IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

KRISTOPHER D. COLE,
Airman First Class (E-3),
United States Air Force,
Appellant.

USCA Dkt. No. 23-0162/AF

Crim. App. Dkt. No. 40189

BRIEF ON BEHALF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Supreme Court of the United States

Court of Appeals for the Armed Forces and Court of Military Appeals

State Courts

Service Courts of Criminal Appeals

Constitutional Provisions, Statutes, Rules, and Other Authorities

ISSUE PRESENTED

WHETHER APPELLANT IS ENTITLED TO RELIEF BECAUSE THE MILITARY JUDGE MISAPPREHENDED THE OFFENSE IN SPECIFICATION 2 OF CHARGE II FOR WHICH HE SENTENCED APPELLANT.

STATEMENT OF STATUTORY JURISDICTION

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

STATEMENT OF THE CASE

At Davis-Monthan Air Force Base (AFB), Arizona, on April 1, 2021, and June 15, 2021, a military judge sitting as a general court-martial convicted Airman First Class (A1C) Kristopher D. Cole, Appellant, in accordance with his pleas, of one specification of aggravated assault via strangulation (Specification 1 of Charge II), one specification of simple assault with an unloaded firearm (Specification 2 of Charge II), and one specification of assault consummated by a battery (Specification 7 of Charge II), in violation of Article 128, UCMJ, 10 U.S.C. § 928. Joint Appendix (JA) at 031-033, 095. The military judge sentenced Appellant to 14 months' confinement, reduction to E-1, a reprimand, and a bad-

[1] All references to the Uniform Code of Military Justice (UCMJ) and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.) [*2019 MCM*].

conduct discharge. JA at 109. Appellant's confinement sentence was apportioned as follows, with all terms to run consecutively: 6 months for Specification 1 of Charge II, 6 months for Specification 2 of Charge II, and 2 months for Specification 7 of Charge II. JA at 109. The convening authority took no action on the findings and sentence except to disapprove the reprimand. JA at 034. The Air Force Court affirmed the findings and sentence. JA at 030.

STATEMENT OF FACTS

a. Without any explanation of how the maximum punishment was calculated, the military judge agreed with counsel's assessment of the maximum punishment authorized.

On June 15, 2021, Appellant's court-martial began with the military judge summarizing the R.C.M. 802 conferences that had occurred the day before. The military judge explained, "Yesterday . . . the parties notified the court that a plea agreement might be in the works and then there were status updates." JA at 041. "[Y]esterday afternoon[,] the General, the convening authority, accepted the plea agreement." JA at 041. "[P]art of the plea agreement is, that there would be a stipulation of fact, and the parties worked hard on that over the evening and maybe even into this morning."[2] JA at 041.

[2] Appellant's plea agreement was approved and accepted by the convening authority on June 14, 2021, and the stipulation of fact was signed on the day of Appellant's court-martial, June 15, 2021. JA at 114, 121.

The military judge then summarized the R.C.M. 802 conference that had occurred prior to the parties coming on the record that day:

> We had another [R.C.M.] 802 conference this morning and in that particular conference, the government and the defense just wanted to let me know how they calculated the maximum punishment that would be authorized based upon the offenses that [A1C] Cole was pleading guilty to. And, I appreciate that and I did look through the appendix to the Manual for Courts-Martial and I do agree with counsel on the maximum punishment that they already agreed to.

JA at 041-42.

The military judge did not state what the parties believed the maximum sentence was or how they came to this calculation. Nor did he state which offenses he reviewed within the appendix.

b. <u>The military judge had not presided over the earlier session of Appellant's court-martial and decided to skip announcing the general nature of the charges.</u>

The military judge was detailed to Appellant's case on June 4, 2021, eleven days before Appellant's court-martial, and had not presided over the earlier session of Appellant's court-martial or seen the transcript. JA at 040, 042. Nonetheless, the military judge decided to skip announcing the general nature of the charges. JA at 043-44.

c. The military judge advised Appellant that by pleading guilty, he gave up the right against self-incrimination with respect to Specifications 1, 2, and 7 of Charge II and Charge II, and to accept his guilty plea, he must admit every element of those offenses.

Appellant pleaded guilty to Specifications 1, 2, and 7 of Charge II and Charge II. JA at 045-46. The military judge advised Appellant, "Your plea will not be accepted unless you realize that by your plea you admit every act or omission and element of the offenses to which you have pled guilty, and that you are pleading guilty because you actually are guilty." JA at 046.

He continued, "By your plea of guilty you give up three important rights, but you give up these rights solely with respect to the offenses to which you have pled guilty. First, you give up the right against self-incrimination. That is the right to say nothing at all." JA at 047. After explaining the remaining rights waived by his plea of guilty, the military judge confirmed, "Do you understand that by pleading guilty you no longer have these rights with respect to the offenses to which you have pled guilty?" JA at 047. Further, "you will be placed under oath and I will question you to determine whether you are guilty. Anything you tell me may be used against you in the sentencing portion of the trial. Do you understand this?" JA at 047. Each time, Appellant responded, "Yes, Your Honor." JA at 047.

d. <u>While reviewing Appellant's stipulation of fact, the military judge did not refer to a copy of the charge sheet and did not recognize when the stipulation of fact incorrectly included dates outside of the charged time frame.</u>

Appellant agreed to a stipulation of fact that detailed the underlying facts of the offenses he agreed to plead guilty to. JA at 115-121. In the stipulation of fact, Specification 1 of Charge II was labeled "Divers Strangulation, Assault Consummated by a Battery (Article 128, UCMJ)." JA at 116. Specification 2 of Charge II was labeled "Assault with an Unloaded Firearm (Article 128, UCMJ)." JA at 119. And Specification 7 of Charge II was labeled "Twist Arm Behind Back, Assault Consummated by a Battery (Article 128, UCMJ)." JA at 120.

The military judge reviewed the stipulation of fact with the Appellant. JA at 92-111. In doing so, the military judge highlighted that he did not have a copy of the charge sheet in front of him, or at least he did not think he did, and he relied on trial counsel to confirm when Appellant's case was referred: "Can I stop you there, was this referred on 14 June 2021 or 14 June 2020? I don't have the charge sheet in front of me, I don't think." JA at 050-51. The military judge next stated that he believed "it look[ed] like it was referred on 5 March," but he never stated he had a copy of the charge sheet. Further, after trial counsel confirmed the date of referral was "5 March 2021," the military judge then told Appellant "I am just going to say in March 2021," and in referring to the total number of specifications that Appellant had been charged with, "let's just say you pled guilty to three

specifications out of the, I don't know, was there nine or ten specifications, total? The two charges, nine or ten specifications." JA at 051.

In discussing Specification 1 of Charge II, which was alleged to have occurred on divers occasions, between on or about August 1, 2019 and on or about January 20, 2020, the military judge read aloud to Appellant, "Then, on or about 10-12 January 2021, . . . you strangle[d] [R.L.] in your kitchen." JA at 058. It was only after the military judge read this aloud and Appellant agreed that this was true and accurate that trial counsel interrupted to state, "we just noticed, it should be 10 to 12 January 2020, not 2021." JA at 058. The military judge responded, "Okay. All right, so I gave you the wrong date, when I read that to you . . . my apologies, I should have caught that, but I didn't." JA at 058.

Relevant to Specification 2 of Charge II, Appellant admitted, "On or about 21 September 2019, [he] pointed an unloaded firearm at [R.L]'s head, touching her temple. [He] had no legal justification or excuse for doing so. [He] did so with force and violence. [R.L.] did not consent to [this] action." JA at 062.

The military judge confirmed Appellant, R.L., and M.P. were in the living room of the apartment that Appellant and M.P. lived in. JA at 063. Appellant was coaching R.L. through disassembling and reassembling his rifle, but R.L. was "having difficulty getting the pieces back together perfectly." JA at 063. Appellant got angry with R.L. and told her that "she could not go to bed until she

fixed the gun and put it back together completely." JA at 063. R.L. stayed sitting on the couch and Appellant "held up his 9mm Smith and Wesson pistol to her temple, yelling at her." JA at 063. Appellant yelled, "Don't disrespect me in my own house, you are going to do this. My house, my rules, you are going to finish it, that's what I told you to do!" JA at 063. "To [R.L.], this was the scariest of all incidents with [Appellant]." JA at 063. She did not know that he had pulled the firing pin out of the firearm and thought he might pull the trigger and kill her. JA at 063.

Appellant told his roommate, J.F., he pulled the trigger when he held the pistol to R.L.'s temple and that it was "[f]ine because [he] took the firing pin out and the gun was not loaded." JA at 064. Appellant also told S.B. he did it to "put the pressure on [R.L.] and make her go faster." JA at 064. Finally, when A.W. "confronted [him], asking if [he] really did hold a pistol up to [R.L.]'s temple," he laughed, said he did, and said it was funny. JA at 064.

Appellant also admitted "between on or about January 10, 2020 and January 20, 2020, [he] unlawfully twisted [R.L.]'s arm behind her back. [He] had no legal justification or excuse for doing so. [He] did so with force and violence. [R.L.] did not consent to [his] action." JA at 064. Appellant knew that R.L. had a prior shoulder injury but a high tolerance for pain. JA at 065. When he twisted her arm back, he took her arm and elbow and held her arm "in a 90-degree bend behind her

back" and he was "pushing her hand into her own shoulder blade," moving her arm upwards. JA at 065. R.L. told him to stop "because it hurt," but he didn't listen. JA at 065. "[Her] shoulder cracked and popped loudly, and it was excruciatingly painful for her." JA at 065. A.W. "had to jump in to stop [Appellant] after [R.L.]'s shoulder made the audible popping and cracking noises." JA at 065.

e. <u>During the providence inquiry for Specification 2 of Charge II, Simple Assault with an Unloaded Firearm, the military judge asked Appellant under oath whether his action of pointing a gun constituted bodily harm and whether the unloaded firearm was a dangerous weapon.</u>

Specification 2 of Charge II alleged:

> In that AIRMAN FIRST CLASS KRISTOPHER D. COLE, United States Air Force, 355th Aircraft Maintenance Squadron, Davis-Monthan Air Force Base, Arizona, did within the state of Arizona, between on or about 1 September 2019 and on or about 28 September 2019, assault [R.L.] by pointing an unloaded firearm at her head.

JA at 033. The military judge stated this offense is called "assault consummated by battery," and explained the elements of this offense are:

> [O]ne, that between on or about 1 August 2019 and on or about 20 January 2020, within the state of Arizona, you did assault [R.L.] by offering to do bodily harm to her. Two, that you did so by pointing at her with a certain weapon, to wit: an unloaded firearm. *Three, that you intended to do bodily harm and four, that the weapon was a dangerous weapon.*

JA at 072 (emphasis added).

The military judge then explained "definitions to use with those elements":

> An assault is an unlawful offer made with force or violence to do bodily harm to another, whether or not the offer consummated. An offer to do bodily harm is an unlawful demonstration of violence by an intentional act or omission which creates in the mind of another, a reasonable apprehension of receiving immediate bodily harm. The use of threatening words alone does not constitute an assault. However, if threatening words are accompanied by a menacing act or gesture, there may be an assault. Since the combination constitutes a demonstration of violence. Bodily harm means an offensive touching of another, however slight. It is not necessary that bodily harm actually be inflicted, however, you must have intended to do the bodily harm. Intent to do bodily harm may be proved by circumstantial evidence. When bodily harm has been inflicted by means of intentionally using force in a manner capable of achieving that result. It may be inferred that the bodily harm was intended. And the offer to do bodily harm is unlawful if done without legal justification or excuse and without the lawful consent of the victim.
>
> A weapon is a dangerous weapon when used in a manner capable of inflicting death or grievous bodily harm. What constitutes a dangerous weapon depends not on the nature of the object itself, but on its capability, given the manner of its use to inflict grievous bodily harm.
>
> Firearm means any weapon which is designed to or may be readily converted to expel any projectile by the action of an explosive. A victim may not lawfully consent to an assault with a dangerous weapon. Consent is not a defense to this offense.

JA at 072-73. Having explained these elements and definitions, the military judge confirmed with Appellant, "Do you understand that your plea of guilty admits that these elements accurately describe what you did?" and "do you believe and admit that the elements and definitions taken together correctly describe what you did?" JA at 073. Appellant stated "Yes, Your Honor," to each question. JA at 073.

The military judge also asked Appellant a series of questions, to include:

> [Military judge]: [W]hat I wanted to ask you was, the unloaded firearm, it was a 9mm Smith and Wesson, I believe in the stipulation of fact, it stated, and I wanted to ask if you consider that a dangerous weapon under the definitions I have given you?
>
> [Appellant]: Yes, Your Honor.
>
> . . .
>
> [Military judge]: Would you agree that pointing the gun at her and stating what you stated was bodily harm under the definition that I gave you?
>
> [Appellant]: Yes, Your Honor.
>
> [Military judge]: And my other question is, did you intend to point the gun at her?
>
> [Appellant]: Yes, Your Honor.

JA at 075.

f. The military judge stated the maximum punishment authorized by law was six years and six months.

The military judge asked trial counsel what they calculated the maximum punishment authorized by law to be, based solely on Appellant's guilty plea. JA at 078. Assistant trial counsel stated it was six years and six months. JA at 078. The military judge then confirmed "do counsel agree that a dishonorable discharge, six years, six months of confinement, reduction to the lowest enlisted grade and total forfeitures are authorized as the maximum punishment in this case?" JA at 078.

The parties agreed. JA at 078. Neither the military judge nor the parties explained which punitive articles were used to calculate the maximum punishment.

g. Appellant's plea agreement provided the military judge with a range of punishments that he could adjudge.

Appellant's plea agreement required that upon acceptance of Appellant's guilty plea, the Court enter a sentence as follows:

a. For Specification 1 of Charge II:

Maximum confinement: 6 months confinement.
Minimum confinement: 60 days confinement.
To be served consecutively.

b. For Specification 2 of Charge II:

Maximum confinement: 6 months confinement.
Minimum confinement: 60 days confinement.
To be served consecutively.

c. For Specification 7 of Charge II:

Maximum confinement: 6 months confinement.
Minimum confinement: 60 days confinement.
To be served consecutively.

d. A Dishonorable Discharge may not be adjudged for any of the specifications to which I am pleading guilty.

JA at 083-84, 111. The military judge accepted Appellant's guilty plea, finding, in part, Appellant had knowingly, intelligently, and consciously waived his rights against self-incrimination. JA at 095.

h. The Government presented four exhibits in its sentencing case-in-chief and R.L. presented an unsworn statement.

The Government presented Appellant's personal data sheet, Appellant's enlisted performance reports from February 23, 2016, through March 31, 2020, a letter of reprimand, and an administrative demotion memorandum. JA at 131-147. Appellant's personal data sheet demonstrated, at the time of trial, Appellant had served on active duty for five years and two months, to include serving overseas at Osan Air Base, Korea, from December 2017 through January 2019. JA at 131.

R.L. presented an unsworn statement to the military judge in which she requested that the military judge consider the physical and emotional impact she felt from Appellant's actions when deciding Appellant's sentence. JA at 149.

i. Appellant provided the military judge with character letters on his behalf and delivered a personal statement.

Appellant spoke to the military judge and apologized to R.L., his family, his unit, the Air Force, and the military judge. JA at 096-97, 156-57. He admitted he was ashamed of his choices and actions and would keep the lessons he learned on the forefront of his mind. JA at 096-97.

N.D., Appellant's Assistant Superintendent, wrote a character letter on behalf of Appellant in which he stated that he interacted with Appellant nearly daily over approximately two years and that Appellant's work performance was exceptional. N.D. rated Appellant's rehabilitative potential as "high," based on

"the personal resiliency he has shown over the course of the last year along with his superb quality of work which he has continually elevated." JA at 154.

K.H., Appellant's direct supervisor, also wrote a character letter on behalf of Appellant. After knowing Appellant for over two years, K.H. opined Appellant often needed no motivation to start a task and was eager to learn new talents. JA at 155. Appellant went above and beyond his daily duties and could be trusted to accomplish a task in a timely manner with great detail and without complaint. JA at 155. K.H. rated Appellant's rehabilitative potential as "extremely high!" JA at 155.

j. The Government presented one exhibit in rebuttal.

The Government provided the military judge with an affidavit prepared by a paralegal, W.K., who was present for an interview with N.D., one of Appellant's character witnesses. JA at 148. According to W.K., N.D. stated he only spent time with Appellant outside of work on one occasion, which was a five-minute interaction at N.D.'s home. JA at 148. N.D. also knew R.L. and observed she "was not in a great state." JA at 148. Further, Appellant had to be moved to another work section and R.L. took time off from work, which led others to pick up the workload. JA at 148.

k. The Government conceded the military judge erred in its filing before the Air Force Court.

The Government agrees that Specification 2 of Charge II charged Appellant with the offense of "simple assault with an unloaded firearm." JA at 158-59. The Government further agrees "the military judge characterized Specification 2 of Charge II as an assault consummated by a battery and read [A]ppellant the elements for aggravated assault with a dangerous weapon," and that these offenses were not alleged. JA at 158-60.

SUMMARY OF THE ARGUMENT

The military judge misapprehended the offense that was charged in Specification 2 of Charge II. Appellant was charged with simple assault with an unloaded firearm. The military judge called the offense (and all of the offenses) assault consummated by a battery and believed the offense was aggravated assault with a dangerous weapon. Due to his misapprehension, the military judge questioned Appellant about aggravated assault elements that were not necessary to satisfy Appellant's plea or the factual basis. In doing so, the military judge exceeded Appellant's knowing and voluntary waiver of the right against self-incrimination. The military judge then sentenced Appellant while under the same misapprehension, sentencing Appellant for the aggravated crime that he believed was charged. But Appellant was not charged with or on notice of this aggravated

offense. The military judge's error violated Appellant's right against self-incrimination and his right to due process. As an error of constitutional magnitude, this Court should find the military judge's error was not harmless beyond a reasonable doubt because it infected the military judge's entire view of the offense. The military judge viewed the simple assault as the aggravated crime of aggravated assault with a dangerous weapon when he sentenced Appellant to the maximum punishment for Specification 2 of Charge II. This Court cannot be confident that this sentence is not attributable to the military judge's error.

If this Court disagrees, however, and finds this error is not an error of constitutional magnitude, this Court should still find Appellant was materially prejudiced under Article 59(a), UCMJ, 10 U.S.C. § 859. The record bears out that the military judge considered aggravating elements that were not relevant to the charged offense that Appellant pleaded guilty to. His view of the entire offense was aggravated by his misunderstanding of the offense.

This Court should reverse with respect to the sentence and return the record to the Judge Advocate General of the Air Force for remand to the Air Force Court to either reassess the sentence or order a sentence rehearing. *United States v. Edwards*, 82 M.J. 239, 248 (C.A.A.F 2022).

ARGUMENT

APPELLANT IS ENTITLED TO RELIEF BECAUSE THE MILITARY JUDGE MISAPPREHENDED THE OFFENSE IN SPECIFICATION 2 OF CHARGE II FOR WHICH HE SENTENCED APPELLANT.

Standard of Review

Whether the military judge misapprehended the charged offense and its elements in Specification 2 of Charge II, simple assault with an unloaded firearm, is a question of law arising from a guilty plea which this Court reviews *de novo*. *United States v. Schell*, 72 M.J. 339, 342-43 (C.A.A.F. 2013).[3]

Law and Analysis

1. The military judge's misapprehension of the offense charged in Specification 2 of Charge II is evidenced by him (a) stating the incorrect offense, (b) advising on incorrect elements and definitions, and (c) inquiring about the elements of an uncharged offense.

    a. The military judge stated Specification 2 of Charge II was "assault consummated by a battery."

Rule for Courts-Martial 910 details the advice the military judge must give to the accused and the military judge's requirement to determine the accuracy of the plea when an accused pleads guilty. "Before accepting a plea of guilty, the military judge shall address the accused personally and inform the accused of . . .

[3] Appellant believes this question of law should be reviewed *de novo*, however, if this Court determines plain error review is the more appropriate standard of review, the military judge's error was nevertheless plain and obvious, and it materially prejudiced Appellant. *See infra* sections 1, 4-5.

[t]he nature of the offense." R.C.M. 910 (c)(1); JA at 167. At Appellant's court-martial, the military judge stated he did not have Appellant's charge sheet and skipped reading the general nature of the charges. JA at 043-44. This may not have been an issue if the military judge understood the offense that Appellant was pleading guilty to and later cited to it correctly during Appellant's providence inquiry. But that did not happen here. Instead, the military judge incorrectly informed Appellant that Specification 2 of Charge II was the offense of "assault consummated by a battery," when the actual charged offense was *simple assault with an unloaded firearm*. JA at 033, 072, 161. The Government agrees that Specification 2 of Charge II charged Appellant with the offense of simple assault with an unloaded firearm and "the military judge characterized Specification 2 of Charge II as an assault consummated by a battery." JA at 158-60.

b. The military judge advised Appellant of the elements and definitions for the wrong offense (aggravated assault with a dangerous weapon).

The military judge is expected to describe for the accused, the elements of each offense to which the accused pleaded guilty. R.C.M. 910 (c)(1), *Discussion*; JA at 167. "An essential aspect of informing Appellant of the nature of the offense is a correct definition of legal concepts." *United States v. Negron*, 60 M.J. 136, 141 (C.A.A.F. 2004).

In Specification 2 of Charge II, Appellant was charged with *simple assault with an unloaded firearm*. JA at 033, 161. The military judge, however, advised

Appellant of the elements of *aggravated assault with a dangerous weapon*, a crime that Appellant was not charged with and was not pleading guilty to. JA at 072. The Government agrees "the military judge. . . read [A]ppellant the elements for aggravated assault with a dangerous weapon," and this offense was not alleged. JA at 158-60. Comparison of the elements stated by the military judge further confirms this error.

Elements advised by the military judge. JA at 072-73.	**Simple Assault with an Unloaded Firearm** MCM, part IV, ¶ 77.b.(1); JA at 161.	**Aggravated Assault with a Dangerous Weapon** MCM, part IV, ¶ 77.b.(4)(a); JA at 161.
(1) "you did assault [R.L.] by offering to do bodily harm to her"	(1) That the accused offered to do bodily harm to a certain person;	(1) That the accused offered to do bodily harm to a certain person;
(2) "that you did so by pointing at her with a certain weapon, to wit: an unloaded firearm"	(2) The offer was done unlawfully;	(2) The offer was made with the intent to do bodily harm; and,
(3) "that you intended to do bodily harm"	(3) The offer was done with force or violence; and,	(3) The accused did so with a dangerous weapon.
(4) "that the weapon was a dangerous weapon."	(4) That the offer was done with an unloaded firearm.	

The military judge further advised Appellant of definitions that did not apply to Specification 2 of Charge II. The military judge told Appellant that he "must have intended to do the bodily harm" and that "[a] weapon is a dangerous weapon when used in a manner capable of inflicting death or grievous bodily harm. What

constitutes a dangerous weapon depends not on the nature of the object itself, but on its capability, given the manner of its use to inflict grievous bodily harm." JA at 072-73.

While "[m]ilitary judges are presumed to know the law and to follow it absent clear evidence to the contrary," here, the military judge's mistake is clear and the Government agrees. *United States v. Rapert*, 75 M.J. 164, 170 (C.A.A.F. 2016) (citing *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007)).[4]

c. The military judge asked Appellant about the elements of aggravated assault with a dangerous weapon, an uncharged offense.

The military judge asked Appellant whether the incorrect elements and definitions (*see supra*, Section 1.b.) described his conduct, and further demonstrated his own misapprehension of the charged offense by asking Appellant:

> [W]hat I wanted to ask you was, the unloaded firearm, it was a 9mm Smith and Wesson, I believe in the stipulation of fact, it stated, and I wanted to ask if you consider that a dangerous weapon under the definitions I have given you?

JA at 072-73, 075.

[4] The military judge's error is also repeated, which demonstrates his true misapprehension. The military judge demonstrated the same error just two months before Appellant's court-martial when he similarly misadvised an accused who was pleading guilty to *simple assault with unloaded firearm* by advising them of the elements of *aggravated assault with a dangerous weapon*. *United States v. Dominguez-Garcia*, No. ACM S32694, 2022 CCA LEXIS 582 (A.F. Ct. Crim. App. Oct. 11, 2022) (unpub. op.).

Here, the military judge asked Appellant to admit to an aggravated element that is not an element of the charged offense. This alone demonstrates his misapprehension of the offense. But his question also contravened settled law from this Court. In *United States v. Davis*, 47 M.J. 484, 486 (C.A.A.F. 1998), this Court held an unloaded firearm is not a dangerous weapon. Moreover, no facts were presented to the military judge in the stipulation of fact or Appellant's explanation of his guilt to cause the military judge to believe that the unloaded firearm had been used in any manner that could qualify the firearm as a dangerous weapon. Therefore, the military judge not only errored in asking Appellant to admit to this aggravated element of an uncharged offense, but he also erred in finding that Appellant had satisfied the element. JA at 072-73, 095.

The military judge then continued:

> [Military judge]: Would you agree that pointing the gun at her and stating what you stated *was bodily harm* under the definition that I gave you?
>
> [Appellant]: Yes, Your Honor.
>
> [Military judge]: And my other question is, did you intend to point the gun at her?
>
> [Appellant]: Yes, Your Honor.

JA at 072-73, 075 (emphasis added). Under the offense that Appellant was charged with and pleading guilty to, it is not necessary that bodily harm be inflicted, or that Appellant intended to commit bodily harm. *See* MCM, part IV, ¶¶

77.b.(1), 77.c.(2)(b)(ii); JA at 161, 163. And though it's not clear whether the military judge was trying to elicit Appellant's intent to commit bodily harm in the questions here, the military judge may have been as he earlier incorrectly stated that the offense required "you intended to do bodily harm," and ultimately, he accepted Appellant's plea, while under the misapprehension that the offense required this specific intent to harm and that it involve a dangerous weapon. JA at 072-73, 095. The military judge's error is clear.

2. The military judge's misapprehension of the offense charged in Specification 2 of Charge II is an error of constitutional magnitude.

Through his misapprehension, the military judge violated Appellant's right against self-incrimination. Although a limited waiver of the right against self-incrimination exists to establish a factual basis for a guilty plea, the military judge had a duty to not exceed the scope of that waiver. By asking questions that went beyond the charged elements, the military judge exceeded that scope, and this resulted in an error of constitutional magnitude.

The military judge must address that the accused has the right, *inter alia*, against self-incrimination and that if the accused pleads guilty, he waives this right and "the military judge will question the accused about *the offenses to which [he] has pleaded guilty*." R.C.M. 910(c)(3)-(5) (emphasis added); JA at 167. "The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea.

R.C.M. 910(e); JA at 167. "There is a presumption against the waiver of constitutional rights, and for a waiver to be effective, it must be clearly established that there was an intentional relinquishment of a known right or privilege." *United States v. Sweeney*, 70 M.J. 296, 303-304 (C.A.A.F. 2011). "The charge sheet provides the accused notice that he or she will have to defend against any charged offense and specification." *United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018).

In *United States v. Miller*, 23 M.J. 553, 553-54 (C.G.C.M.R. 1986), the accused pleaded guilty to unauthorized absence, drug use, and drug introduction. During the providence inquiry, the military judge asked the accused whether he would identify his drug supplier, explaining this would "weigh heavily in the question of sentence," though this fact was not necessary to accept the accused's guilty plea. *United States v. Miller*, 23 M.J. 837, 839 (C.G.C.M.R. 1987). The Coast Guard Court of Military Review, on reconsideration, determined, "[t]he accused, in pleading guilty, waived his Fifth Amendment right to remain silent *only to the extent necessary to establish his guilt and the providence of the plea*. He did not agree to be a witness against himself in all other respects." *Miller*, 23 M.J. at 839 (emphasis added).

In *United States v. Ramelb*, 44 M.J. 625, 630 (A. Ct. Crim. App. 1996), the Army Court of Criminal Appeals, in assessing how an Appellant's plea inquiry

statements could be used, similarly found an appellant's waiver of the right against self-incrimination is limited. "The military judge, in advising the appellant, expressly limited the use of the appellant's statements during the plea inquiry when he advised the appellant that he gave up the privilege against self-incrimination ' . . . only with respect to the offense to which [he] pled guilty[.]'" *Ramelb*, 44 M.J. at 630. Further, the military judge's advice "established the scope of the appellant's 'knowing and intelligent' waiver of his privilege against self-incrimination." *Id*.

In *United States v. Chambers*, NMCCA 200500329, 2006 CCA LEXIS 216 at *2-3 (N.M. Ct. Crim. App. Aug. 3, 2006) (unpub. op.), the Navy-Marine Corps Court of Criminal Appeals also determined "an accused retains his rights under the Fifth Amendment to remain silent when pleading guilty as to any question that exceeded those necessary to establish the factual predicate underlying a plea of guilty" (citing *United States v. Sauer*, 15 M.J. 113, 117 (C.M.A. 1983)), and that it is error of a "constitutional magnitude" "to elicit responses that only serve to magnify the Government's case in aggravation" (citing *Miller*, 23 M.J. at 839).

Moreover, "the Fifth Amendment as explained in *Estelle v. Smith*, [451 U.S. 454 (1981)] affirmatively forbids a scenario wherein an accused is coerced by a judge to provide information that will increase his sentence." *Sauer*, 15 M.J. at 117.

Here, the military judge advised Appellant that he was giving up the right against self-incrimination solely with respect to the offenses he was pleading guilty to. JA at 047. When Appellant pleaded guilty to Specification 2 of Charge II and agreed to waive the right against self-incrimination, his waiver extended only to the elements and necessary factual basis for simple assault with an unloaded firearm. JA at 033, 161.

When the military judge then elicited admissions from Appellant on the aggravated elements *that did not apply to the offense that Appellant was pleading guilty to*, the military judge exceeded the scope of Appellant's limited waiver of the right against self-incrimination. Implicitly relying on the military judge's incorrect advisement of the elements, Appellant was forced to forego his right to remain silent. The constitutional dimension of exceeding an appellant's limited waiver for a plea inquiry has been recognized by this Court's predecessor in *Sauer*, and the service courts of the Army (in *Ramelb*), Coast Guard (in *Miller*), and Navy-Marine Corps (in *Chambers*). This Court should similarly find that under these facts, the military judge's misapprehension of the offense and questioning of the Accused based on that misapprehension was an error of constitutional magnitude as it violated Appellant's right against self-incrimination.

The military judge's misapprehension also violated Appellant's right to due process. "The due process principle of fair notice mandates that an accused has a

right to know what offense and under what legal theory he will be tried and convicted." *United States v. Riggins*, 75 M.J. 78, 83 (C.A.A.F. 2016) (internal citation and quotations omitted). Appellant was on notice of the offense listed on the charge sheet, *simple assault with an unloaded firearm*, when he agreed to plead guilty and be sentenced by the military judge. But the military judge misapprehended the offense and seemingly believed he was sentencing Appellant for aggravated assault with a dangerous weapon. This aggravated offense was not charged and as such, Appellant did not have notice that the military judge would be sentencing him for it.

3. The prejudice for constitutional errors is assessed using the harmless beyond a reasonable doubt standard.

"If a constitutional error is 'structural,' then reversal is automatic. *Neder v. United States*, 527 U.S. 1, 8 . . . (1999) (identifying denial of counsel, a biased trial judge, a defective reasonable doubt instruction, and other errors as structural))." *United States v. Palacios Cueto*, 82 M.J. 323, 334 (C.A.A.F. 2022). "If a constitutional error is nonstructural, then under our precedent, the Government must prove that the error was harmless beyond a reasonable doubt even on plain error review." *Palacios Cueto*, 82 MJ at 334 (citing *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019)).

This Court should assess this constitutional error for prejudice using the harmless beyond a reasonable doubt standard set out in *Chapman v. California*,

386 U.S. 18 (1967) (superseded by statute (28 U.S.C. § 2254(d)) for writs of habeas corpus).

4. The Government cannot demonstrate the military judge's misapprehension of the offense and questioning of Appellant was harmless beyond a reasonable doubt.

The harmless beyond a reasonable doubt standard "is met where a court is confident that there was no reasonable possibility that the error might have contributed to the conviction [or sentence]." *Tovarchavez*, 78 M.J. at 460 (citation omitted). Under this standard, this Court must be able to say with certainty that the military judge's misapprehension of the offense "did not taint the proceedings or otherwise contribute to [Appellant's] conviction or sentence." *Id.*

Examination of *Chapman* demonstrates that proper application of this standard should lead this Court to set aside Appellant's sentence. The facts of *Chapman* were not fully recited by the U.S. Supreme Court but can be found in the lower court's opinion, *People v. Teale*, 63 Cal. 2d 178 (1965). Ms. Chapman, Mr. Teale, and Mr. Adcox had all been seen together at 2 a.m. *Teale*, 63 Cal. 2d at 183. Mr. Adcox was later found (in a remote area) shot in the head with .22 caliber bullets and the estimated time of death was 3 a.m. *Id*. at 183-84. Ms. Chapman had purchased a .22 caliber weapon six days earlier and located in the vicinity of Mr. Adcox's body, there was a check which had been signed by Ms. Chapman. *Id*. at 184.

An expert witness testified to the forensic evidence which included that the victim's blood was spattered inside the defendants' vehicle and on the defendants' clothing. *Id*. The government also presented an informant who testified Mr. Teale told him that he and Ms. Chapman had robbed and killed Mr. Adcox. *Id*. at 184-85. Ms. Chapman also claimed she was in San Francisco at the time of the killing, but this was proven to be false by the fact that she had registered at a motel in Woodland at 4:40 a.m. and the registration card was in her handwriting. *Id*. at 185.

At trial, neither defendant testified, and the prosecutor repeatedly argued to the jury that the silence of the defendants could be used against them, which was bolstered by an improper instruction from the trial judge. *Id*. at 186, 196. Based on this constitutional error, and despite *all the evidence* admitted at trial, the U.S. Supreme Court reversed the defendants' convictions. *Chapman*, 386 U.S. at 26. The U.S. Supreme Court reasoned:

> And though the case in which this occurred presented a reasonably strong "circumstantial web of evidence" against petitioners, . . . it was also a case in which, absent the constitutionally . . . forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts. Under these circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions.

Chapman, 386 U.S. at 25-26. The government had a very strong case in *Chapman* including evidence of the opportunity to commit the crime, forensic evidence, and a confession. Nonetheless, the strength of the government's case was not

sufficient to avoid reversal. This decision, despite the significant evidence against the defendants, demonstrates the Supreme Court's intent that it be very difficult for the government to show that a constitutional error was harmless.

It is the government's burden to show here that the military judge's error was harmless beyond a reasonable doubt and Appellant's sentence "was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). In *Chapman*, it was the repeated nature of the prosecutor's arguments and the judge's instruction that led the U.S. Supreme Court to reverse the defendant's convictions, despite the significant incriminating evidence. Here, the military judge viewed Specification 2 of Charge II through the prism of an aggravated assault with a dangerous weapon throughout the *entire court-martial*. This was not simply an error of improperly admitting evidence or argument that invaded a portion of Appellant's trial, but rather, the military judge's incorrect and aggravated view of the entire offense pervades every part of Appellant's trial on this offense.

When the military judge read the wrong elements and definitions to Appellant, he demonstrated that he believed the offense required proof of specific intent to cause bodily harm and a dangerous weapon. When he asked Appellant about these elements, he was trying to satisfy a guilty plea for the wrong offense. And when he accepted Appellant's plea of guilty, the military judge used Appellant's admissions to convict him of the offense that he believed it was,

aggravated assault with a dangerous weapon. To accept Appellant's plea under his misapprehension of the offense, the military judge had to have found that Appellant maintained the specific intent to commit the aggravated offense and that the unloaded firearm was a dangerous weapon.

Aggravated assault is by name an aggravated offense. While this military judge misapprehended what offense was charged, he can be presumed to have understood that an aggravated assault has been deemed to be more serious than a simple assault, in its plain delineation. There is a foreseeable tendency to increase punishment for aggravated offenses and here, the military judge imposed the maximum sentence authorized under the plea agreement for Specification 2 of Charge II. JA at 109, 111. Had the military judge correctly understood that the offense charged was a simple assault, which requires no specific intent nor the use a dangerous weapon, there is a real possibility that he may have sentenced Appellant to a lesser sentence.

Simply comparing Appellant's sentence for Specification 2 of Charge II with his sentence for Specification 7 of Charge II bears out this possibility. Under Specification 7 of Charge II, Appellant was charged with inflicting bodily harm by twisting R.L.'s arm behind her back. JA at 033. When he did so, he knew that she had a prior shoulder injury. JA at 120. This fact is aggravating because common sense would suggest that a person may be more likely to be hurt when that part of

their body has previously been injured.

Not only did Appellant twist R.L.'s arm back knowing about her prior injury, but when she asked him to stop because it hurt, he did not listen. JA at 120. Her shoulder cracked and popped, causing her excruciating pain which required medical treatment. JA at 120. Appellant's persistence in hurting R.L., even with the cracking and popping and her pleas for him to stop, caused A.W. to jump in and force Appellant to stop. JA at 120.

Despite the aggravating nature of Specification 7, the military judge sentenced Appellant to the *minimum* sentence permissible under the plea agreement, two months of confinement. JA at 109, 111. While Specification 2 and Specification 7 are not the same, Specification 7 demonstrates the military judge was willing to sentence Appellant to the least amount of confinement allowable even when presented with significant evidence in aggravation. In comparison, Specification 2 required only that Appellant offered to do bodily harm. The difference in the sentences adjudged supports the real possibility that the military judge's sentence for Specification 2 would have been less had the military judge correctly understood the offense that Appellant was pleading guilty to and elicited only the elements and factual basis necessary for that offense.

This Court has recognized "there is a broad spectrum of lawful punishments that a panel [or military judge] might adjudge." *Edwards*, 82 M.J. at 247. Under

Appellant's plea agreement, that remained true, and "[d]eciding whether an error influenced the sentence is more difficult than deciding whether an error influenced the findings." *United States v. Cunningham*, No. 23-0027, 2023 CAAF LEXIS 520, at *24 (C.A.A.F. Jun. 21, 2023) (Maggs, J., dissenting). Here, the military judge's awareness of the facts from the stipulation of fact and Appellant's responses do not remove the incorrect prism through which the military judge was viewing the offense. The Government cannot meet its burden to show that Appellant's sentence "was surely unattributable to the error," as it pervaded the military judge's entire view of the offense. *See Sullivan*, 508 U.S. at 279. Because this error was not harmless beyond a reasonable doubt, Appellant respectfully requests that this Honorable Court reverse with respect to the sentence and return the record to the Judge Advocate General of the Air Force for remand to the Air Force Court to either reassess the sentence or order a sentence rehearing.

5. <u>While Appellant asserts this error is of constitutional magnitude, if this Court disagrees, Appellant was nevertheless materially prejudiced.</u>

If this Court finds the military judge erred but this error was not of constitutional magnitude, it must answer whether the error materially prejudiced Appellant's substantial rights under Article 59(a), UCMJ.[5] Article 59(a), UCMJ,

[5] This Court has applied a four-factor test to evaluate prejudice from evidentiary errors. *See e.g. United States v. Barker,* 77 M.J. 377 (C.A.A.F. 2018); *United States v. Bowen*, 76 M.J. 83 (C.A.A.F. 2017); *United States v. Featrow*, 76 M.J. 181 (C.A.A.F. 2017). Recognizing this factor test exists, it does not apply here.

provides "[a] finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946) (evaluating prejudice from a nonconstitutional error).[6]

Here, Appellant was entitled to be sentenced only for the offenses of which he was found guilty. When the military judge sentenced Appellant, he viewed Specification 2 of Charge II as a more aggravated offense than was charged and he placed weight in the uncharged aggravated elements. We know this because he specifically asked about the elements, believing they were necessary to the factual basis of the plea. JA at 072-75. The military judge believed these elements (and Appellant's responses in satisfying them) were the nature of this offense and used them whole cloth in adjudging Appellant's sentence because he believed they were appropriate to consider.

The military judge also sentenced Appellant to less punishment for Specification 7 of Charge II (twisting R.L.'s arm behind her back) than the

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Two of the four factors in the test evaluate "evidence," meanwhile, the error here is not limited to the admission or exclusion of evidence.

[6] This Court has followed this guidance from the U.S. Supreme Court when assessing material prejudice in sentencing. *See United States v. Boyd*, 55 M.J. 217, 221 (C.A.A.F. 2001).

Government asked for. The Government asked the military judge to sentence Appellant to a total of 18 months' confinement.[7] JA at 099. But the military judge sentenced Appellant to the minimum of 2 months confinement for Specification 7, despite the aggravating circumstances of that offense, suggesting he was receptive to Appellant's mitigation case when he sentenced Appellant for an offense that he did not misapprehend. JA at 109; *see United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005). Here, Appellant was remorseful for his actions, and despite them, his supervisors opined he demonstrated a high potential for rehabilitation. JA at 154-155, 157.

The military judge's misapprehension impacted his judgment because he misunderstood the offense he was sentencing Appellant for. This isn't a question of whether the military judge was moved by a certain argument, for example. We know he considered the wrong elements and Appellant's admissions to them in finding Appellant guilty and that he then sentenced Appellant under the same misapprehension. Where sentencing deliberation requires considerable discretion,[8] and many options remained for Appellant's punishment, to include the decision between months of confinement, the military judge's improperly aggravated view of the offense materially prejudiced Appellant.

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[7] The military judge was required to sentence Appellant to a minimum of 60 days and a maximum of 6 months' confinement for each specification. JA at 111.
[8] See *Cunningham*, 2023 CAAF LEXIS 520, at *24 (Maggs, J., dissenting).

Conclusion

Whether reviewed *de novo* or for plain error, the military judge's error is plain and obvious. And whether this Court agrees that the error is a constitutional error or not, the military judge's error materially prejudiced Appellant. There is no way for this Court to be confident, given the military judge's misapprehension of the entire offense, that the error did not impact the sentence the military judge would have adjudged.

WHEREFORE, Appellant respectfully requests that this Honorable Court reverse with respect to the sentence and return the record to the Judge Advocate General of the Air Force for remand to the Air Force Court to either reassess the sentence or order a sentence rehearing.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on August 4, 2023.

CERTIFICATE OF COMPLIANCE WITH RULES 24(b) and 37

This brief complies with the type-volume limitation of Rule 24(b) because it contains 8,272 words.

This brief complies with the typeface and type style requirements of Rule 37.

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