broce, 488 U.S. at 570*). Appellant affirmed to the military judge that not only had he committed the acts alleged in the specification, but that they constituted a crime of which he believed he was guilty and which he wanted to admit. Appellant's post-trial effort to, in effect, deny his guilt does not, under **[*27]** these circumstances, stir our sense of justice so as to pierce Appellant's waiver.

Second, Appellant's claim is without substantive merit in light of the United States Court of Appeals for the Armed Forces (CAAF) decision in *Voorhees, 79 M.J. at 15-17*. There the CAAF held that Article 133, UCMJ, is a general intent offense; accordingly, Appellant was only required to intend to commit the conduct in the specification—i.e., "grab[bing] and hold[ing] [BV's] body

with his hands and legs without her express consent." *See id. at 16*. Contrary to Appellant's argument, no greater specific intent applied. Moreover, "[c]onscious conduct that is unbecoming an officer 'is in no sense lawful,'" and therefore the specification including the allegation that Appellant's conduct was unbecoming sufficiently distinguished lawful and unlawful behavior. *Id. at 17* (quoting *United States v. Caldwell, 75 M.J. 276, 282 (C.A.A.F. 2016)*). Appellant's reply brief argues that *Voorhees* was wrongly decided but, as we have said before, "[w]e are not at liberty to contradict our superior court on a point of law," even if we were inclined to do so. *United States v. Knarr, 80 M.J. 522, 532-33 (C.A.A.F. 2020)*.

D. Improper Referral and UCI [9]

1. Additional Background

Before the rehearing, the Defense moved to dismiss the charges and specifications "for improper referral and unlawful command **[*28]** influence." The Defense argued the convening authority's General Court-Martial Order No. 3 dated 26 January 2019 was a referral, which was improper because the convening authority had not obtained the advice of the SJA in accordance with Article 34, UCMJ, *10 U.S.C. § 834*, and R.C.M. 406. The Defense further argues that General Court-Martial Order No. 3 unlawfully influenced the subsequent actions by subordinate commanders and SJAs, who otherwise might have been more willing to advise the convening authority of "the legal hurdles created by [this court's] ruling" and recommend an alternative disposition.

The Government responded that this court's authorization of a rehearing did not "reset the entire court-martial process." The Government argued the case was never returned to the 78 ABW/CC for action as the special court-martial convening authority, and therefore no Article 32, UCMJ, *10 U.S.C. § 832*, preliminary hearing or re-transmittal to the general court-martial convening authority was required. Furthermore, the Government contended General Court-Martial Order No. 3 was not a referral, and the actual referral did not occur until 14 February 2019, after the convening authority received the SJA's pretrial advice to refer **[*29]** the Article 133 and Article 134, UCMJ, charges and specifications to a general court-martial.

The military judge denied the defense motion. He found the convening authority's 26 January 2019 order directing a rehearing "before another court-martial to be hereinafter designated" was distinct from the act of referring the charges and specifications to such a court-martial, which did not occur until the general court-martial was convened on 14 February 2019. The military judge further agreed with the Government that the case was never returned to the 78 ABW/CC for disposition, and the evidence suggested that the commander's recommendation on disposition was simply the result of using "standard templates" for sending a list of the potential court members who would be needed for the rehearing court-martial. Accordingly, the military judge concluded that the court-martial was not improperly referred and that the Defense had failed to carry its burden to provide "some evidence" of UCI.

During the military judge's guilty plea inquiry with Appellant, as described above, Appellant told the military judge that he understood that as a result of his PTA and pleas, the military judge's adverse ruling **[*30]** on this pretrial motion would not be subject to appellate review.

2. Law

HN10[↑] "Allegations of [UCI] are reviewed de novo." *United States v. Salyer, 72 M.J. 415, 423 (C.A.A.F. 2013)* (citations omitted). "On appeal, the accused bears the initial burden of raising [UCI]." *Id.*

HN11[↑] "Two types of [UCI] can arise in the military justice system: actual [UCI] and the appearance of [UCI]." *United States v. Boyce, 76 M.J. 242, 247 (C.A.A.F. 2017)*. Actual UCI "is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case." *Id.* (citations omitted). In order to demonstrate actual UCI, the appellant "must show: (1) facts, which if true, constitute [UCI]; (2) that the proceedings were unfair; and (3) that the [UCI] was the cause of the unfairness." *United States v. Salyer, 72 M.J. 415, 423 (C.A.A.F. 2013)* (citation omitted). "[T]he initial burden of showing potential [UCI] is low, but is more than mere allegation or speculation." *Id.* (citation omitted). Once

[9] Appellant's assignment of error styles this issue as "improper preferral/referral and unlawful command influence." However, the pretrial motion upon which the issue is based, and Appellant's explanation of the issue, do not allege improper preferral.

the appellant makes an initial showing of "some evidence," the burden shifts to the Government to "persuad[e] the Court beyond a reasonable doubt that (1) the predicate facts do not exist; (2) the facts do not constitute [UCI]; or (3) the [UCI] did not affect the findings or sentence." *Id.* (citing United States v. Biagase, 50 M.J. 143, 151 (C.A.A.F. 1999)).

HN12[] Unlike actual UCI, a meritorious claim of an appearance **[*31]** of UCI does not require prejudice to an accused. Boyce, 76 M.J. at 248. "[W]hen an appellant asserts there was an appearance of [UCI,] [t]he appellant initially must show 'some evidence' that [UCI] occurred." Id. at 249 (footnote omitted) (citations omitted). "Once an appellant presents 'some evidence,' the burden then shifts to the [G]overnment to . . . prov[e] beyond a reasonable doubt that either the predicate facts proffered by the appellant do not exist, or the facts as presented do not constitute [UCI]." *Id.* (quoting Salyer, 72 M.J. at 423) (additional citation omitted). If the Government fails to rebut the appellant's factual showing, it may still prevail if it proves "beyond a reasonable doubt that the [UCI] did not place 'an intolerable strain' upon the public's perception of the military justice system and that 'an objective, disinterested observer, fully informed of all the facts and circumstances, would [not] harbor a significant doubt about the fairness of the proceeding.'" Id. at 249-50 (alteration in original) (quoting Salyer, 72 M.J. at 423).

HN13[] "Whether an accused has waived an issue is a question of law we review de novo." United States v. Ahern, 76 M.J. 194, 197 (C.A.A.F. 2017) (citation omitted). "[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) (internal quotation marks omitted) **[*32]** (quoting United States v. Olano, 507 U.S. 725, 733, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)). "Whether a particular right is waivable; whether the [accused] must participate personally in the waiver; whether certain procedures are required for waiver; and whether the [accused]'s choice must be particularly informed or voluntary, all depend on the right at stake." Ahern, 76 M.J. at 197 (quoting United States v. Girouard, 70 M.J. 5, 10 (C.A.A.F. 2011)). UCI in the adjudicative stage of a court-martial generally may not be waived. *See* United States v. Baldwin, 54 M.J. 308, 310 n.2 (C.A.A.F. 2001). However, where the suggestion for a PTA and waiver originates with the accused and his counsel, an accused may affirmatively and knowingly waive an allegation of UCI in the preferral of charges in order to obtain the benefits of a favorable PTA. United States v. Weasler, 43 M.J. 15, 19 (C.A.A.F. 1995). In general, "an 'unconditional guilty plea waives all nonjurisdictional defects at earlier stages of the proceedings.'" Hardy, 77 M.J. at 442 (quoting Lee, 73 M.J. at 167).

3. Analysis

On appeal, Appellant reasserts his claims from the defense motion to dismiss that the convening authority improperly referred the charges and specifications to the court-martial, and that UCI infected the referral process. The Government responds that Appellant waived this issue, and that his argument has no merit in any event. We agree with the Government.

The record before us indicates Appellant knowingly and intelligently waived **[*33]** appellate review of the issue raised in his pretrial motion. HN14[] UCI, of course, "is the mortal enemy of military justice," United States v. Boyce, 76 M.J. 242, 246 (C.A.A.F. 2017) (citation omitted), and "it is against public policy to require an accused to withdraw an issue of [UCI] in order to obtain a pretrial agreement." United States v. Kitts, 23 M.J. 105, 108 (C.M.A. 1986) (citation omitted). However, the CAAF has held that an accused may knowingly and intelligently waive a known UCI issue in the preferral of charges in order to secure a favorable PTA initiated by the defense. Weasler, 43 M.J. at 19. The CAAF has also implied that a known UCI issue in the referral of charges may similarly be knowingly and intelligently waived. *See, e.g.,* Baldwin, 54 M.J. at 310 n.2 (citations omitted) (citing *Weasler* for the principle that a "pretrial agreement initiated by accused waived any objection to unlawful command influence in the preferral and referral of charges"); Weasler, 43 M.J. at 17-18 (explaining that referral, like preferral, is part of the accusatorial process and distinct from the adjudicative process).

In this case, the motion waiver provision originated with the Defense. Appellant and his counsel were obviously aware of this alleged UCI issue as the Defense raised it in its pretrial motion. During the guilty plea inquiry, the military judge explained to Appellant **[*34]** that his PTA and guilty plea would waive appellate review of the military judge's adverse ruling on this motion. Appellant affirmed that he understood, but he nevertheless desired to proceed with the PTA. As described above, the PTA was favorable to Appellant in multiple respects. In light of Weasler and general principles of waiver as explained by our superior court, we find no reason to conclude Appellant could not or did not effectively waive appellate review of the alleged UCI issue in the referral

of charges.

Again, finding waiver does not end our inquiry. Assuming *arguendo* that Appellant did not effectively waive this issue, and also because we recognize our authority to pierce Appellant's waiver in order to correct a legal error, *see* Hardy, 77 M.J. 442-43, we have considered the substance of the defense motion to dismiss and find it to be without merit.

As to defective referral, we agree with the military judge that the referral did not occur with the issuance of General Court-Martial Order No. 3 on 26 January 2019, but on 14 February 2019 when the charges were actually referred to the general court-martial created by Special Order A-9. The court-martial to which the charges were referred was not **[*35]** created until 14 February 2019. Thus referral was after the convening authority received the SJA's pretrial advice.

As to UCI, the military judge correctly concluded the charges and specifications had never been returned to the 78 ABW/CC for action, forwarding, or a recommendation. The record was returned to the convening authority for action pursuant to this court's decision authorizing a rehearing. The convening authority promptly decided a rehearing was appropriate and, eventually, referred the charges to the general court-martial. The 78 ABW/CC transmitted the names and data of potential rehearing court members to the convening authority. However, neither the 78 ABW/CC nor any other subordinate commander had any formal authority or role in the disposition of the case on remand, in the performance of which they could be unlawfully influenced. The convening authority appropriately exercised the authority that rested with him. Accordingly, we find Appellant has failed to carry his initial burden to demonstrate "some evidence" of UCI.

III. Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant **[*36]** occurred. *Articles 59* and *66, UCMJ*, *10 U.S.C. §§ 859*, *866*. Accordingly, the findings and sentence are **AFFIRMED**.[10]

[10] We note an error in the promulgating order with respect to the finding as to the Specification of Charge III, the Article 133, UCMJ, offense. The order accurately records Appellant's plea of guilty by exceptions and substitutions. However, the order fails to record that the Government withdrew the excepted language and that the military judge found Appellant guilty of the Specification as modified by the substituted language. We direct the publication of a corrected order to remedy the error.

End of Document