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

REPLY BRIEF ON BEHALF OF APPELLANT

MICHAEL J. BRUZIK, Capt, USAF
U.S.C.A.A.F. Bar No. 37931
Air Force Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
michael.bruzik@us.af.mil

Counsel for Appellant

INDEX OF BRIEF

TABLE OF AUTHORITIES

Cases

Supreme Court of the United States

Court of Appeals for the Armed Forces

Service Courts of Criminal Appeals

Federal Circuit Courts

Federal District Court

Statutes

Rules

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*	)	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	)	
	)	April 2, 2025
JAKALIEN J. COOK Airman (E-2), United States Air Force, *Appellant*	)	Crim. App. Dkt. No. ACM 40333
	)	USCA Dkt. No. 24-0221/AF

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

COMES NOW, Appellant, Airman (Amn) Jakalien J. Cook, by and through his undersigned counsel pursuant to Rule 19(b)(3) of this Honorable Court's Rules of Practice and Procedure, hereby replies to the Government's Brief on Behalf of the United States filed on March 21, 2025 (Appellee Br.). Appellant relies on the facts, law, and arguments filed with this Court on February 19, 2025 (Opening Br.) and provides the following additional arguments for this Court's consideration.

ARGUMENT

III.

Amn Cook's due process rights entitled him to the maximum penalty calculation procedures under R.C.M. 1003(c), and those rights could not be waived merely from lack of objection under *United States v. Davis*, 79 M.J. 329 (C.A.A.F. 2020).

Amn Cook could not waive his right to have the military judge correctly follow the maximum penalty calculation procedures under Article 56, Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. § 856(a) (2018) and R.C.M. 1003(c)[1] simply from counsel's acquiescence. This is because the military judge's failure to follow those procedures resulted in material prejudice to Amn Cook's substantial rights, which precludes affirmance of Amn Cook's sentence under Article 59(a), U.C.M.J., 10 U.S.C. § 859(a) (2018). While the Government tries to minimize the fundamental nature of the substantial right at issue (Appellee Br. at 19), Amn Cook was entitled to the sentencing procedures established by Congress and the President. *United States v. McDonald*, 55 M.J. 173, 175 (C.A.A.F. 2001).

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

A. *United States v. Davis*, 79 M.J. 329 (C.A.A.F. 2020), does not support a finding of waiver because that case dealt exclusively with findings instructions reflecting settled areas of law.

The Government previously agreed that maximum sentence calculation should be evaluated for plain error before the Air Force Court of Criminal Appeals (A.F.C.C.A.), only now shifting its position to suggest waiver. (Ans. at 11.) It now urges this Court to obviate Amn Cook's constitutional and statutory rights by narrowing its focus on the limited and inapplicable holding in *United States v. Davis*, 79 M.J. 329 (C.A.A.F. 2020). (Appellee Br. at 12.) But that case dealt with a lack of objection to findings instructions that reflected a settled area of law. 79 M.J. at 331. Under those circumstances, this Court found that the appellant's novel challenge to those routine instructions had been waived. *Id.* The granted issue before the Court in this case is unrelated for two reasons. First, it has nothing to do with whether there was a waiver to challenging routine findings instructions, but instead concerns whether Amn Cook could wholesale waive his right to challenge the military judge's misapplication of the important sentencing procedures mandated by Congress. Second, the issue of maximum sentence calculation for a duplicitous specification alleging an offense under 8 U.S.C. § 1324 (2018) is unsettled.

The Government acknowledges that *Davis* dealt with a different issue altogether, but asserts that if "proper instructions" can be waived then "it stands to reason an appellant can waive . . . computation of the maximum punishment." (Appellee Br. at 11.) But this oversimplifies the issue of how waiver is determined. The threshold questions before this Court are (1) whether the right is not so essential that it could be waived, and (2) if so, whether that waiver can occur merely through lack of objection or acquiescence. *United States v. Olano*, 507 U.S. 725, 733 (1993) (explaining the criteria for whether waiver has taken place). The military judge was bound to correctly calculate the maximum sentence under Article 56 and R.C.M. 1003(c). The military judge's failure to do so jeopardized the integrity of the proceeding. *United States v. Cummings*, 17 C.M.A. 376, 380 (C.M.A. 1968). The statutory basis of Amn Cook's right along with the harm created by the error strongly refutes the notion that the correct application of the procedures could be waived through mere lack of objection. Put differently, the doctrine of waiver does not insulate the military judge against scrutiny.

Even if the important procedures for correct maximum sentence calculation under R.C.M. 1003(c) could be waived, lack of objection from

counsel would not be sufficient to trigger it. An intentional waiver, contrasted with a waiver by operation of law, can only occur if a party intentionally relinquishes or abandons a known right. *United States v. Day*, 83 M.J. 53, 56 (C.A.A.F. 2022). Fundamental rights cannot be waived through counsel's lack of objection, but require that the record show the accused understood the right at issue and intentionally waived it. *United States v. Hasan*, 84 M.J. 181, 240 (C.A.A.F. 2024). The record does not show that Amn Cook understood and waived his right to a correct maximum sentence calculation under R.C.M. 1003(c). Moreover, the idea that Amn Cook could waive the right through trial defense counsel's acquiescence overlooks the fact that the military judge carries "[p]rimary responsibility for determining the legal limits of punishment." *United States v. Harden*, 1 M.J. 258, 259 (C.M.A. 1976). This is distinct from the findings instructions which were at issue in *Davis* because the Rules for Courts-Martial place responsibility on the parties to object to instructions lest they forfeit it. R.C.M. 920(f).

B. *Davis* is inapplicable because the maximum sentence calculation at issue here is unsettled.

Even if the distinct issue in *Davis* were relevant, that decision still would not inform this case because it dealt with a narrow set of

circumstances not present here. In that case, the appellant challenged the instructions delivered for indecent visual recording in violation of Article 120c, U.C.M.J. *Davis*, 79 M.J. at 331. In particular, the appellant argued that the instruction for lack of consent was deficient because it did not specify that the appellant must have subjectively known that the alleged victim did not consent. *Id.* Trial defense counsel had not only declined to object, but offered no additional instructions. *Id.* Crucially, the instruction that was delivered came after "applicable precedents" had settled the issue that the appellant attempted to contest. *Id.* at 331. This meant that the appellant's challenge was rooted in a novel assertion of how the instruction should have been framed even though the military judge delivered instructions consistent with the recognized law. This novel challenge was waived based on the appellant's acquiescence to those instructions. *Id.*

This Court later clarified that *Davis* does not apply where the legal issue is unsettled by binding precedent. *United States v. Schmidt*, 82 M.J. 68, 71-72 (C.A.A.F. 2022) ("trial defense counsel's failure to object was not waiver given the unsettled nature of the law at the time of Appellant's court-martial."). *Davis* does not apply here because the underlying issue

of how the maximum sentence should be calculated for the offense of transporting aliens under Article 134 is unsettled in military jurisprudence, especially in the context of duplicitous pleading. This is demonstrated by comparison of the A.F.C.C.A.'s treatment of the issue with the way the Navy-Marine Corps Court of Criminal Appeals (N-M.C.C.A.) has dealt with it. In this case, the A.F.C.C.A. held that a sentencing range modified by each named alien was appropriate even though the individual aliens were named in a single specification. (JA at 33.) Conversely, in *United States v. Spykerman*, 81 M.J. 709, 732 (N-M. Ct. Crim. App. 2021), the N-M.C.C.A. held that single specifications for transporting multiple aliens only warranted a maximum sentence for a single offense. This highlights the unsettled nature of how the maximum sentence should be calculated for a duplicitous specification involving 8 U.S.C. § 1324, which makes the issue distinguishable from *Davis*. The Government concedes that "the military judge was faced with a unique situation uncommon in military sentencing procedures" and also that the "sentencing structure is somewhat unique." (Appellee Br. at 27, 30.) The Government also concedes that this issue is unsettled in Federal civilian courts. (Appellee Br. at 36) ("in light of disagreement among federal

courts, the military judge's treatment of the specification as non-duplicitous cannot be plain error."). Given this, the reasoning behind *Davis* does not apply.

C. *Davis* did not create a sweeping rule for waiver when fundamental rights are at issue.

This Court should reject the argument that *Davis* creates an ironclad rule for waiver whenever trial defense counsel acquiesces to the military judge. The Government's suggestion for a contrary holding in this case is a bridge too far. Rather, any analysis for waiver must consider the right at stake and the proportionate means for how waiver must be expressed. *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008) (acknowledging that whether a particular right is waivable depends on the right at stake). Even in the limited realm of findings instructions that *Davis* addressed, this Court has never held that the absence of objection gives the military judge carte blanche to deliver erroneous instructions that are contrary to settled law.

Instructions must always be appropriate. *United States v. Hale*, 78 M.J. 268, 274 (C.A.A.F. 2019); *United States v. Voorhees*, 79 M.J. 5, 19 (C.A.A.F. 2019). Blatant instructional errors affecting substantial rights are subject to review even without objection at the trial level. *See United*

States v. Tovarchavez, 78 M.J. 458, 462 (C.A.A.F. 2019) (holding that unconstitutional propensity instruction was merely forfeited); *United States v. Girouard*, 70 M.J. 5, 12 (C.A.A.F. 2011) (holding that erroneous instruction as to lesser included offense was subject to plain error analysis even though instruction was requested by accused); *United States v. Haverty*, 76 M.J. 199, 201 (C.A.A.F. 2017) (finding plain error where military judge failed to instruct on the mens rea for offense under Article 92). These cases highlight the narrowness of the *Davis* holding, which is not that all instructional issues can be waived through acquiescence, but only those where counsel agrees to instructions reflecting settled areas of law. The Government's position that *Davis* stands for the idea that an issue as "fundamental as proper instructions on the elements" can be waived is an inappropriately broad reading of that case. The appellant in *Davis* did not waive instructions of the elements altogether, but merely chose not to contest the contents of a specific instruction regarding one of the elements. *See Henderson v. Kibbe*, 431 U.S. 145, 154 (1977) ("An appraisal of the significance of an error in the instructions to the jury requires a comparison of the instructions which were actually given with those that should have been given.").

Extension of *Davis* to all instances where counsel acquiesces would lead to absurdities. Can the Government omit entire elements from the instructions without scrutiny? Can the military judge avoid instructing the panel on the burden of proof? Can the military judge choose to not advise the panel on the presumption of innocence? The answer to these questions should be an emphatic "no" because such omissions would create an array of procedural defects that would prejudice the accused's substantial rights and taint the court-martial. Similarly, the military judge's failure to correctly follow the procedures for maximum sentence calculation under R.C.M. 1003(c) demonstrate a fatal defect over an essential matter that could not be waived by mere acquiescence or silence. Put differently, R.C.M. 1003(c) required the military judge to get the calculation correct. This is categorically different than *Davis*. The absence of an objection does not push the issue beyond the reach of appellate review.

To bolster its position, the Government relies on three unpublished cases from the service courts, one of which is actually the A.F.C.C.A.'s decision in the case at bar. (Appellee Br. at 20.) Those cases only go to show how *Davis* has been misunderstood. In *United States v. Ozbirn*, No.

ACM 39556, 2020 CCA LEXIS 138, at *48 (A.F. Ct. Crim. App. May 1, 2020), the A.F.C.C.A. declined to correct the military judge's miscalculated maximum sentence. The court reasoned, based on *Davis*, that "If an appellant may waive so fundamental a matter as the elements of the offense, we do not doubt the C.A.A.F. would also find he may waive an objection to the military judge's computation of the maximum punishment." *Id.* at *48-49. The N-M.C.C.A. also relied on *Davis* to find waiver for maximum sentence instructions. *United States v. Hoffman*, No. 201400067, 2020 CCA LEXIS 198, at *19 (N-M Ct. Crim. App. June 8, 2020). But these cases misinterpret *Davis*. This Court did not go so far as to say that an accused could waive all instructional challenges. Nor did this Court address waiver of the procedures created by R.C.M. 1003(c). This Court merely held that novel challenges to instructions reflecting settled areas of law could not be raised for the first time on appeal. *Davis*, 79 M.J. at 332.

This Court should reject the notion that the unsettled issue of properly calculating the maximum penalty for a duplicitously plead offense incorporating a Title 18 offense can be waived through mere acquiescence. Rather, this Court should hold that the binding precedent

established in *United States v. Harden* remains authoritative on this issue. The Government unduly dismissed this case. (Appellee Br. at 23.) *Harden* was a decision issued by this Court operating under one of its former names that controls the issue.[2] Waiver is inapplicable because the military judge is charged with protecting the integrity of the maximum sentence calculation, not the accused. *Harden*, 1 M.J. at 259. While this Court recognized in dicta that circumstances may emerge where the integrity of that calculation is "misled by defense counsel," that is not the case here. *Id.* Like *Harden*, the record does not show that trial defense

[2] The Government referred to *Harden* as "a case decided in 1976 by this Court's predecessor." (Appellee Br. At 23.) This Court has had three names throughout its almost seventy-five years of operation. Its original name was the "Court of Military Appeals." Uniform Code of Military Justice art. 67, Pub. L. No. 81-506, 64 Stat. 107, 129 (1950). A 1968 statute amended article 67 by changing this Court's name to the "United States Court of Military Appeals." Pub. L. No. 90-340, 82 Stat. 178 (1968). That statute provided that the "United States Court of Military Appeals established under this Act is a *continuation* of the Court of Military Appeals as it existed prior to the effective date of this Act." *Id.* at § 2, 82 Stat. 178-79 (emphasis added). The National Defense Authorization Act for Fiscal Year 1995 changed this Court's name to the "United States Court of Appeals for the Armed Forces." Pub. L. No. 103-337, § 924, 108 Stat. 2663, 2831 (1994). The statute characterized that action as the "RENAMING OF THE UNITED STATES COURT OF MILITARY APPEALS." *Id.*

counsel drove the discussion about the maximum sentence. Rather, trial defense counsel merely acquiesced to a collective agreement. (J.A. at 185.)

Nor does *United States v. Harcrow*, 66 M.J. 154, 157 (C.A.A.F. 2008), support a finding of waiver, as contended by the Government. (Appellee Br. at 18.) The Government cites that case for the proposition that "even constitutional rights can be waived." (*Id.*) (quoting *Harcrow*, 66 M.J. at 157). Overlooked in this assessment is that this Court did not hold that the appellant had waived his constitutional right to confrontation. *Harcrow*, 66 M.J. at 157. And waiver of that right could not occur by operation of counsel declining to object. This is because circumstances where counsel may waive that right are exceptional and limited. *Id.* This type of waiver could be manifest where the right at issue is abandoned by counsel to further the defense trial strategy. *Id.* at 158. However, Amn Cook received no conceivable strategic benefit from the erroneous calculation that would validate waiver as a function of trial strategy. To the contrary, the substantial right created by R.C.M. 1003(c) required any waiver to be clearly established on the record. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (holding that waiver of substantial rights can only be effective if clearly shown on the record). This Court should be

unpersuaded that defense counsel's mere acquiescence was sufficient to create waiver.

IV.

The maximum sentence calculation for the offense of transporting aliens could not be greater than five years because of the manner that the Government chose to charge Airman Cook.

A. The limited maximum sentence range available was self-imposed by the Government's charging scheme.

The Government self-limited its ability to pursue a maximum period of confinement beyond five years for the offense of transporting aliens because it chose to utilize a duplicitous specification. While the Government leans heavily into the statutory language of 8 U.S.C. § 1324 for the idea that there could be "cumulative punishment for each alien transported," this misses the important issue raised by this case. (Appellee Br. at 28.) The question is not whether 8 U.S.C. § 1324 allowed for cumulative sentencing based on each individual alien transported. It could, but only if the Government charged each alien transported as a separate specification. By choosing to join each alien transported under a single duplicitous specification, the Government was bound by the sentencing consequences that it created. The Government's responsibility

for accepting these consequences is in line with several recent decision from this Court. *See United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019) (Government is bound to proving type of force alleged in specification); *United States v. Mendoza*, ___ M.J. ___, 2024 CAAF LEXIS 590, at *18 (C.A.A.F. 2024) ("Government cannot . . . charge one offense under one factual theory and then argue a different offense and a different factual theory at trial."); *United States v. Smith*, ___ M.J. ___, 2024 CAAF LEXIS 759 at *8 (C.A.A.F. 2024) (acknowledging that the "Government . . . controls the charge sheet," and was therefore limited to pursuing liability under Article 116 for speech alone, as charged, rather than conduct). As the purveyor of the charge sheet, had the Government desired to pursue a maximum penalty based on each alien transported, it would have been incumbent upon the Government to use a charging scheme consistent with that intent. While the specification could have been severed by motion of the parties, that remedy is one that the Government should have pursued at trial if it wanted cumulative sentencing. (Appellee Br. at 41.) Amn Cook could not be prejudiced by the Government's failure to do so by being subject to an impermissible range of punitive exposure.

The Government contends that the military judge's calculation had to account for "a unique situation uncommon in military sentencing procedures." (Appellee Br. at 27.) This is untrue. Duplicity is a factor well known in both military and federal practice. In the military, this is ingrained in R.C.M. 307(c)(4), which permits only a single offense per specification. Likewise, the Federal Rules of Criminal Procedure refer to the "joining of two or more offenses in the same count (duplicity)" as a defect in an indictment. Fed. R. Crim. Pro. R. 12(b)(3)(B)(i). The Government attempts to side-step the issue of duplicity by explaining that Amn Cook did not object to it. Of course he did not. This is because "in a duplicity context, [the accused] may be motivated *not* to object, as it is the duplicitous charge . . . that would afford the accused a more favorable sentence." *United States v. Walters*, 58 M.J. 391, 398 (C.A.A.F. 2003). Likewise, an objection to "duplicity is rarely made where but a single statutory prohibition is involved since the effect of joining several violations as one redounds to the benefit of the defendant." *United States v. Means*, 12 C.M.A. 290, 294 (C.M.A. 1961) (quoting *Korholz v. United States*, 269 F.2d 897, 901 (10th Cir. 1959)). In other words, it was to Amn Cook's benefit not to object to the duplicitous charge because it should

have constrained the maximum sentence that the Government could pursue. (*See* Opening Br. at 30.)

The failure of the military judge to recognize the sentencing limitations created by the duplicitous pleading was prejudicial to Amn Cook because it impermissibly increased his punitive exposure. *United States v. Neblock*, 45 M.J. 191, 199 n.1 (C.A.A.F. 1996) (recognizing that "[a]dverse effects on a defendant [from duplicity] may include improper notice of the charges against him, prejudice in the shaping of evidentiary rulings, in sentencing, in limiting review on appeal, [and] in exposure to double jeopardy). Additionally, while the Government asserts duplicity is less an issue in the military system during findings due to exceptions and substitutions (Appellee Br. 33 n.5), the Government gives no consideration to the fact that the military judge's error deprived Amn Cook of segmented sentencing. (Opening Br. at 36.)

The Government's reliance on *Bell v. United States* is misplaced because it confuses duplicity for multiplicity. (Appellee Br. at 14.) In that case, the petitioner pleaded guilty to two counts of transporting women based on a single incident in which the women were transported in the same vehicle. *Bell v. United States*, 349 U.S. 81, 82 (1955). On appeal,

the petitioner challenged the cumulative punishment incurred by each count on the basis that he had committed only a single offense. *Id.* The Supreme Court agreed because the unit of prosecution under the federal statute was the act of transportation itself, not the women being transported. *Id.* at 84. This precluded the Government from "turning a single transaction into multiple offenses." *Id.* Hence, *Bell* was a case about a single offense between divided into two separate counts. By contrast, the Government chose to charge Amn Cook with arguably five separate offenses joined in a single specification. Contrary to the Government's assertion, this was not the protocol endorsed by *Bell*. (Appellee Br. at 30.) However, *Bell* does inform the unit of prosecution, which in this case only goes to show that although the Government could have sought a penalty based on each alien transported, its decision to use a duplicitous specification prevented it from doing so.

B. *United States v. Beatty*, 70 M.J. 39 (C.A.A.F. 2011), undermines the argument that the punishment for a federal offense can be imposed in this case.

The military judge's miscalculation of the maximum sentence is highlighted by his erroneous treatment of the procedures in R.C.M. 1003(c). This is because "[a]n offense not listed in part IV [of the Manual

for Courts-Martial] and not included in or closely related to any offense listed therein is punishable as authorized by the United States Code." R.C.M. 1003(c)(1)(B)(ii). But no punishment is authorized under the United States Code unless the conduct at issue is actually proscribed. *United States v. Beaty*, 70 M.J. 39, 43 (C.A.A.F. 2011). The punishment authorized by the United States Code cannot be imposed for a specification that does not accurately capture the conduct being proscribed. *Id.* 8 U.S.C. § 1324 does not punish all instances of transporting unlawful aliens, but only those done for the purpose of furthering the unlawful presence in the United States. Because the Government did not charge that element, the United States Code did not authorize any punishment. The Government misapprehends this point, erroneously characterizing the argument in Amn Cook's opening brief as a question of failure to state an offense. (Appellee Br. at 28, n.4.) However, for purposes of the granted issue this defect meant that no punishment could be imposed under R.C.M. 1003(c)(1)(B)(ii). The military judge's failure to consider this speaks to the plain error that was committed.

C. Federal jurisprudence does not show that a penalty can be assessed for each alien described in a duplicitous specification.

The other Federal cases cited by the Government reiterate the idea that each alien represents a separate unit of prosecution that can be used to charge multiple offenses from a single transaction without giving any discussion about duplicity. *United States v. Sanchez-Vargas*, 878 F.2d 1163, 1168 (9th Cir. 1989) (contrasting potential for multiple prosecutions based on number aliens based on unit of prosecution with multiple subsection violations under 8 U.S.C. § 1324); *United States v. Gonzalez-Torres*, 309 F.3d 594, 601-602 (9th Cir. 2002) (case involving multiple counts, not single duplicitous count); *Vega-Murrillo v. United States*, 264 F.2d 240, 241 (9th Cir. 1959) (rejecting multiplicity challenge where defendant was charged with three counts of transporting aliens, each count involving a single alien); *United States v. Ortega-Torres*, 174 F.3d 1199, 1201 (11th Cir. 1999) (addressing whether sentencing provision of 8 U.S.C. § 1324 is unconstitutionally vague, but not discussing how the Government charged the offense).

Serentino v. United States, 36 F.2d 871 (1st Cir. 1930), is inapposite. The Government acknowledges that that case deals with an entirely different statute in effect at the time, the Immigration Act of 1917, 39

Stat. 857, 874 (1917), 8 U.S.C. § 144 (repealed 1952). (Appellee Br. at 36.) However, the Government overlooks a crucial distinction between that statute and the one that Amn Cook was charged with violating. In particular, the 1917 act provided:

> That any person, including the master, agent, owner, or consignee of any *vessel*, who shall bring into or land in the United States, by *vessel or otherwise*, any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter or to reside within the United States under the terms of this Act, upon conviction thereof shall be punished by a fine not exceeding $2,000 and by imprisonment for a term not exceeding five years, for each and every alien so landed or brought in.

Serentino, 36 F.2d at 872 (emphasis added). The distinction is that 8 U.S.C. § 144 made the act of transporting "by vessel or otherwise" the unit of prosecution such that multiple aliens could be charged in one count as a single offense. This reading was the reading adopted by the 1st Circuit which held that "As count 1 alleges a single act or transaction in violation of the law, the bringing in of eleven aliens at one time, we are convinced that it charges a single offense." *Serentino*, 36 F.2d at 872. By contrast, federal treatment of 8 U.S.C. § 1324 demonstrates that the statute Amn Cook was charged with placed the unit of prosecution at each individual alien, thus requiring separate counts to avoid the sentencing limitations

of duplicity. *United States v. Martinez-Gonzales*, 89 F. Supp. 62, 64 (S.D. Cal. 1950).

D. *United States v. Mincey*, 42 M.J. 376 (C.A.A.F. 1995), is inapplicable.

The Government's position is similarly unsupported by *United States v. Mincey*, 42 M.J. 376 (C.A.A.F. 1995). (Appellee Br. at 37.) Crucially, that case has limited application because this Court narrowed the holding to just bad check cases. Despite this, the Government asserts that "[*Mincey*] did not state that it's [sic] reasoning was limited solely to bad check cases," even though that is plainly what this Court declared. (Appellee Br. at 39.) This Court stated, "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." *Mincey*, 42 M.J. at 378 (emphasis added).

Despite this, the Government cites *Mincey* for the general proposition that "punishment is authorized for each separate offense, not for each specification." (Appellee Br. at 39.) The portion of the case that the Government relies on to support this is dicta. In particular, this Court mentioned:

> *Notwithstanding the joinder of multiple offenses under each specification* . . . in reality appellant was convicted of 17 offenses of uttering bad checks, in violation of Article 123a. The maximum punishment for each of the charged offenses was a bad-conduct discharge, 6 months' confinement, total forfeitures, and reduction to the lowest enlisted grade. In the aggregate, he thus could have been sentenced to 102 months of confinement for these check offenses (plus additional punishment for the other offenses).

Mincey, 42 M.J. at 378 (emphasis added.) In other words, this Court's discussion of maximum sentence based on individual offenses was premised on how it could have been calculated without duplicity. But that was not this Court's holding. Rather, *Mincey* only addressed whether the collective dollar amount of multiple bad checks could be used to trigger Article 123a's upgraded sentence range for offenses involving more than $1000. *Id.* On that limited question, this Court held that multiple checks could be considered collectively to reach the $1000 threshold for the heightened maximum sentence under Article 123a, "regardless whether the Government correctly pleads only one offense in each specification or whether the Government joins them in a single specification as they have here." *Id.* Because of this limited holding, *Mincey* is not instructive in this case. 8 U.S.C. § 1324 does not describe the number of aliens transported as a sentence range modifier in the way that Article 123a does

for dollar amounts. Instead, the federal code identified the individual aliens transported as the unit of prosecution, which therefore must be plead as separate counts or specifications to warrant sentencing based on the number of aliens.

E. The military judge grossly miscalculated Amn Cook's punitive exposure, thereby inflicting prejudice upon him.

The military judge's failure to consider the sentencing limitations incurred by the Government's duplicitous charging scheme grossly exaggerated Amn Cook's punitive exposure and caused him prejudice. Because the duplicitous offense of transporting aliens was incorporated in both Charge IV, Specification 1 and the specification under Additional Charge I, a maximum confinement of only five years was available for each. The military judge's calculation of 25 years for each specification based on the number aliens transported resulted in a maximum sentence calculation of forty years greater than permitted, and nearly three times what it should have been. This vast misunderstanding of the law was prejudicial because it calls into question whether the sentence imposed was unduly influenced by this misunderstanding. (Opening Br. at 35.) Additionally, it deprived Amn Cook of his right to segmented sentencing. (Opening Br. at 36.) The Government gives no consideration to these

serious forms of prejudice raised in Amn Cook's opening brief. This Court should not ignore the real prejudice flowing from the military judge's clearly erroneous calculation of the maximum sentence. Consequently, this Court should find that the miscalculation constituted plain error, and the sentence imposed should be set aside.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
U.S.C.A.A.F. Bar No. 37931
Air Force Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
michael.bruzik@us.af.mil

Counsel for Appellant

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 April 2, 2025.

Respectfully Submitted,

MICHAEL J. BRUZIK, Capt, USAF
U.S.C.A.A.F. Bar No. 37931
Air Force Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
michael.bruzik@us.af.mil

Counsel for Appellant

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 6007 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.

Respectfully Submitted,

MICHAEL J. BRUZIK, Capt, USAF
U.S.C.A.A.F. Bar No. 37931
Air Force Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
michael.bruzik@us.af.mil

Counsel for Appellant