IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

JAKALIEN J. COOK,
Airman (E-2),
United States Air Force,
Appellant.

USCA Dkt. No. 24-0221/AF

Crim. App. Dkt. No. 40333

BRIEF ON BEHALF OF APPELLANT

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III.

Whether an appellant can waive the military judge's incorrect maximum punishment calculation that tripled appellant's punitive exposure.

IV.

Whether the military judge erred in calculating the maximum punishment for the offense of illegally transporting aliens as a violation of 8 U.S.C. § 1324.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (A.F.C.C.A.) reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. § 866(d) (Supp. III 2019-2022).[1] This Honorable Court has jurisdiction to review this case pursuant to Article 67(a)(3), U.C.M.J., 10 U.S.C. § 867(a)(3) (Supp. III 2019-2022).

Nevertheless, this case presents a threshold jurisdictional issue: whether the findings of guilty to the offenses at issue were jurisdictionally valid. They were not, thus mooting granted issues III and IV. *See Ctr. for*

[1] Unless otherwise noted, all references to the U.C.M.J. and the Rules for Courts-Martial (R.C.M.) are to the version in the *Manual for Courts-Martial* (M.C.M.)*, United States* (2019 ed.).

Constitutional Rights v. United States, 72 M.J. 126, 128 (C.A.A.F. 2013) (jurisdiction is threshold matter that must be resolved before further adjudication); *M.W. v. United States*, 83 M.J. 361, 363 (C.A.A.F. 2023) (all federal courts have an independent obligation to determine whether subject-matter jurisdiction exists). Subject-matter jurisdiction may not be waived because such defects go to the underlying authority of a court to hear a case. *United States v. Alexander*, 61 M.J. 266, 269 (C.A.A.F. 2005). "[A] jurisdictional error impacts the validity of the entire trial and mandates reversal." *Id.*

Under R.C.M. 203, a court-martial lacks subject-matter jurisdiction to try an offense unless it is listed "under the U.C.M.J. [or], in the case of general courts-martial, [violative of] the law of war." This means a federal civilian offense under the U.S.C. cannot be directly prosecuted in a court-martial. A federal crime may be incorporated as a U.C.M.J. offense under Article 134, clause (3), 10 U.S.C. § 934, but only if the specification alleges every element contained in the federal statute "expressly or by necessary implication." M.C.M., Part IV, ¶ 91.c.(6).(b). For purposes of R.C.M. 203, this means a specification under Article 134, clause (3), that does not allege every element of an incorporated federal crime fails to articulate an

offense punishable under the U.C.M.J. so as to establish subject-matter jurisdiction.

Facially, it appears that the Government intended to prosecute Charge IV, Specification 1 through clause (3) with reference to 8 U.S.C. § 1324. Had this been the case, the Government was required to allege that the transportation took place "in furtherance" of the migrants' unlawful presence in the United States. 8 U.S.C. § 1324(a)(1)(A)(ii). The specification does not allege this element and therefore does not articulate a crime under the U.S.C. which could be prosecuted as a violation of the U.C.M.J. through Article 134. This means that the court-martial did not have subject-matter jurisdiction over Charge IV, Specification 1 or the specification of Additional Charge I per the limitations of R.C.M. 203.

An offense not listing all of the elements of the federal statute may still be prosecuted under clause (1) or (2) of Article 134, but only if the specification alleges the terminal element. *United States v. Jones*, 20 M.J. 38, 40 (C.M.A. 1985); *United States v. Gaskins*, 72 M.J. 225, 231-32 (C.A.A.F. 2013) ("Where . . . a specification neither expressly alleges nor necessarily implies the terminal element, the specification is defective."). Charge IV, Specification 1 cannot be rescued through clause (1) or (2)

because no terminal element was alleged. Without the terminal element, no U.C.M.J. offense was charged which could be prosecuted at court-martial consistently with R.C.M. 203. This demonstrates a lack of subject-matter jurisdiction which should compel this Court to dismiss the specification with prejudice, thereby mooting the question of waiver or whether the military judge calculated the correct maximum sentence.[2]

Relevant Authorities

The Fifth Amendment of the United States Constitution provides, in relevant part, that "[n]o person . . . shall be deprived of life, liberty, or property, without due process of law."

When Appellant was sentenced, Article 56, U.C.M.J., 10 U.S.C. § 856, provided in relevant part:

> (a) SENTENCE MAXIMUMS.—The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.
>
> . . . .
>
> (c)(2) SENTENCING BY MILITARY JUDGE ALONE.—In announcing the sentence in a general or special court-martial in which the accused is sentenced by military judge alone under section 853 of this title (article 53), the military judge shall, with respect to each offense of which the accused is found guilty, specify the

[2] Even if subject-matter jurisdiction did exist, the absence of all the required elements under any of the three clauses of Article 134 means that the specification failed to state an offense. This may warrant additional briefing on the merits of that issue.

term of confinement, if any and the amount of fine, if any. If the accused is sentenced to confinement for more than one offense, the military judge shall specify whether the terms of confinement are to run consecutively or concurrently.

R.C.M. 1003 provided that:

(c) *Limits on punishments*.

(1) *Based on offenses.*

(A) *Offenses listed in Part IV.*

(i) *Maximum punishment*. The maximum limits for the authorized punishments of confinement, forfeitures and punitive discharge (if any) are set forth for each offense listed in Part IV of this Manual. These limitations are for each separate offense, not for each charge. When a dishonorable discharge is authorized, a bad-conduct discharge is also authorized.

(ii) *Other punishments*. Except as otherwise specifically provided in this Manual, the types of punishments listed in paragraphs (b)(1), (3), (4), (5), (6) and (7) of this rule may be adjudged in addition to or instead of confinement, forfeitures, a punitive discharge (if authorized), and death (if authorized).

(B) *Offenses not listed in Part IV.*

(i) *Included or related offenses*. For an offense not listed in Part IV of this Manual which is included in or closely related to an offense listed therein the maximum punishment shall be that of the offense listed; however if an offense not listed is included in a listed offense, and is closely related to another or is equally closely related to two or more listed offenses, the maximum punishment shall be the same as the least severe of the listed offenses.

(ii) *Not included or related offenses*. An offense not listed in Part IV and not included in or closely related to any offense listed therein is punishable as authorized by the United States Code, or as authorized by the custom of the service. When the United States Code provides for confinement for a specified period or not more than a specified period the maximum punishment by court-martial shall include confinement for that period. If the period is 1 year or longer, the maximum punishment by court-martial also includes a dishonorable discharge and forfeiture of all pay and allowances; if 6 months or more, a bad-conduct discharge and forfeiture of all pay and allowances; if less than 6 months, forfeiture of two-thirds pay per month for the authorized period of confinement.

(C) *Multiple Offenses.* When the accused is found guilty of two or more specifications, the maximum authorized punishment may be imposed for each separate specification, unless the military judge finds that the specifications are unreasonably multiplied.

M.C.M, ¶ 91.c.(6).(b) (*Article 134 – General Article*), provided:

Specifications under clause 3. When alleging a clause 3 violation, each element of the federal statute (including, in the case of a prosecution under 18 U.S.C. § 13, each element of the assimilated State, Territory, Possession, or District law) must be alleged expressly or by necessary implication, and the specification must expressly allege that the conduct was "an offense not capital." In addition, any applicable statutes should be identified in the specification.

8 U.S.C. § 1324 provided, in relevant part:

(a)(1)(A) Any person who–

> . . . .
> (ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;
> . . . .
> shall be punished as provided in subparagraph (B).

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs–

> . . . .
> (ii) in the case of a violation of subparagraph (A) (ii), (iii), (iv), or (v)(II), be fined under title 18, United States Code, imprisoned not more than 5 years, or both.

Article 59, U.C.M.J., 10 U.S.C. §859(a), provided: "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."

Statement of the Case

On 14 February 2022, at a general court-martial convened at Davis-Monthan Air Force Base (A.F.B.), Arizona, Amn Cook was found guilty, consistent with his pleas, of one specification of absence without leave (A.W.O.L.) in violation of Article 86, U.C.M.J., 10 U.S.C. § 886; one specification of breaching restriction in violation of Article 87b, U.C.M.J., 10 U.S.C. § 887b; and one specification of marijuana use in violation of

Article 112a, U.C.M.J., 10 U.S.C. § 912a. (J.A. 051.) He was found guilty, contrary to his pleas, of one specification of transporting aliens who were in the United States unlawfully in violation of clause 3 of Article 134, U.C.M.J., 10 U.S.C. § 934; one specification of conspiracy to transport aliens in violation of Article 81, U.C.M.J., 10 U.S.C. § 881; and one specification of obstructing justice in violation of Article 131b, U.C.M.J., 10 U.S.C. § 931b. (J.A. 051, 183.) The military judge sentenced Appellant to reduction to the grade of E-1, forfeiture of all pay and allowances, twenty-seven months' confinement, and a dishonorable discharge. (J.A. 186-187.) The military judge credited Amn Cook with 155 days of pretrial confinement credit. (J.A. 187.) The convening authority took no action on the findings, denied requested deferments of reduction in grade and forfeitures, and approved the sentence in its entirety. (Convening Authority Decision on Action, 21 Mar. 2022.)

Statement of Facts

1. Q.M.'s money troubles.

Amn Cook was stationed at Davis Monthan A.F.B., where he lived in the dorms and developed a friendship with Q.M. (J.A. 113.) This close friendship continued after Q.M. had been discharged from the Air Force

but continued to live in the local area. (J.A. 113.) At that time, Q.M. encountered problems with his finances after his fiancée became pregnant and he was fired from his job at Target. (J.A. 162, 172.) He later explained as to the nature of the work he was interested in: "it doesn't matter" because "I [was] like, money, money, money, I need to have this money so [his unborn child] did not struggle like I did." (J.A. at 166.) An unknown person contacted Q.M. and offered him "easy money" to drive people. (*Id.*) Q.M. would receive $500 for each person transported on a single occasion. (J.A. at 165.)

2. A Sunday drive transformed: Q.M. was "about to make some money."

On Sunday, August 22, 2021, Q.M., who liked to travel, texted Amn Cook and asked if he "want[ed] to do something?" (J.A. 113, 149.) They initially planned to visit Pheonix, which is northwest of Davis Monthan A.F.B. (J.A. 113.) At the time, Amn Cook had taken his personally owned vehicle to a local Firestone for a check-up in anticipation that he would soon be driving back to Florida after his discharge from the Air Force. (J.A. 118, 151.)

Amn Cook and Q.M. drove south to the town of Sierra Vista before taking Q.M.'s fiancée back northwest of Davis Monthan A.F.B. to Phoenix

to drop her off. (J.A. at 113, 148, 150.) They returned to Sierra Vista later in the day, went to the mall, and then ended up in a town called Bisbee. (J.A. 148.) Q.M. then said to Amn Cook: "I'm about to make some money." (*Id.*) Calls began coming into Q.M.'s phone from random numbers that said, "no caller I.D.," and Q.M. began texting frequently. (*Id.*) Amn Cook did not receive any of these calls or texts and was mainly using his phone for music. (J.A. at 116.)

3. To Amn Cook's surprise, five people appeared and entered the vehicle.

Q.M. and Amn Cook were driving down a dirt road somewhere south of Sierra Vista when they stopped at a stop sign. (J.A. 148.) A man in a gray outfit spoke with Q.M., then the man opened the trunk and people entered the car, with three going into the back seat of the vehicle. (*Id.*) Amn Cook remained unaware of the two individuals who had entered the trunk. (J.A. 148-147.) In Amn Cook's words, "I literally just sat forward. I didn't know what he was doing." (J.A. 148.) Q.M. recounted that Amn Cook said, "Why the fuck is they ducking?" as they drove away. (J.A. 164.) Amn Cook further explained that he had no idea what Q.M. was planning, pointing out that he was just going for the ride. (J.A. 113.) Amn Cook was not aware of how much Q.M. would make. (J.A. 117; 155.) Amn Cook

described his thought process as it was happening: He did not believe Q.M. would "do something like that" because they were on the main roads and "still passing like border patrol troopers and things like that." (J.A. 152.)

Sergeant C.M., who worked investigations for the Arizona Department of Public Safety, received a tip about "[b]odies run from the desert" to a light-colored SUV. (J.A. 093.) Between 2200 and 2300 hours, he located the vehicle, identified it as a rental with California license plates, and followed the SUV for approximately two miles before pulling it over because it failed to fully stop at a stop light before turning right. (J.A. 094-095, 098.) When he approached, Q.M. was driving and Amn Cook was the passenger. (J.A. 095-096.) Sergeant C.M. explained that the five others in the car had a "very distinctive smell" of one who has not showered for several days. (J.A. 097.) Sergeant C.M. then called border patrol. (J.A. 098.) Another responding officer noted that the migrants wore camouflage and had carpet shoes on, which are worn over regular shoes and leave no "foot sign." (J.A. 123-124.) The Government later produced records showing that the group of five that Q.M. picked up had not legally entered the United States. (J.A. 058, 063, 064, 066, 068, 069)

The Government introduced evidence from various forms prepared

about each of the five immigrants. Field processing forms from the Department of Homeland Security indicated only their names, birthdates, and time of apprehension. (J.A. 058) Two of the five immigrants had an Alien File (A-File), indicating some interaction with the immigration system. (J.A. 134.) One of the immigrants had an Alien File, presented at trial, indicating she was removed from the country weeks after the apprehension at issue here. (J.A. 063, 135, 138.) Another immigrant had a court hearing in 2017 and was thereafter removed to Mexico. (J.A. 063, 064, 066, 068, 069.)

4. The Government's unified charging decision throughout the court-martial.

The Government charged Amn Cook with a single specification purporting to incorporate 8 U.S.C. § 1324 through Article 134(3), U.C.M.J. (J.A. 046.) It described the offense of "transporting aliens with knowing or reckless disregard" that they had unlawfully entered the United States. (*Id.*) The Government's charging scheme unified the incident that took place on or about August 22, 2021, by listing the group of five aliens in the vehicle within a single compound specification. (*Id.*) At trial, the Government reinforced this by emphasizing the incident as an illicit course-of-conduct during opening statements. (J.A. 084.)

Before findings, the military judge engaged with the parties concerning instructions for the offense. (J.A. 110.) The military judge's proposed instruction listed the five aliens under a single element for "transport," stating: "1. That on or about 22 August 2021 . . . the accused knowingly transported or moved [M.J.F.], [O.N.], [P.O.], [T.M.], and [O.D.N.] to help *them* remain in the United States illegally." (J.A. 071) (emphasis added.) When asked by the military judge if it agreed with the instruction, the Government replied affirmatively. (J.A. 110.) The panel was given this same instruction. (J.A. 179-180.) The panel returned a unified finding of guilty to the charged specification, and the panel did not distinguish or sever the findings as they pertained to any of the aliens listed individually. (J.A. 183.)

Amn Cook elected to be sentenced by the military judge alone. (J.A. 051.) The military judge inquired from the parties what the maximum sentence for the "transporting aliens" was. The Government contended that the maximum punishment included twenty-five years of confinement. (J.A. 184.) This was based on a reading of the incorporated statute which assigned a punishment of up to five years of confinement per alien transported. (*Id.*) The military judge asked the Government to

clarify if that interpretation was drawn from 8 U.S.C. § 1324(a)(1)(b)(2), and the Government agreed. (*Id.*) The trial defense counsel declined to contest that calculation and agreed that this rendered the maximum punishment based on all convicted offenses as "57 years of confinement and two months confinement, dishonorable discharge, total forfeiture, and reduction to E-1." (J.A. 185.) The military judge imposed a single period of confinement for the specification, which was twenty-four months. (J.A. 186.)

5. The Air Force Court of Criminal Appeals' decision.

Before the A.F.C.C.A., Amn Cook challenged the military judge's calculation of the maximum sentence. (J.A. 032) ("Appellant claims the maximum punishment for [transport] should be five years.") The A.F.C.C.A. declined to review this issue by concluding that Amn Cook had waived it. (J.A. 033) Citing *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017), a case having to do with the wavier of objection to the admission of evidence, the A.F.C.C.A. held that Amn Cook's waiver was effected by trial defense counsel's acquiescence to the calculation. (J.A. 032-033.) The court explained, "trial defense counsel's affirmative concurrence with the calculation at trial waived this issue." (J.A. at 033.)

Furthermore, the A.F.C.C.A. held that it "would decline to pierce the waiver in this case where we tend to think the maximum punishment was ultimately calculated correctly at trial." (*Id.*) The A.F.C.C.A. leaned into this by holding that Amn Cook suffered no prejudice because the adjudged confinement–twenty-four months–was still below the maximum had it been calculated at five years. (J.A. 033-034.) Significantly, the A.F.C.C.A. acknowledged that the sentence was imposed for a single "set of operative facts," but determined that a sentence reassessment would not yield a different result. (*Id.*)

III.

Airman Cook could not waive the challenge to the military judge's incorrect calculation of the maximum punishment because the miscalculation was a substantial error that impacted Airman Cook's due process rights.

Standard of Review

Whether an issue has been waived on appeal is a question of law that this Court reviews de novo. *United States v. Haynes*, 79 M.J. 17, 19 (C.A.A.F. 2019) (quoting *United States v. Rosenthal*, 62 M.J. 261, 262 (C.A.A.F. 2005)).

Law and Analysis

The military judge's miscalculation of the maximum sentence for "transporting aliens" could not be waived as a matter of due process because the error violated Amn Cook's right to a fair sentencing proceeding as prescribed by the U.C.M.J. and the Rules for Courts-Martial. Waiver can occur by operation of law or by the "intentional relinquishment or abandonment of a known right." *United States v. Day*, 83 M.J. 53, 56 (C.A.A.F. 2022). "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant'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. Olano*, 507 U.S. 725, 733 (1993)). However, the fundamental and constitutional nature of Amn Cook's right to a fair proceeding, which included an appropriate calculation of the maximum potential sentence by the military judge, belies a holding that this issue could be waived for appellate review.

Due process is enshrined in the Fifth Amendment of the United States Constitution, which prohibits the deprivation of "life, liberty, or property, without due process of law." U.S. CONST. AMEND. V. "A

fundamental requirement of due process is that individuals subjected to proceedings by the Government are entitled to the safeguards established in the governing statutes and regulations, and that the Government must follow the prescribed procedures, regardless whether they are constitutionally required." *United States v. McDonald*, 55 M.J. 173, 175 (C.A.A.F. 2001) (citing *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)). This requirement applies to sentencing proceedings in the military justice system. *Id.* at 176. Hence, for Amn Cook's due process rights to be honored, the military judge was required to follow the procedures outlined in the U.C.M.J. and the Rules for Courts-Martial. *United States v. Vazquez*, 72 M.J. 13, 18 (C.A.A.F. 2013) (quoting *Weiss v. United States*, 510 U.S. 163, 176-77 (1994) ("determining what process is due, courts must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces.") (internal quotations marks removed)).

Congress has mandated that the maximum sentences for U.C.M.J. offenses are set by the President. Article 56(a), U.C.M.J., 10 U.S.C. § 856(a). R.C.M. 1003 creates a triage for how the maximum sentence

should be calculated, to include imposing the punishment authorized by the United States Code for offenses not listed or closely related to those found in Part IV of the M.C.M. R.C.M. 1003(c)(1)(B)(ii). Announcement of the correct maximum punishment is a mandatory instruction. R.C.M. 1006(e). *See also United States v. Stanley*, 71 M.J. 60, 63 (C.A.A.F. 2012) (holding that waiver does not apply to mandatory instructions). The military judge was ultimately responsible for ensuring these procedures were carried out correctly by soundly calculating the maximum punishment. *See generally Rosales-Mireles v. United States*, 585 U.S. 129, 134 (2018) (holding that the trial court is responsible for ensuring that the sentencing range it considers is correct, and that failure to do so is procedural error). The military judge's miscalculation of Amn Cook's punitive exposure was therefore a violation of due process.

Because of the constitutional nature of this issue, it could not be waived. Generally, a brightline presumption operates against the waiver of constitutional rights. *United States v. Harcrow*, 66 M.J. 154, 157 (C.A.A.F. 2008) (quoting *Glasser v. United States*, 315 U.S. 60, 70-71 (1942)); *United States v. Jones*, 69 M.J. 294, 299 (C.A.A.F. 2011) (recognizing that defects in jurisdiction and due process of law are not

waived even during an unconditional guilty plea). No waiver may be applied to matters of due process where it jeopardizes the integrity of the proceeding. *United States v. Cummings*, 38 C.M.R. 174, 178 (C.M.A. 1968). However, an error in the sentencing range calls into question the "fairness, integrity, [and] public reputation of [the] judicial proceedings." *Rosales-Mireles*, 585 U.S. at 137. Given that the military judge committed this type of error, a finding of waiver would be inappropriate.

United States v. Harden, 1 M.J. 258 (C.M.A. 1976), is instructive. In that case, the appellant challenged the lower court's "reliance upon waiver as a basis for denying review of the impact on the sentence of the misconception of the trial judge as to the legal period of confinement." *Id.* The facts of that case align with those present here. The trial counsel offered that the maximum sentence was twenty years, and the trial defense counsel agreed. *Id.* This Court held that a challenge to this miscalculation could not be waived. *Id.* Importantly, the C.M.A. acknowledged that "[p]rimary responsibility for determining the legal limits of punishment rests upon the trial judge." *Id.* Also, "[i]f the judge was misled, the government must share responsibility for the error." This

was due to the fact that calculation was offered by the trial counsel before adoption by the military judge. *Id.*

This case presents a nearly identical situation that undermines the A.F.C.C.A.'s finding of waiver. Here, the military judge solicited a maximum punishment calculation from the Government. (J.A. 184.) The Government affirmatively explained that the maximum punishment was twenty-five years. (*Id.*) The military judge clarified whether this was based on an interpretation of 8 U.S.C. § 1324(a)(1)(B)(ii), to which the Government answered "yes." (*Id.*) It was only after this that the trial defense counsel acquiesced. In *Harden*, this Court held that this same series of facts was insufficient to show waiver. The military judge bore primary responsibility for calculating the maximum punishment in accordance with the Rules for Courts-Martial, and the initial calculation was forwarded by the Government, which the military judge adopted. A finding of waiver is inappropriate.

Similarly, in *United States v. Leonard*, 64 M.J. 381, 383 (C.A.A.F. 2007), this Court analyzed whether the military judge had correctly determined the maximum sentence for an offense under Article 134 mirroring a federal statute criminalizing possession of contraband

images. "Prior to sentencing, the military judge, trial counsel, and defense counsel agreed that the maximum term of imprisonment for Appellant's offense was fifteen years." *Id.* at 382. While waiver doctrine was not explicitly discussed, this Court still reviewed the issue of whether the military judge erred in his calculation. *Id. Leonard* is indicative of waiver being nonapplicable to this issue. *See also United States v. Ronghi*, 60 M.J. 83, 84 (C.A.A.F. 2004) (reviewing maximum sentence calculation despite accused and trial defense counsel agreeing to calculation at trial); *Rosales-Mireles*, 585 U.S. at 134 (holding that miscalculation of defendant's punitive exposure can be reviewed for first time on appeal).

In *United States v. Beaty*, 70 M.J. 39 (C.A.A.F. 2011), this Court again took up the issue of whether a miscalculation of maximum sentence was erroneous. This Court noted that "[t]he Government [had] not argued waiver," and made no analysis under that doctrine despite the military judge permitting the appellant to withdraw from the guilty plea if he disagreed with the calculation. 70 M.J. at 41 n.4. Instead, this Court reviewed the issue under an abuse of discretion standard. *Id.* at 41 ("While we review a military judge's sentencing determination under an abuse of discretion standard . . . where a military judge's decision was

influenced by an erroneous view of the law, that decision constitutes an abuse of discretion."). A finding by this Court that Amn Cook could not waive the military judge's miscalculation is consistent with this Court's rulings in *Leonard*, *Ronghi*, and *Beaty*.

The A.F.C.C.A.'s reliance on *United States v. Ahern*, 76 M.J. 194 (C.A.A.F. 2017), was misplaced. This Court found that the appellant's challenge to the admission of phone recordings was waived by virtue of trial defense counsel's assertion that there was no objection to the evidence. *Id.* at 198. The issue present here is qualitatively and procedurally distinct. This is because the calculation of the maximum punishment was an essential ingredient in the due process required for sentencing. By contrast, *Ahern* dealt with rules of evidence that placed "primary if not full responsibility upon counsel for objecting to or limiting evidence." *Id.* (internal quotations marks removed). However, the military judge bears primary responsibility for the determination of the maximum sentence. *Harden*, 1 M.J. at 258. The maximum sentence calculation is not a question of strategic advantage that might incline an accused not to object in the same way that evidence might, thereby triggering waiver. Rather, it was an almost purely legal question that the

military judge had to get right as a matter of due process. Given these considerations, the military judge's gross miscalculation of Amn Cook's punitive exposure could not be waived.

IV.

The military judge erred in arriving at a twenty-five-year maximum period of confinement by multiplying Amn Cook's punitive exposure across five units of prosecution despite the Government's decision to charge him with a compound specification alleging a single course-of-conduct offense which carried only five years of potential confinement if properly alleging an offense under 8 U.S.C. § 1324, thereby prejudicing Amn Cook by calling into question the military judge's sentencing determination.

Standard of Review

The maximum punishment authorized for an offense is a question of law that this Court reviews de novo. *Beaty*, 70 M.J. at 41. In the absence of an objection by trial defense counsel, a military judge's determination of the maximum punishment is reviewed for plain error. *See United States v. St. Blanc*, 70 M.J. 424, 430 (C.A.A.F. 2012). To prevail under plain error analysis, an appellant must show (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right. *Harcrow*, 66 M.J. at 158.

Law and Analysis

1. The military judge's miscalculation of Amn Cook's punitive exposure, which included five times the amount of confinement he could have been exposed to under the Government's charging scheme, was plain and obvious.

The military judge's calculation of the maximum confinement for "transporting aliens" under 8 U.S.C. § 1324 was erroneous because it multiplied Amn Cook's punitive exposure beyond the Government's charging scheme that alleged only a single course-of-conduct offense. As the purveyor of the charge sheet, the Government was bound to its charging decision including any legal implications resulting from it. *United States v. Smith*, No. 23-0207, 2024 CAAF LEXIS 759, at *8 (C.A.A.F. Nov. 26, 2024). In this case, its charging decision limited the Government's ability to seek confinement greater than five years.

R.C.M. 307(c)(4) mandates that a specification may state only a single offense. *See also United States v. Parker*, 13 C.M.R.. 97, 102 (C.M.A. 1953) ("military practice permits the allegation of only one offense within the terms of a single specification"). This requirement is one of the "rudimentary principles of pleading." *United States v. Paulk*, 32 C.M.R. 456, 457 (C.M.A. 1963) (citing, *inter alia*, *Kotteakos v United States*, 328 U.S. 750 (1946)). "A duplicitous specification is one which alleges two or

more separate offenses." R.C.M. 906(b)(5), discussion. "However, if two acts or a series of acts constitute one offense, they may be alleged conjunctively." R.C.M. 307(c)(4), discussion at ¶(G)(iv) (M.C.M., 2019 ed.). "The rule against duplicitous pleading is not offended by a count charging more than one act if the acts were part of a transaction constituting a single offense." *Hanf v. United States*, 235 F.2d 710, 715 (8th Cir. 1956).

Because of the prohibition against duplicitous pleading, the Government's decision to charge Amn Cook under a single specification meant that the transportation of multiple aliens had to be understood as a single continuing offense. There was apparently little confusion about this considering that the instruction which the Government agreed to, and which was given to the panel, grouped the five aliens under a single element. (J.A. 540-41; 586-87.) The military judge's decision to assign an individual maximum penalty of five years' confinement for each alien violated this principle by expanding the number of offenses alleged in the specification from one to five, and treating them individually.

The military judge's error was reinforced by his misinterpretation of 8 U.S.C. § 1324's prescribed punishment. Without explaining on the record, the military judge presumably relied on this statute to calculate

the maximum punishment based on R.C.M. 1003(c)(1)(B)(ii). This provision calls for the maximum punishment for offenses not listed or closely related to those found Part IV of the M.C.M. to be informed by the punishment authorized by the United States Code. *Id.* It would appear that the military judge used this to reference 8 U.S.C. § 1324(a)(1)(B), which explained "A person who violates subparagraph (A), shall, for each alien in respect to whom such violation occurs (ii) . . . be . . . imprisoned not more than 5 years."

As an initial matter, 8 U.S.C. § 1324 was not directly relevant to the specification charged. This is because although it referenced 8 U.S.C. § 1324 for purposes of incorporating the offense of "transporting aliens," the specification did not contain the element that the transportation be undertaken "in furtherance of [the unlawful presence]." (J.A. 046.) *See* M.C.M., ¶ 91.c.(6)(b) ("When alleging a clause 3 violation, each element of the federal statute . . . must be alleged expressly or by necessary implication."). No punishment can be assigned under R.C.M. 1003(c)(1)(B)(ii) if the specification does not accurately reflect the conduct prohibited by the United States Code. *Beaty*, 70 M.J. at 43 (holding that maximum punishment in federal statute did not apply to charged offense

under Article 134, Clause 3, because it did not contain the elements of "conduct proscribed by . . . federal statute."). 8 U.S.C. § 1324 did not criminalize transportation of illegal aliens without the element of "in furtherance of such violation of law," which was not charged by the Government. This rendered the punishment under the federal statute irrelevant.

Even if 8 U.S.C. § 1324 had supplied the maximum punishment, the military judge misapplied it in light of the Government's compound charging scheme. This presents a question of the unit of prosecution, which is the specific act or conduct that constitutes a single criminal offense. *Bell v. United States*, 349 U.S. 81, 83 (1955). While a unit of prosecution may provide a basis for the Government to seek cumulative punishment for multiple acts in the same transaction, they must be pled as separate specifications so as to reap a punishment for each one. *See generally id.* at 83 (holding that the defendant could not be charged with two separate counts of illegal transportation, each with a separate maximum sentence, where the Mann Act did not define the unit of prosecution as individual persons transported); *United States v. Forrester*, 76 M.J. 479, 485 (C.A.A.F. 2017) (whether separate

punishments can be assigned for multiple instances of misconduct depends on whether each instance is a separate unit of prosecution that must be charged across multiple specifications.)

The unit of prosecution is readily identified where Congress expressly indicates the criminal activity that is intended to be punished. *United States v. Chipps*, 410 F.3d 438, 448 (8th Cir. 2005); *United States v. Martinez-Gonzales*, 89 F. Supp. 62, 64 (S.D. Cal. 1950) ("It is the punishment prescribed which makes an act a crime, not a mere interdiction of conduct without punishment."). 8 U.S.C. § 1324 assigns each alien transported as a separate unit of prosecution by virtue of punishment being assigned for each one individually. This being so, separate punishment reaching a total maximum confinement of twenty-five years could only be reached if the Government chose to charge the transport of each alien in separate specifications.

This conclusion is drawn from federal courts interpreting the statute. In *United States v. Martinez-Gonzalez*, the United States District Court for the Southern District of California held that the "harboring or concealing of an alien" represented a distinct crime for each individual alien by virtue of the separate punishment imposed on the

defendant for each one. 89 F. Supp. at 64-65. Crucially, this meant that "such conduct is a separate crime with separate punishment as to each alien and must be separately charged in different counts of an indictment." *Id.* On this basis, the court held that an indictment charging a single count alleging four aliens was duplicitous. *Id.*

Importantly, duplicity does not automatically render a specification so inherently flawed that it would need to be dismissed. *Parker*, 13 C.M.A. at 103 (citing *Martinez-Gonzalez* for the proposition that the Government can proceed with a duplicitous pleading so long as it is understood to collectively constitute a single offense). However, if the Government chooses to charge a compound specification—such as it did here—the accused's punitive exposure cannot be multiplied for each unit of prosecution that could have been charged separately, but was conjoined by the Government in a single specification. *United States v. King*, 72 B.R. 247, 255 (1948) (holding that where a duplicitous specification alleges multiple offenses, punishment can only be entered for one, thereby limiting the maximum sentence). The military judge erred by doing just that in this case.

The principle that compound charging limits the maximum punishment to a single offense is fundamental and pervasive in military jurisprudence. *E.g.*, *United States v. Calhoun*, 18 C.M.R. 52, 55 (C.M.A. 1955) (recognizing that duplicitous pleading is prejudicial if it results in a multiplied maximum sentence for each conjoined offense); *United States v. Mack*, 58 M.J. 413, 418 (C.A.A.F. 2003) (calculating maximum sentence for conjoined specification as lower than if charged separately); *United States v. Campbell*, 71 M.J. 19, 25 (C.A.A.F. 2012) (holding that for three merged specifications "it would be inappropriate to set the maximum punishment based on an aggregation of the maximum punishments for each separate offense."); *United States v. Lovejoy*, 42 C.M.R. 210, 212 (C.M.A. 1970) (when calculating the maximum punishment and "two or more [criminal acts] are set out in a single specification, the result is beneficial to the accused."); *United States v. Peoples*, 29 M.J. 426, 429 (C.M.A. 1990) (severing conjoined specification would have resulted in higher maximum punishment based on sentence range for individual offenses); *United States v. Poole*, 26 M.J. 272, 274 (C.M.A. 1988) (maximum sentence for merged specification limited due to Government's decision to charge in that manner); *United States v. Rodriguez*, 66 M.J.

201, 205 n.5 (C.A.A.F. 2008) (where specification charged multiple acts "[a]ppellant could be sentenced to a maximum of five years of confinement, rather than the fifteen available had the acts been charged individually.").

By contrast, in *United States v. Mincey*, 42 M.J. 376, 377 (C.A.A.F. 1995), this Court held that multiple separate instances of using bad-checks could be used cumulatively for purposes of determining the maximum sentence, despite the use of a compound specification. Importantly, this Court's holding was limited to the offense of casting bad-checks, and has limited application here. *Id.* at 378 ("We now *only* hold that in bad-check cases, the maximum punishment is calculated by the number and amount of the checks as if they had been charged separately.") (emphasis added). However, this holding coheres with the principle that a single offense should reflect the unit of prosecution as understood by the conduct punished. The unit of prosecution for the bad-check offense was described in the Manual for Courts-Martial by the dollar amount of the illicit transaction, not the individual financial instruments. M.C.M., Part IV, ¶70.d.1 (maximum punishment for Article 123, U.C.M.J., dependent on whether illicit transaction exceeds

$1000.00). Unlike the bad-check offense taken up in *Mincey*, the unit of prosecution for "transporting aliens" that Amn Cook faced was the individual aliens. Consequently, the military judge could not consider each alien cumulatively for purposes of assigning the maximum punishment because the Government chose not to charge Amn Cook with five separate specifications.

This interpretation of 8 U.S.C. § 1324 is consistent with how federal courts have calculated the maximum sentence when the offense of transporting multiple aliens is charged under a single count that lists all aliens transported in a single incident. Like in military practice, in federal civilian criminal cases, a duplicitous pleading is not defective so long as the multiple alleged acts are treated as "enter[ing] into and constitut[ing] a single offense, though such acts may in themselves constitute distinct offenses." *United States v. Hood*, 200 F.2d 639, 641 (5th Cir. 1953). Likewise, duplicity is permissible in federal practice so long as it does not multiply the accused's punitive exposure beyond a single offense. *Masinia v. United States*, 296 F.2d 871, 880 (8th Cir. 1961). These principles illuminate instances where federal courts have calculated a maximum five-year sentence for single counts that listed

multiple aliens as a single course-of-conduct offense. *United States v. Salazar-Villarreal*, 872 F.2d 121, 121–22 (5th Cir. 1989) (calculating maximum sentence for single count alleging transporting multiple aliens as five years); *United States v. Ramirez-De Rosas*, 873 F.2d 1177, 1178 (9th Cir. 1989) (calculating maximum sentence for count alleging illegal transportation of four aliens as five years); *United States v. Hilario-Hilario*, 529 F.3d 65, 69 (1st Cir. 2008) (calculating maximum sentence for offense under 8 U.S.C. § 1324 involving eighty-seven aliens as five years if accused was just accessory or ten years if principal.) Likewise, the Federal Sentencing Guidelines recognize the potential for charging the transportation of multiple aliens under a single count as a conjoined course-of-conduct type offense, using the number of aliens merely as an enhancement factor rather than a basis for increasing the maximum punishment calculation. U.S. SENT'G GUIDELINES MANUAL § 2L1.1.(b).(2) (U.S. SENT'G COMM'N 2021) ("If the offense [vice offenses] involved . . . transporting . . . six or more unlawful aliens, increase [the sentencing level]."). Given these considerations, the military judge's miscalculation of Amn Cook's punitive exposure was plainly erroneous.

2. The military judge's miscalculation materially prejudiced Amn Cook by calling into question whether he was fairly sentenced because of the military judge's misunderstanding of the law.

The potential that Amn Cook's sentence was aggravated by the military judge's misunderstanding of his punitive exposure is enough to demonstrate that Amn Cook was prejudiced. Article 59, 10 U.S.C. § 859(a) (mandating that a sentence may not be upheld where a legal error "materially prejudices the substantial rights of the accused."). Where an accused is sentenced under an incorrect range of punitive exposure, that alone will often "be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez v. United States*, 578 U.S. 189, 195 (2016). This is because the higher range goes to establish a reasonable probability that the accused received a sentence higher than necessary to address the criminal act. *Rosales-Mireles*, 585 U.S. at 139.

In *United States v. St. Blanc*, the military judge miscalculated the confinement portion of the maximum sentence as twelve years of confinement when the maximum confinement was two years and four months. This Court held that the miscalculation was a plain and obvious error. 70 M.J. at 430. Moreover, this Court explained, "[W]e cannot say

that this error did not substantially influence the sentence and materially prejudice Appellant's substantial rights." *Id.* Likewise, in *Poole*, 26 M.J. at 274, this Court addressed a disparity between the calculated confinement portion of the maximum sentence of twenty-one years versus the actual limit of three and half years. Even though Private Poole was sentenced to only two years of confinement, this Court explained, "The prejudice to appellant as a result of the military judge's miscalculation of the maximum imposable sentence cannot be questioned." *Id.* at 274 (internal quotations removed).[3]

In this case, the military judge's miscalculation exposed Amn Cook to five times the punitive exposure he would have faced had the maximum confinement been properly computed. (*Supra.* at 21.) This created a disparity of twenty years greater than the only legal limit which could be imposed. Like *St. Blanc* and *Poole*, this wide disparity demonstrates the military judge's misunderstanding of the law, which should leave this Court unconvinced that the error was harmless.

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[3] In *Poole*, the Army Court had reassessed the sentence and affirmed only fourteen months of the adjudged confinement. *United States v. Poole*, 24 M.J. 539, 544 (A.C.M.R. 1987). This Court affirmed based on the Army Court's "meaningful reassessment" of the sentence. *Poole*, 26 M.J. at 275.

A finding of prejudice based on a miscalculation like this is not obviated by the fact that the sentence imposed was still lower than the actual legal limit. In *United States v. Cooper*, 8 C.M.R. 133, 138 (C.M.A. 1953), the law officer calculated a fifty-year maximum confinement whereas the limit was twenty years. *Id.* The appellant's sentence was still below the legal limit in spite of the error. *Id.* However, this Court held, "[W]e have no way of knowing what the sentence, as regards confinement, would have been had the court been instructed properly." *Id.* Accordingly, the "error on the part of the law officer must be deemed to have been prejudicial." *Id.* Such is the case here as well, where the influence of the military judge's miscalculation casts doubt on what sentence would have been imposed if the military judge had a correct understanding of the law.

3. Had the military judge been correct in assessing a maximum sentence based on each alien transported, Amn Cook would have been entitled to segmented sentencing.

The military judge's misunderstanding of the law was also demonstrated by the paradoxical entry of a single period of confinement despite the maximum sentence calculation being based on five separate units of prosecution. A maximum confinement of twenty-five years would

have only been possible by severing the Government's compound specification into five separate offenses. However, this would have entitled Amn Cook to segmented sentencing. The military judge's failure to impose segmented sentencing shows a serious misunderstanding of the law that fatally undermines the fairness of the sentencing proceeding and shows prejudice. Instead, the military judge gave the Government a windfall benefit for its duplicitous pleading while depriving Amn Cook of his right to a segmented sentence.

Article 56, U.C.M.J., requires segmented sentencing in a military judge alone forum when there are convictions for multiple offenses. 10 U.S.C. § 856(b)(2). Under this provision, the military judge was required to announce a sentence "with respect to each offense of which the accused is found guilty." *Id.* This is reflected in R.C.M. 1002(d)(2)(A), which calls for segmented sentencing which identifies specific periods of confinement for each individual offense that an accused is found guilty of.

Amn Cook does not concede that the military judge's calculation of his punitive exposure was correct. However, if the military judge was inclined to base punishment on each alien listed—and if this Court were to find that appropriate—it would have been incumbent upon the military

judge to conduct segmented sentencing. Aside from undermining the fairness of Amn Cook's sentencing proceeding, the ambiguity resulting from the military judge's failure to impose segmented sentences is highly prejudicial because it deprived Amn Cook of the opportunity for meaningful sentence appropriateness review. *See United States v. Flores*, 84 M.J. 277, 278 (C.A.A.F. 2024) ("the [Court of Criminal Appeals] must consider the appropriateness of each segment of a segmented sentence and the appropriateness of the sentence as a whole.").

The single sentence creates ambiguity concerning the relative punishment imposed for each migrant transported, making it impossible for the Court of Criminal Appeals to review the appropriateness of the sentence. There are a multitude of sentencing combinations that the military judge could have imposed to arrive at a total confinement of twenty-four months. For example, the military judge could have imposed twenty-four months of confinement for each alien transported to run concurrently. Alternatively, he could have imposed 4.8 months of confinement for each one running consecutively to reach the total adjudged. A myriad of other possible sentencing combinations could have taken place by varying the relative confinement for each migrant. This is

especially so given that the Government presented evidence in aggravation for some of the migrants, but not others. The single period of confinement resulting from the military judge's misunderstanding of 8 U.S.C. § 1324 and the Government's charging scheme leave it impossible to know if this was the case.

This is akin to the circumstances presented in *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003). In that case, the appellant was charged with a specification alleging multiple illegal drug uses on "divers occasions." The panel found him guilty by exceptions which omitted the phrase "divers occasions," thus narrowing the findings to a single instance of wrongful use. *Id.* at 394. The military judge did not seek clarification for which instance of use was factually relied on in these findings. *Id.* This Court held that the ambiguity deprived the appellant of meaningful review under Article 66 because it left uncertain what set of facts were relied upon in the findings, resulting in prejudice. In this case, the ambiguity in the military judge's determination is prejudicial because it leaves uncertain how Amn Cook was sentenced, which makes it impossible to tell if the military judge abused his discretion or unfairly sentenced him, as would be required during Article 66 review. This shows

material prejudice to Amn Cook's substantial right to be fairly and appropriately sentenced. Accordingly, this Court should find that the military judge's error warrants a reassessment of Amn Cook's sentence.

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 and Trial Operations Division on February 19, 2025.

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CERTIFICATE OF COMPLIANCE WITH RULES 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(b) because it contains 9277 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface, Century, in 14-point type.

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