IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellee,	)	BRIEF ON BEHALF OF
	)	THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 40333
	)	
Airman (E-2)	)	USCA Dkt. No. 24-0221/AF/SF
JAKALIEN J. COOK	)	
United States Air Force	)	21 March 2025
Appellant.	)	

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

ISSUES PRESENTED

III.[1]

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.

[1] This Court's Grant Order dated 29 January 2025 ordered briefing solely on Issues III and IV of the granted issues.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d), UCMJ. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ[2].

RELEVANT AUTHORITIES

8 U.S.C. § 1324(a)(1) states, in relevant part:

> (A) Any person who—
>
> > (ii) knowingly or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of the 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).

8 U.S.C. § 1324(a)(1)(B) states, in relevant part:

> (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 find under title 18, United States Code, imprisoned not more than 5 years, or both.

[2] Unless otherwise noted, all references to the UCMJ, 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.) (MCM).

R.C.M. 1005(c) states:

> (c) *Request for instructions*. During presentencing proceedings or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. The military judge may require the requested instruction to be written. Each party shall be given the opportunity to be heard on any proposed instruction on sentence before it is given. The military judge shall inform the parties of the proposed action on such requests before their closing arguments on sentence.

R.C.M. 1005(e)(1) states that the instructions on sentence shall include "a statement of the maximum authorized punishment that may be adjudged and of the mandatory minimum punishment, if any."

R.C.M. 1005(f) states:

> *Failure to object.* Failure to object to an instruction or to omission of an instruction before the members close to deliberate on the sentence shall constitute forfeiture of the objection. The military judge may require the party objecting to specify in what respect the instructions were improper. The parties shall be given the opportunity to be heard on any objection outside the presence of the members.

R.C.M. 1003(c)(1)(ii) provides guidance on determining the maximum punishment when the offense is not listed in Part IV of the Manual:

> (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.

The maximum punishment authorized for conspiracy, in violation of Article 81, UCMJ, provides "[a]ny person subject to the UCMJ who is found guilty of conspiracy shall be subject to the maximum punishment authorized for the offense that is the object of the conspiracy." MCM, pt. IV, para. 6.d.(1).[3]

Article 59, UCMJ, 10 U.S.C. §859(a), states: "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

At a general court-martial convened at Davis-Monthan AFB, Arizona, Appellant elected trial by officer and enlisted members and entered mixed pleas. (JA at 51-53.) In accordance with his pleas, Appellant was found guilty of one charge and specification of Absence Without Leave in violation of Article 86, UCMJ; one charge and specification of Breaching Restriction in violation of Article 87b, UCMJ; and one charge and one specification of Illegal Use of

[3] It does not appear that Appellant is challenging the maximum sentence computation for the conspiracy offense, even though it is informed by the same interpretation of the language of 8 U.S.C. § 1324. To the extent that this Court considers it, the argument pertaining to trafficking an alien below, extends to any challenge to the conspiracy charge as well.

Marijuana in violation of Article 112a, UCMJ. (Id.) Contrary to his pleas, the members found Appellant guilty of one charge and one specification of transporting aliens in violation of Clause 3 of Article 134, UCMJ and 8 U.S.C. § 1324; one specification of conspiracy to transport aliens in violation of Article 81, UCMJ; and one specification of obstructing justice in violation of Article 131b, UCMJ. (JA at 51, 183.) The military judge sentenced Appellant to a reduction to the grade of E-1, forfeiture of all pay and allowances, 27 months confinement, and a dishonorable discharge. (JA at 186-187.) For the specifications at issue here, Appellant was sentenced to 24 months confinement for each offense, with those sentences to run concurrently. The military judge provided Appellant with 155 days of pretrial confinement credit. (JA at 187.) The convening authority took no action on the findings and approved the sentence in its entirety. (JA at 57.)

STATEMENT OF THE FACTS

The Offense

On the evening of 22 August 2021, Sergeant CM from the Arizona Department of Public Safety (DPS), Border Strike Force Bureau, received a report that a light-colored sports utility vehicle (SUV) was stopped on a desert road, and that "bodies" ran from the desert and entered the vehicle. (JA at 87, 93-94.) The report indicated the SUV was only a few miles from the U.S. – Mexico border. (JA at 94.) Sergeant CM searched for and eventually located the SUV and

conducted a traffic stop when the vehicle failed to stop for a red light. (JA at 94-95.) Sergeant CM approached the SUV and observed a male driver and passenger, later revealed to be Appellant, and three "bodies" in the back seat who appeared "disheveled, tired, and acting as if they were sleeping." (JA at 95.) Based on the appearance of the individuals in the back seat, Sergeant CM requested assistance from United States Border Patrol. (JA at 96.) While waiting for the Department of Homeland Security (DHS), Sergeant CM located two other individuals in the trunk area of the SUV. (JA at 97.) DHS conducted a search of the vehicle and located a Glock .45, a 33-round magazine, and 15 rounds of ammunition. (JA at 124.) A subsequent search of Appellant's dorm room revealed a case for the Glock and a sticker with a serial number matching the Glock found in the rental vehicle. (R. at 430.)

Agents from DHS later questioned the driver of the SUV, QM. (JA at 162.) During his interview, QM explained that he and Appellant became friends while they were both stationed together at Davis Monthan Air Force Base, Arizona. (JA at 162, 173.) During the interview with DHS, QM initially stated that he was exploring the area, and he decided not to use his GPS system to get home. (JA at 162-163.) QM explained that he drove down a dirt road and saw individuals on the side of the road. (JA at 163.) He initially claimed he offered them a ride because it was dark. (JA at 163.) When DHS agents indicated they did not believe his

story, he admitted that he had previously arranged the pick-up of the individuals on the side of the road in exchange for compensation. (JA at 163-165.)

QM explained that approximately one week prior to he and Appellant being detained, he was contacted via SnapChat by an unknown individual offering him "easy money" to pick up some Mexicans and drive them. (JA at 164-166.) The agreed compensation was five hundred dollars per individual. (JA at 165.)

QM explained that at the time of their detention, Appellant had approximately one week left before he was going to be discharged from the Air Force. (JA at 174.) Appellant was also interviewed by DHS and explained that he rented the car they were driving that evening, and he was aware that QM was in contact with someone over SnapChat. (JA at 114-116.) Sergeant CM later testified that in his experience, individuals who transport illegal aliens often use rental vehicles because if they are caught with illegal aliens, the rental vehicle will be seized, not their personal vehicle. (R. at 94.)

The five individuals who were in Appellant's rental car were identified as having entered the United States illegally. (JA at 58-70.) During his interview with DHS agents, Appellant admitted he knew the individuals who entered his rental vehicle on 22 August 2021 were not in the United States legally. (JA at 119.)

Convicted Offenses

The specification Appellant was convicted of under Clause 3 of Article 134, UCMJ, states that Appellant:

> did, within the State of Arizona, on or about 22 August 2021, transport [MFL], [ONA], [POM], [TMV], and [ONC] within the United States by means of passenger vehicle, knowing or in reckless disregard that they were aliens that entered the United States in violation of the law, in violation of 8 United States Code §1324, an offense not capital.

(JA at 52.) The specification Appellant was convicted of under Article 81, UCMJ, states that Appellant:

> did, within the State of Arizona, conspire with [QM] and unknown conspirators to commit an offense under the Uniform Code of Military Justice, to wit: transporting [MFL], [ONA], [POM], [TMV], and [ONC] within the United States by means of passenger vehicle, knowing or in reckless disregard that they were aliens that entered the United States in violation of the law, in violation of 8 United States Code §1324, an offense not capital, and in order to effect the object of the conspiracy, the said [QM] and [Appellant], did secure a rental vehicle, drive the vehicle to the US-Mexico border, and transported the aforementioned aliens in violation of the law.

(JA at 52-53.)

Discussion of Maximum Punishment

While the members were deliberating on findings, the military judge requested trial counsel submit Appellate Exhibit XLVII, which was "Joint Proposed Instructions and Maximum Sentence for the Article 134 Clause 3 offenses." (JA at 585.) The government's proposed instruction on the maximum penalty for the Article 134, Clause 3 offense stated "[t]he government proposes that the maximum penalty for this offense, under 8 U.S.C. § 1324(a)(1)(A)(ii), is no more than five (5) years' confinement for each alien in respect to whom such a violation occurs. *See* 8 U.S.C. § 1324(B)(ii)." (JA at 75-76.) The government's proposed instructions were served on Appellant's trial defense counsel on 24 January 2024, two weeks before Appellant's trial. (JA at 78.) Prior to his acceptance of the proposed instructions, the military judge conferred with Appellant's trial defense counsel:

> MJ: I believe [App. Ex. XLVII] is labeled or marked as, the Government's Proposed Instructions, however, defense counsel, you did indicate through email that you agreed with those instructions and maximum sentence articulated. But just to have that on the record, is that accurate?
>
> DC: That is accurate, Your Honor.
>
> MJ: Anything else we need to get on the record or handle before we recall the members?
>
> TC: No, Your Honor.

DC: No, Your Honor.

(JA at 181-182.)

After findings, but prior to sentencing, the military judge once again raised the issue of maximum punishment:

> Trial counsel, what is the maximum punishment in this court-martial based on the convictions and specifically, you can refer to the, I believe this is contained in the draft instructions that were sent by the trial counsel and agreed to by the defense counsel but, specifically, what are you relying upon for the maximum penalty for Specification 1 of Charge IV?

(JA at 184.) Trial counsel responded they calculated the maximum punishment to be 25 years of confinement, five years for each alien. (Id.) The military judge then inquired into what authority they were relying on for that calculation. (Id.) After some discussion, the military judge confirmed the government was deriving their punishment calculation from 8 U.S.C. §1324. (JA at 184.) The military judge asked Appellant's defense counsel if they agreed that the 25 years cited by the government was the correct maximum punishment. (JA at 185.) Defense counsel replied "Yes, Your Honor." (Id.) The military judge then asked what the total maximum punishment in the case was, based on trial counsel's calculations. (Id.) Trial counsel responded, "the maximum punishment would…57 years and two months confinement." (Id.) The military judge again asked if the defense counsel

agreed with that computation and defense counsel again responded in the affirmative. (Id.)

Appellant's Confinement Sentence for Article 134, Clause 3 Offense and Conspiracy

Appellant was convicted of Transporting Aliens, in violation of Article 134, Clause 3, and conspiracy to commit the same under Article 81, UCMJ. For those offenses, the military judge sentenced Appellant to 24 months confinement for each offense, with those sentences to run concurrently. (JA at 186-187.)

SUMMARY OF THE ARGUMENT

Issue III- Waiver of Maximum Sentence Computation

Appellant waived his right to raise the issue of maximum sentence computation. This Court's decision in United States v. Davis, demonstrates that maximum sentence computation is a waivable issue. 79 M.J. 329 (C.A.A.F. 2020). In Davis, this Court held that where an appellant "expressly and unequivocally acquiesc[ed]" to the military judge's instructions, the appellant had "waived all objections to the instructions, including in regard to the elements of the offense. Id. at 331. If an appellant can waive the right to raise issues as fundamental as proper instruction on the elements of the very offense he is accused of committing, it stands to reason an appellant can waive the right to complain about the military judge's computation of the maximum punishment.

In fact, Service Courts of Criminal Appeals have relied on Davis for resolving this very question, including at the CCA in this case. *See* United States v. Cook, No. ACM 40333, 2024 CCA LEXIS 276, at *27 (A.F. Ct. Crim. App. July 3, 2024) (finding waiver of maximum sentence computation based on this Court's opinion in Davis); United States v. Ozbirn, No. ACM 39556, 2020 CCA LEXIS 138, at *48-49 (A.F. Ct. Crim. App. May 1, 2020) (noting that "[i]f an appellant may waive so fundamental a matter as the elements of the offense, [the Court did] not doubt [this Court] would also find he may waive an objection to the military judge's computation of the maximum sentence."); *see also* United States v. Hoffman, No. 201400067, 2020 CCA LEXIS 198, at *18-19 (N-M Ct. Crim. App. July 8, 2020) (citing this Court's decision in Davis to support their determination that the appellant had affirmatively waived any error resulting from the military judge's computation of the maximum punishment and the resulting maximum punishment instruction to the members). Appellant ignores Davis and the cases cited above entirely and fails to provide any case law that indicates this is a nonwaivable issue. This Court should adhere to the principles it established in Davis and find that an appellant *can* affirmatively waive the right to object to maximum sentence computation.

Here, Appellant affirmatively waived his right to raise the issue of maximum sentence computation on three separate instances. (JA at 182, 184-185.) Since

Appellant thrice affirmatively waived any objection, there is no error left for this Court to review. United States v. Campos, 67 M.J. 330, 332 (C.A.A.F. 2009).

In sum, this Court should find that maximum sentence computation is a waivable issue, and Appellant affirmatively waived his objection to this issue.

Issue IV- The Military Judge Correctly Computed the Maximum Sentence

Even if this Court were to find that maximum sentence computation is nonwaivable, and Appellant merely forfeited the objection, there is no plain error warranting relief. In applying the forfeiture framework, Appellant bears the burden of demonstrating "(1) the error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights." United States v. Knapp, 73 M.J. 33, 36 (C.A.A.F. 2014). Here, there is no error, nor one that is plain or obvious. Moreover, even assuming error, Appellant was not prejudiced.

Expressly, 8 U.S.C. § 1324(1)(B) states that a violation will be punished with a maximum punishment of 5 years "for each alien in respect to whom such a violation occurs." Put more plainly, Congress expressly and unambiguously authorized that the simultaneous transport of more than one alien in violation of 8 U.S.C. § 1324 is subject to cumulative punishment for each alien so transported. This sentencing structure was endorsed by the Supreme Court in Bell v. United States, 349 U.S. 81, 82-83 (1955). Further, federal courts have recognized this unique sentencing mechanism since 1957. *See* Vega-Murrillo v. United States,

247 F.2d 735, 738 (9th Cir. 1957) ("It appears to us that Congress has expressly done in the statute here [8 U.S.C. § 1324] what the Supreme Court suggested in the Bell case it could have done in the Mann Act; namely, provided cumulative punishment for each person transported.") Therefore, the military judge's computation of the maximum punishment by multiplying the 5 year maximum sentence by the 5 aliens transported by Appellant was correct and there was no error, much less plain or obvious error.

Appellant asserts the specification here was duplicitous. But even if it was, that should not be the end of this Court's analysis. In United States v. Mincey, this Court established two important principles relevant to this issue: (1) this Court found that duplicity is a waivable issue; and (2) even when a specification is duplicitous, relief may not be merited. 42 M.J. 376, 378 (C.A.A.F. 1995).

Duplicity exists where a single specification states two offenses. *See* R.C.M. 307(c)(4) ("Each specification shall state only one offense.") Even if this Court finds that the specification here is duplicitous, Appellant waived any objection regarding duplicity when he stated he had no objection to the maximum punishment calculation. *Cf.* United States v. Hardy, 77 M.J. 438, 442 (C.A.A.F. 2018). Since Appellant waived the question of whether the specification was duplicitous, he cannot claim now that it should have been charged as five separate specifications in order for him to be subject to the five-years-per-alien punishment.

In any event, Appellant suffered no prejudice from a duplicitous specification. The sole remedy for a duplicitous specification is severance of the specification into two or more specifications, each of which alleges a separate offense contained in the duplicitous specification. R.C.M. 906(b)(5), Discussion. Here, even if the specifications were duplicitous and Appellant had properly objected at trial, the appropriate remedy would have been breaking the specification into five separate specifications with each alien transported named individually. Thus, he would have been in the same position as he is now, with a proper maximum sentence computation of 25 years confinement. Therefore, even if the specification were duplicitous, Appellant suffered no prejudice and there was no plain error in calculating the maximum sentence of 25 years.

Even if this Court found error in the military judge's maximum sentence computation, there was no prejudice to Appellant because his sentence was not "substantially influenced" by the error. United States v. Edwards, 82 M.J. 239, 246 (C.A.A.F. 2022) (quoting United States v. Barker, 77 M.J. 377, 384 (C.A.A.F. 2018)). Even assuming Appellant's computation of the 5 years as the maximum sentence is correct (App. Br. at 26), he still received less than half of the maximum punishment authorized by law. (JA at 186-187.) Further, the military judge was sentencing him for the same operative set of facts— Appellant transported and conspired to transport five aliens—one of whom was a repeat criminal offender.

Even if this Court were to find that Appellant wasn't subject to cumulative punishment, the fact that five aliens were involved in his crime is an aggravating circumstance the military judge could have considered in determining an appropriate sentence. This Court should be convinced—as the CCA was—that the military judge would have sentenced Appellant to the same sentence. 2024 CCA LEXIS 276, at *27.

Therefore, this Court should find that the military judge properly calculated the applicable maximum sentence in accordance with long-settled federal law and affirm the decision of the Air Force Court.

ARGUMENT

III.

APPELLANT CAN, AND DID, AFFIRMATIVELY WAIVE HIS ABILITY TO CHALLENGE THE MILITARY JUDGE'S CALCULATION OF THE MAXIMUM PUNISHMENT.

Standard of Review

This Court cannot review waived issues. United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009). Whether an appellant has waived an objection is a legal question that this Court reviews de novo. United States v. Davis, 79 M.J. 329, 331 (C.A.A.F. 2020). Waiver is the intentional relinquishment or abandonment of a known right. Gladue, 67 M.J. at 313 (quoting United States v. Olano, 507 U.S. 725, 733 (1993)). Consequently, while this Court reviews forfeited issues for plain

error, this Court cannot review waived issues at all because a valid waiver leaves no error for the Court to correct on appeal. Campos, 67 M.J. at 332. "Plain error" requires a showing of (1) error, (2) that was clear or obvious, and (3) the error prejudiced the accused's substantial rights." United States v. Easterly, 79 M.J. 325, 327 (C.A.A.F. 2020) (citing United States v. Grier, 53 M.J. 30, 34 (C.A.A.F. 2000)).

Law and Analysis

Appellant clearly and unequivocally waived his right to raise this issue on appeal on three separate occasions at trial. An affirmative statement that an accused at trial has "no objection" generally "constitutes an affirmative waiver of the right or admission at issue." United States v. Swift, 76 M.J. 210, 217 (C.A.A.F. 2017) (citations omitted). Waiver is different than forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right. Davis, 79 M.J. at 331. "[U]nder the ordinary rules of waiver, [an a]ppellant's affirmative statement that he had no objection to [the] admission of evidence…operate[s] to extinguish his right to complain about [the] admission [of evidence] on appeal." United States v. Ahern, 76 M.J. 194, 198 (C.A.A.F. 2017) (citing Campos, 67 M.J. at 332-333). Since Appellant affirmatively waived the maximum punishment issue, there

is no error for this Court to correct and this Court should dismiss this assertion of error.

1. *This Court's decision in Davis demonstrates the maximum punishment determination is a waivable issue.*

An appellant's right to object to the maximum punishment determination is one that is subject to affirmative waiver. The government asserts this situation is not one of constitutional magnitude because even accepting Appellant's sentence computation, his sentence was still within the statutorily authorized limits—thus, Appellant's Due Process rights were not violated. Even if this issue were one of constitutional magnitude , this Court in United States v. Harcrow, held that even constitutional rights can be waived if there was "an intentional relinquishment or abandonment of a known right or privilege. 66 M.J. 154, 157 (C.A.A.F. 2008).

This Court addressed the issue of waiver recently in Davis. 79 M.J. at 331. In Davis, the appellant asserted that it was plain error when the military judge failed to instruct the members on a required element of the offense. Id. This Court found that the appellant had "affirmatively declined to object to the military judge's instructions and offered no additional instructions." Id. This Court determined that by "expressly and unequivocally acquiescing" to the military judge's instructions, the appellant had "waived all objections to the instructions, including in regards to the elements of the offense." Id. It stands to reason that if an appellant can *affirmatively* waive the right to raise an issue as fundamental as

proper instruction on the elements of a crime, he can certainly *affirmatively* waive the right to complain about the military judge's computation of the maximum punishment. *See also* Hardy, 77 M.J. at 442 (finding that when the defense counsel state they agree with the government's calculated maximum punishment, they waive any unnecessary multiplication of charges objection because it would impact the maximum sentence). In asserting that the issue before this Court is of such a fundamental and constitutional nature as to invoke Due Process concerns, Appellant fails to address Davis at all. (App. Br. at 16.) Nor does he make any attempt to demonstrate how this issue could possibly be more central to Due Process than instructions on the actual elements of a charged offense. This Court should be unpersuaded by Appellant's mere invocation of the Due Process clause and adhere to the precedent it established in Davis and the wisdom of Harcrow and find that where an appellant has intentionally relinquished a known right, the issue is waived.

In deciding this issue below, the Air Force Court of Criminal Appeals (AFCCA) specifically cited Davis to support their conclusion that Appellant had waived this issue. Cook, 2024 CCA LEXIS 276, at *27. AFCCA's reliance on this Court's opinion in Davis in finding affirmative waiver in this case was not an anomaly. *See* Ozbirn, 2020 CCA LEXIS 138, at *48-49 (noting that "[i]f an appellant may waive so fundamental a matter as the elements of the offense, [the

Court did] not doubt the CAAF would also find he may waive an objection to the military judge's computation of the maximum punishment."); *see also* Hoffman, 2020 CCA LEXIS 198, at *18-19 (citing this Court's decision in Davis to support their determination that the appellant had affirmatively waived any error resulting from the military judge's computation of the maximum punishment and the resulting maximum punishment instruction to the members). Thus, this Court's decision in Davis supports a finding that appellants can affirmatively waive this issue, and CCAs have justifiably relied on Davis for their resolution of this same issue.

2. *This Court should be unpersuaded by Appellant's argument because Appellant misapprehended his citations of law.*

While the Appellant cites to several cases to support his position that computation of the maximum sentence is a nonwaivable issue, Appellant has made some fundamental errors in his interpretation of those cases. (App. Br. at 16-22.)

First, Appellant cites United States v. Stanley, 71 M.J. 60 (C.A.A.F. 2012), for the proposition that waiver does not apply to required instructions. (App. Br. at 18.) However, Appellant misapprehends the use of the word "waiver" in Stanley. In Stanley, this Court used the word waiver but discussed forfeiture. 71 M.J. at 63. This is apparent because this Court cited United States v. Davis, 53 M.J. 202, 205 (C.A.A.F. 2000) which discusses waiver in the context of a failure to object to an instruction where waiver is reviewed for plain error. This Court in Davis (2000)

was discussing forfeiture but was citing R.C.M. 920(f) which in the 1995 version of the Manual used the word waiver when it was describing forfeiture. Id. Pivotally, this Court has since found that required instructions *can* be affirmatively waived. In United States v. Gutierrez, this Court noted that required instructions cannot be waived *simply by* counsel's failure to request such instructions. 64 M.J. 374, 376 (C.A.A.F. 2007). Nonetheless, this Court determined that the defense counsel's statement "I simply do not want to request [a lesser included offense instruction] for the battery" constituted affirmative waiver of a required instruction. 64 M.J. at 377-378. Thus, Appellant's reliance on Stanley is misplaced, and this Court should adhere to its decision in Gutierrez by finding that Appellant affirmatively waived this issue.

Second, Appellant cites United States v. Leonard and United States v. Ronghi, asserting that the lack of discussion of waiver in those cases indicates waiver is not applicable to the issue of maximum sentence computation. (App. Br. at 21.) But that is a logical fallacy. In Leonard there is no indication in the opinion that either party on appeal raised the issue of waiver or that the requisite facts existed to support application of the waiver doctrine. 64 M.J. 381 (C.A.A.F. 2007). Moreover, the question before this Court was whether the military judge erred by referring to a federal statute to determine the maximum punishment, not an assertion that the calculation based on the statute was erroneous. 64 M.J. at

383. Similarly, in Ronghi, this Court addressed the question of whether the appellant's sentence to life without the possibility of parole was an authorized court-martial punishment. 60 M.J. 83, 84 (C.A.A.F. 2004). That is a fundamentally different question than the one currently before this Court. This Court in Ronghi was faced with determining whether the appellant had received an illegal sentence, something that this Court has made clear is nonwaivable. *See also* United States v. Dinger, 77 M.J. 447, 452 (C.A.A.F. 2018) (finding that while an accused may waive many of the most fundamental constitutional rights, they cannot waive their right to appeal a sentence that is unlawful.) Neither Ronghi nor Dinger stand for the proposition that an accused cannot waive the right to assert error regarding the computation of the maximum punishment, they merely say that an accused cannot waive the right to appeal an unlawful sentence. This distinction makes sense because it is the ultimate sentence imposed that matters in determining whether a court exceeded its statutory authority. Allowing review of the ultimate sentence ensures that where an Appellant waives a potentially improper maximum sentence calculation, courts can review to ensure that any error did not result in a sentence not authorized by law. Not every erroneous maximum sentence computation ends in an illegal sentence, and thus there may be no prejudice. But an illegal sentence is inherently prejudicial, and Dinger and Ronghi properly keep the focus on the actual imposed sentence. Here, the issue is not

whether Appellant received an unlawful sentence – he did not – it is whether the maximum punishment was properly computed. Even if the military judge was incorrect about the maximum punishment and it was only five years for Appellant's offense, by Appellant's own admission his adjudged sentence of 24 months was still well below the statutorily-authorized maximum punishment. (App. Br. at 14.)

Finally, Appellant attempts to draw a corollary between his case and United States v. Harden, 1 M.J. 258 (C.M.A. 1976), a case decided in 1976 by this Court's predecessor. (App. Br. at 19-20.) In Harden, the Court found waiver of the maximum punishment computation inapplicable because the initial sentence computation was proffered by the government, and trial defense counsel merely replied that they agreed with the prosecution. 1 M.J. at 258. But this Court's predecessor did not say that waiver could never apply, merely that based on the facts of Harden they would not apply it. Specifically, the Court asserted that there may be situations where a judge is misled by defense counsel, but Harden was not that case. Id.

Here, the initial maximum sentencing computation stemmed from a *joint* proposed instruction from both the defense and the government. (JA at 75, 182.) Moreover, the military judge asked defense counsel on two other occasions whether they agreed with the maximum sentence computation, and they responded

affirmatively each time. (JA at 184-185.) While it may be the military judge's "primary responsibility," to determine the maximum sentence (App. Br. at 22.), the defense counsel in this case had multiple opportunities to raise an objection and affirmatively noted they had none. (JA at 182, 184-185.) In this case if the judge was misled, the defense should "share the blame and responsibility for the error." 1 M.J. at 259. To hold otherwise would encourage defense counsel to sit idly by while a Court is making an error so they may later complain about it on appeal. The proper time to raise this objection would have been at any of the three opportunities provided by the military judge. Thus, Harden is distinguishable from this case, and this Court should not rely on it.

This Court should be unconvinced by Appellant's misguided citations of law and instead, rely on its own precedent in Davis and find that the issue of maximum sentence computation is waivable.

3. Appellant affirmatively waived his right to complain about the maximum sentence computation on appeal.

Not only *could* Appellant waive any error in the computation of his maximum sentence, he did so at trial. Appellant did not just fail to object and thereby merely forfeit his claim. On the contrary, Appellant affirmatively declined to object to the maximum sentence determination on three separate occasions during his trial. (JA at 182, 184-185.) Since Appellant thrice affirmatively waived

any objection, there is nothing left for this Court to review. Campos, 67 M.J. at 332.

At trial in accordance with R.C.M. 1005(c), the military judge had the parties submit "Joint Proposed Instructions and Maximum Sentence for the Article 134 Clause 3 offenses." (JA at 75, 181-182.) The Joint Proposed Instructions provided to the judge stated that the maximum sentence for the Article 134 offense was "no more than five (5) years confinement for each alien in respect to whom such a violation occurs. *See* 8 U.S.C. § 1324(B)(ii)." (JA at 76.) Prior to entering the sentencing phase, the military judge asked defense counsel if they agreed with the instructions and maximum sentence articulated in the proposed instructions. (JA at 182.) Trial defense counsel stated "[t]hat is accurate, Your Honor." (Id.)

Prior to sentencing proceedings, the military judge asked trial counsel what they were relying on for the maximum punishment calculation for the Article 134 offense. (JA at 184.) During the discussion, trial counsel indicated they believed the maximum punishment was "25 years of confinement. Five years for each alien." (JA at 184.) The military judge then confirmed that they were deriving this calculation from the plain language of 8 U.S.C. § 1324(a)(1)(b)(ii). (Id.) The military judge then again asked defense counsel if they agreed with the maximum sentence computation. (JA at 185.) Trial defense counsel again responded in the affirmative. (Id.) The military judge then asked whether the defense counsel

agreed that based on all the applicable charges that the maximum punishment overall would be 57 years and two months confinement. (JA at 185.) Once again trial defense counsel affirmatively stated "[y]es, Your Honor." (Id.)

While R.C.M. 1005(f) states that failure to object to an instruction shall constitute forfeiture of the objection, Appellant went beyond merely failing to object. Trial defense counsel "expressly and unequivocally acquisc[ed]" to the maximum sentence computation on three separate occasions. Davis, 79 M.J. at 331. At no point during any of these three exchanges did defense counsel object or ask for any modifications to the maximum sentence computation, thereby "directly bypass[ing] [three] offered opportunit[ies] to challenge and perhaps modify the instruction." Id. Appellant affirmatively waived any objection to the maximum sentence computation, leaving this Court no error to correct on appeal.

IV.

THE MILITARY JUDGE'S CALCULATION OF THE MAXIMUM PUNISHMENT FOR THE OFFENSE OF ILLEGALLY TRANSPORTING ALIENS IN VIOLATION OF 8 U.S.C. § 1324 WAS CORRECT AND THUS, NOT PLAIN ERROR.

Standard of Review

The maximum punishment authorized for an offense is a question of law, which this Court reviews de novo. United States v. Beaty, 70 M.J. 39, 41 (C.A.A.F. 2011). In cases of forfeiture, this Court reviews for plain error. United

States v. King, 83 M.J. 115, 120-121 (C.A.A.F. 2023). Under a plain error review the Appellant bears the burden of demonstrating (1) the error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights." Knapp, 73 M.J. at 36.

Law and Analysis

Even if this Court determines Appellant did not—or could not—waive the issue of proper maximum sentence computation, and instead applies the forfeiture framework, Appellant's claim still fails. In cases of forfeiture, this Court reviews for plain error. United States v. King, 83 M.J. 115, 120-121 (C.A.A.F. 2023). Under a plain error review the Appellant bears the burden of demonstrating (1) the error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights." Knapp, 73 M.J. at 36. Here, there is no plain error for three reasons: (1) the maximum sentence determination was not error; (2) given that there was no error, it could hardly be a clear and obvious one; and (3) even if it were an error, Appellant suffered no prejudice.

The military judge correctly calculated the applicable maximum punishment in this case consistent with the plain language of 8 U.S.C. § 1324. In this case, the military judge was obliged to apply the federal sentencing provisions contained within 8 U.S.C. §1324. R.C.M. 1003(c)(1)(ii). Here, the military judge was faced with a unique situation uncommon in military sentencing procedures. In the

statute, Congress has expressly and unambiguously authorized that the simultaneous transport of more than one alien in violation of 8 U.S.C. § 1324 is subject to cumulative punishment for each alien so transported. This type of cumulative punishment was endorsed by the Supreme Court in Bell, 349 U.S. at 82-83 ("Congress could no doubt make the simultaneous transportation of more than one woman in violation of the Mann Act liable to cumulative punishment for each woman so transported.") Thus, the military judge's determination that the maximum punishment of five years confinement under 8 U.S.C. § 1324(a)(1)(b)(ii) required multiplication by the number of aliens involved—here five—to arrive at the statutorily authorized maximum of 25 years confinement was correct, and this Court should find no plain error.

1. 8 U.S.C. § 1324 authorizes a punishment scheme unique in the military justice system.

Appellant was charged and convicted of an offense under Article 134, Clause 3, UCMJ—specifically a violation of federal law, 8 U.S.C. § 1324[4]. Because the offense involves the incorporation of a federal statute, the Manual

[4] The government's brief does not address Appellant's argument pertaining to Appellant's assertions that the government failed to state an offense because it did not contain all the requisite elements of the federal statute. (App. Br. at 26-27.) This Court did not grant review of that issue, and it is outside the scope of the issues this Court ordered briefed. Although Appellant asserts the government did not properly charge Appellant with a violation of 8 U.S.C. § 1324, (App. Br. at 26-27) the government maintains that all the elements of 8 U.S.C. § 1324 were alleged "expressly or by necessary implication." *See* M.C.M., para. 91.c.(6)(b).

does not provide a maximum punishment for this offense. Instead R.C.M. 1001(c)(1)(ii) states "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." 8 U.S.C. § 1324(1)(B)(ii) provides the statutorily authorized punishment for transporting an alien. It states that "[a] person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs…be fined under title 18, imprisoned not more than 5 years, or both." "Unless the text of a statute is ambiguous, 'the plain language…will control unless it leads to an absurd result.'" United States v. Schell, 72 M.J. 339, 343 (C.A.A.F. 2013) (quoting United States v. King, 71 M.J. 50, 52 (C.A.A.F. 2012). Here, the plain language of the statute indicates the penalties for a violation of 8 U.S.C. § 1324 are to be applied "for each alien." 8 U.S.C. § 1324(1)(B).

Federal courts have interpreted the plain language of the penalty provisions to indicate Congress' clear intent that the "penalties for violating § 1324(a)(1) could be multiplied by the number of aliens involved." United States v. Sanchez-Vargas, 878 F.2d 1163, 1168 (9th Cir. 1989); *See also* United States v. Gonzalez-Torres, 309 F.3d 594, 601-602 (9th Cir. 2002) ("[appellant] alleges that the penalty provision was not intended to apply to 'each alien,' but rather, was intended to apply to 'each conviction.' This position is directly contrary to the plain language of the statute and its legislative history."). In fact, this interpretation has been

settled law since 1957. *See* Vega-Murrillo, 247 F.2d at 738 ("It appears to us that Congress has expressly done in the statute here [8 U.S.C. § 1324] what the Supreme Court suggested in the Bell case it could have done in the Mann Act; namely, provided cumulative punishment for each person transported."); *See also* Vega-Murrillo v. United States, 264 F.2d 240, 241 (9th Cir. 1959) (explaining that where Congress has defined the unit of prosecution on an individual alien basis, each alien transported in a single transaction constitutes a separate offense for sentencing). While this sentencing structure is somewhat unique, such a system was endorsed by the Supreme Court in Bell.

In Bell, the Supreme Court explained that "[t]he punishment appropriate for the diverse federal offenses is a matter for the discretion of Congress, subject only to constitutional limitations." 349 U.S. at 82. In Bell the Court assessed whether the Mann Act authorized cumulative punishment. The Mann Act criminalized the transportation of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose." Id. at 82. The punishment provision in Bell stated whoever violated the Act "[s]hall be fined not more than $5,000 or imprisoned not more than five years or both." Id. In Bell the Court determined that because Congress had not fixed the punishment "clearly and without" ambiguity, lenity required the Court to find that it did not authorize cumulative punishment. Id. at 83-84. But the Supreme Court explicitly endorsed a system of

punishment like the one enshrined in 8 U.S.C. § 1324(1)(B)(ii), "Congress could [have] no doubt [made] the simultaneous transportation of more than one woman in violation of the Mann Act liable to cumulative punishment for each woman so transported." Id. at 82-83. In Bell, Congress simply had not. On the other hand, here Congress has expressly and unambiguously authorized that the simultaneous transport of more than one alien in violation of 8 U.S.C. § 1324 is subject to cumulative punishment for each alien so transported. Sanchez-Vargas, 878 F.2d at 1168.

This reading of 8 U.S.C. § 1324 is further supported by the 11th Circuit's opinion in United States v. Ortega-Torres. 174 F.3d 1199 (11th Cir. 1999). In Ortega-Torres, the court was interpreting the impact of the adoption of the language "for each alien in respect to whom a violation of this paragraph occurs" from the statutory punishment language for transporting aliens in 8 U.S.C. § 1324(a)(1)(B) into the punishment subsection for smuggling aliens in 8 U.S.C. § 1324(a)(2). Id. at 1201. The 11th Circuit ultimately concluded that the plain language of the change indicated that for purposes of sentencing under 8 U.S.C. § 1324(a)(2), courts should count each alien as a separate violation. Id.; *See also* United States v. Hsin-Yung Yeh, 278 F.3d 9, 16 (D.C. Cir. 2002) (concurring with Ortega-Torres that "Congress clearly expressed its intent that district courts determine the penalties for alien smuggling offenses based on the number of

aliens…smuggled into the United States."). This interpretation comports with the 9th Circuit's interpretation of the same language contained in 8 U.S.C. § 1342(a)(1)(B) in Sanchez-Vargas and Vega-Murrillo.

While "the plain language of the statute controls," an examination of the legislative history of Congress' incorporation of the punishment provision for transporting aliens into the punishment provision for smuggling aliens provides additional support for the premise that the language "for each alien" authorizes cumulative punishment. Schell, 72 M.J. at 343. In arriving at their decision in decision in Ortega-Torres, the 11th Circuit explained that their plain language reading of the punishment provision for smuggling aliens was supported by the legislative history behind the adoption of the statutory punishment language for transporting aliens in 8 U.S.C. § 1324(a)(1)(B) into the punishment subsection for smuggling aliens in 8 U.S.C. § 1324(a)(2). Ortega-Torres, 174 F.3d at 1201. Specifically, the court explained that in 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), PUB. L. NO. 104-208, 110 Stat. 3009-546. Id. Prior to the IIRIRA, the statute provided punishment be administered "for each transaction constituting a violation of this paragraph, regardless of the number of aliens involved." 8 U.S.C. § 1324(a)(2) (1996). As explained in the IIRIRA Conference Report "[t]his provision will change the standard for *calculating penalties* for alien smuggling crimes.

Henceforth, an offense will be counted for each alien smuggled, not, as under current law, for each transaction regardless of the number of aliens involved." H.R. Conf. Rep. No. 104-828, at 204 (1996) (emphasis added). Thus, the plain language of the penalty provision in 8 U.S.C. § 1324(a)(1)(B)—and the legislative history behind the same language being added into 8 U.S.C. § 1324(a)(2)—demonstrates that the penalty provision authorizes cumulative punishment based on the number of aliens involved in a given transaction.

Appellant cites several cases in support of his argument that the maximum punishment calculation should have been 5 years. (App. Br. at 32-33.) While the cases cited by Appellant indicate that in those respective cases the applicable maximum punishment was 5 years, those cases lack important context that leaves their persuasive value wanting. Neither United States v. Salazar-Villareal, 872 F.2d 121, 122 (5th Cir. 1989), United States v. Ramirez-De Rosas, 873 F.2d 1177 (9th Cir. 1989), nor United States v. Hilario-Hilario, 529 F.3d 65 (1st Cir. 2008) provide insight into the way the indictment was charged in their respective cases nor how many aliens were charged in each count.[5] Moreover, none of the cases

[5] In federal courts, other considerations not present in the military justice system may lead to charging each alien in a separate count. In Sepulveda v. Squier, 192 F.2d 796 (9th Cir. 1951), when interpreting a predecessor to 8 U.S.C. § 1324, the court said, "Logically it would seem that the offense as appertaining to each alien should be set forth in a separate count so that the court may intelligently impose sentence. Otherwise, the judge can not certainly know whether a general verdict of guilty imports a finding that all the aliens named, or only some of them, had been

cited by Appellant address the "for each alien in respect to whom such a violation occurs" language contained in 8 U.S.C. § 1324(a)(1)(B). Finally, those cases provide little analysis as to the potential impact of the Federal Sentencing Guidelines on their maximum punishment determination. To the extent they involved the guidelines, the guidelines do not apply in courts-martial. *See* United States v. Garner, 39 M.J. 721, 727 (N-M.C.M.R. 1993). Given the lack of clarity in the cases cited by Appellant and the lack of discussion regarding the cumulative punishment provision, this Court should not find that the military judge's adherence to the plain language of the statute was plain or obvious error.

In determining that the maximum punishment in Appellant's case was 25 years—5 years for each alien involved—the military judge adhered to the plain language of the statute and instituted a punishment in accordance therewith. The military judge's maximum sentence computation was not error, much less plain and obvious error. This Court should deny this assignment of error.

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illegally brought in." Such concerns are not present in the military justice system when each alien is named in the specification. The members may make findings by exceptions and substitution under R.C.M. 918(a)(1)(C). If the members convict, but do not make exceptions and substitutions, it must be assumed that they found the accused guilty of transporting all aliens named in a specification.

2. *Appellant waived any objection regarding duplicity, so he cannot now claim the offense should have been charged as five separate specifications.*

In support of his argument that the military judge's maximum sentence computation was error, Appellant cites United States v. Martinez-Gonzales, 89 F. Supp. 62 (S.D. Cal. 1950). (App. Br. at 28.) In Martinez-Gonzales, the district court assessed a single count indictment alleging a violation of 8 U.S.C. § 144[6], referred to as the Smuggling Aliens statute, with respect to four named aliens. 89 F. Supp. at 63. At trial, the jury convicted appellant as to only one alien. Id. The court concluded the indictment was duplicitous because the statute created a separate offense as to each alien by virtue of its prescription of a mandatory punishment "for each and every alien" involved. Id. at 64-65. Therefore, the court concluded 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. at 65. But in Martinez-Gonzales, the appellant asserted the charge was duplicitous because "a [federal] jury cannot find a verdict of guilty as to one part of a count in an indictment and not guilty as to another part of the same count." Id. at 64. In the military justice system, a panel of members is permitted to find guilt based on exceptions and substitutions, thus the concern that was before the Court in

[6] 8 U.S.C. § 144 is the predecessor to the current 8 U.S.C. § 1324.

Martinez-Gonzales, does not apply here, which leaves its precedential value in question.

Even so, the First Circuit analyzed the same question in Serentino v. United States and arrived at a different result. 36 F.2d 871, 872 (1st Cir. 1930). In Serentino, the Court also analyzed the punishment provision in 8 U.S.C. § 144. Id. Specifically, the Court evaluated whether an indictment alleging eleven aliens in a single count constituted a single offense. In determining that it did, the Court stated, "count 1 alleges a single act or transaction in violation of law, the bringing in of eleven aliens at one time, we are convinced that it charges a single offense." Id. Despite the specification alleging a single offense, the Court determined the proper punishment calculation required the Court to impose a sentence increased by the number of aliens involved, because the act expressly "provide[d] that the offender 'upon conviction thereof shall be punished…by imprisonment for a term not exceeding five years, for *each and every alien* so landed or brought in.'" Id. (emphasis in original). This Court should follow Serentino and find that the specification was not duplicitous because it alleged a single offense that was subject to cumulative punishment for "each alien in respect to whom a violation occurs." 8 U.S.C. § 1324(a)(1)(B). But in light of disagreement among federal courts, the military judge's treatment of the specification as non-duplicitous cannot be plain error.

Appellant also cites to Mincey, and as he seems to acknowledge, that case weighs in favor of the government here. (App. Br. at 31.) Mincey stands for two pivotal propositions: (1) this Court found that duplicity is a waivable issue; and (2) even where a specification is duplicitous, relief may not be merited. 42 M.J. at 378. Here, Appellant waived the duplicity issue and even if this Court finds he did not, relief is not warranted.

A. Appellant waived any objection as to duplicity.

Even if this Court finds that the specification here is duplicitous, Appellant waived any objection regarding duplicity when he failed to object at trial and agreed to the maximum punishment calculation. Duplicity exists where a single specification states two offenses. *See* R.C.M. 307(c)(4) ("Each specification shall state only one offense.") In Mincey, this Court assessed whether the military judge miscalculated the maximum punishment for the appellant's bad checks conviction. 42 M.J. at 377. The appellant uttered a total of 18 bad checks which were charged in four specifications, some of which charged multiple checks in the same specification. Id. The Court found that the government's charging scheme violated R.C.M. 307's command that "[e]ach specification shall state only one offense," in determining the specifications at issue were duplicitous. But the Court determined that the appellant had "waived" any complaint regarding duplicity by

failing to object to the "misjoinder of numerous bad-check offenses into one duplicitous specification." Id. at 378.

While failure to object is ordinarily treated as forfeiture, this Court's decision in Hardy supports a finding of waiver of this issue. In Hardy, this Court found that when defense counsel state they agree with the government's calculated maximum punishment, they waive any unnecessary multiplication of charges objection because such an objection would impact the maximum sentence. 77 M.J. at 442. In Mincey, this Court recognized that duplicitous specifications can impact the calculation of the maximum punishment. 42 M.J. at 377-378. Following this Court's reasoning from Hardy, because duplicity can affect the maximum sentence calculation, it logically follows that agreeing with the maximum sentence computation would constitute waiver of duplicity the same as it does for unreasonable multiplication of charges.

Here, the military judge made clear through his discussions with counsel at trial that he intended to apply a cumulative punishment for each alien involved. (JA at 184.) Specifically, after the government asserted the maximum punishment was "25 years of confinement. Five years for each alien," the military judge ensured the government's calculation comported with 8 U.S.C. § 1324(a)(1)(B)(ii). (Id.) The military judge then asked defense counsel if they agreed with that calculation, to which defense counsel affirmatively stated "Yes, Your Honor." (JA

at 185.) Defense counsel was provided the opportunity to contest or modify the maximum sentence computation, but defense counsel "expressly and unequivocally acquisc[ed]" to the computation. Davis, 79 M.J. at 331. Thus, Appellant waived any objection to duplicity by virtue of his agreement to the government's calculated maximum punishment. And if the specification was not duplicitous, Appellant's sentence was properly calculated.

B. Appellant was not prejudiced by any potential duplicity.

Even if this Court does not find Appellant waived the issue of duplicity, this Court should follow the reasoning in Mincey in determining that Appellant was not prejudiced. Despite Appellant's assertion that Mincey is limited to bad-check offenses (App. Br. at 31), Appellant misreads Mincey. In Mincey this Court stated that it neither "condone[d] nor condemn[ed] the practice of joining numerous offenses into one specification for ease of pleading and prosecuting the case." 42 M.J. at 378. Thus, Mincey did not state that it's reasoning was limited solely to bad checks cases, it just adhered their ruling only to the issue properly before the Court. Mincey also pointed out that under R.C.M. 1003(c)(1)(A)(i), punishment is authorized for each separate offense, not for each specification. Id. The Court recognized that despite the joinder of offenses, "in reality appellant was convicted of 17 offenses of uttering bad checks." Id. This meant it was appropriate to sentence the appellant for 17 offenses, rather than four specifications. The same

logic would apply here. R.C.M. 1003(c)(1)(B)(ii), the sentencing provision at issue in this case, also discusses punishment by offense not by specification. If the specification in this case indeed charged five separate offenses, then Appellant should be able to be sentenced per offense, like in Mincey.

In Mincey, after finding error this Court determined that although the specifications were duplicitous, that error did not prejudice the appellant. 42 M.J. at 378. In arriving at that conclusion, the Court noted that in determining punishment "[w]e look to the offenses of which an accused has been convicted to determine his punishment." Id. This Court noted that "notwithstanding the joinder of multiple offenses under each specification [of the Charge], in reality appellant was convicted of 17 offenses of uttering bad checks, in violation of Article 123a." Id. This Court then determined the maximum sentence by multiplying the maximum punishment for a single violation by 17—the number of offenses. Id. The Court stated that this was the proper method for calculating the maximum sentence "regardless [of] whether the Government correctly pleads only one offense in each specification or whether the Government joins them in a single specification." Id.

Here, the government charged a violation of 8 U.S.C. § 1324 that involved five aliens being simultaneously transported. 8 U.S.C. § 1324 specifically authorizes a punishment of 5 years for each violation compounded by the number

of aliens involved in that violation. 8 U.S.C. § 1324(1)(B). That is precisely how the miliary judge determined the maximum sentence computation—multiplying the maximum punishment for one violation by each alien charged. Thus, even if the specification here were duplicitous because each alien represented a separate offense, the military judge properly determined the applicable sentence for all offenses of which Appellant was convicted.

Moreover, the lack of prejudice to Appellant from this charging scheme becomes more apparent when this Court considers the remedy for duplicity. "The sole remedy for a duplicitous specification is severance of the specification into two or more specifications, each of which alleges a separate offense contained in the duplicitous specification." R.C.M. 906(b)(5), Discussion. Here, even if the specifications were duplicitous and Appellant had properly objected at trial, the appropriate remedy would have been breaking the specification into five separate specifications with each alien transported named individually. Further, Appellant has not indicated that he was in any way inhibited from presenting his defense based on the charged specification. Given that Appellant was convicted of the transport of all five aliens, he would be in the same position as he is now, subject to a maximum punishment of 25 years of confinement. Thus, as in Mincey, this Court should find no prejudice under these circumstances and that the proper maximum punishment calculation in this case multiplies by the number of aliens

transported "as if they had been charged separately, regardless whether the Government correctly pleads only one offense in each specification or whether the Government joins them in a single specification." Mincey, 42 M.J. at 378.

Appellant provides a string of parenthetical citations to support his position that any duplicity in this case was prejudicial. (App. Br. at 30.) A closer analysis of those cases reveals that they lack persuasive value here. First, Appellant cites to United States v. Calhoun, 18 C.M.R. 52, 55 (C.M.A. 1955), and asserts it stands for the proposition that duplicitous pleading is prejudicial if it results in a multiplied maximum sentence for conjoined offenses. (App. Br. at 30.) But Calhoun merely stated that as long as the duplicitous specification did not deny the appellant the adequate opportunity to prepare his defense "or cause[] him to be twice sentenced for the same offense" there was no prejudice. 18 C.M.R. at 55. But Appellant has not asserted that any duplicity hindered his ability to prepare his defense. And if the specification was duplicitous, then Appellant would have been sentenced for five offenses – not twice for the same offense.

Appellant next cites United States v. Mack, 58 M.J. 413, 418 (C.A.A.F. 2003) for the proposition that the maximum sentence for a conjoined specification is lower than if they had been charged separately. (App. Br. at 30.) But in Mack, the appellant was erroneously charged with two specifications of conspiracy, where only one conspiracy existed. 58 M.J. at 418. The Court consolidated the

two specifications because there was only one offense, and thus the appellant could only be sentenced for one offense. Id. Mack lacks any persuasive value here, where, if the specification were indeed duplicitous, there were 5 separate offenses—one for each alien.

Appellant also cited to United States v. Campbell, 71 M.J. 19, 25 (C.A.A.F. 2012), stating that this Court held "it would be inappropriate to set the maximum punishment based on an aggregation of the maximum punishments for each separate offense." (App. Br. at 30.) But Appellant fails to point out that the Court's holding stated it was not an abuse of the military judge's discretion to merge the offenses for purposes of sentencing, not that the military judge was required to do so. Campbell, 71 M.J. at 25. Thus, Campbell does not mandate the proposition Appellant asserts and this Court should be unpersuaded.

Following that, Appellant cites United States v. Lovejoy, where the Court stated that "when two or more acts of sodomy between the same persons are set out in a single specification, the result is beneficial to the accused." 42 C.M.R. 210, 212 (C.M.A. 1970). The Court premised its holding on the fact that, based on the facts of the case, the government had only alleged a single offense of sodomy. Id. As previously pointed out, if the specification could be deemed duplicitous, here there were five distinct offenses involving 5 different aliens. Thus, Lovejoy

provides no guidance because it only pertains to situations where a single offense was alleged.

In sum, the cases cited by Appellant are no analogous to Appellant's. Here, assuming the specification resulted in joinder of multiple offenses, this Court should follow the reasoning in Mincey and find that his maximum sentence was appropriately calculated.

3. *Even assuming error, Appellant was not prejudiced by any miscalculation of the maximum sentence.*

Pursuant to Article 59, UCMJ, 10 U.S.C. §59(a), "[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." In assessing for prejudice stemming from an error in the sentencing phase, the ultimate question before this Court is "whether the error substantially influenced the adjudged sentence." Edwards, 82 M.J. at 246 (quoting Barker, 77 M.J. at 384). Even if there was error, Appellant has not been prejudiced by that error.

Here, this Court should be convinced that any error did not have a substantial influence on the adjudged sentence. While Appellant asserts that because of the gulf in the military judge's maximum sentence computation of 25 years and Appellant's asserted computation of 5 years—prejudice should be assumed, this Court should not be convinced. (App. Br. at 34-36.)

Appellant was found guilty of transporting not one but five aliens in violation of 8 U.S.C. § 1324. One of those aliens Appellant transported had three prior convictions for drunk driving offenses. (JA at 29.) Moreover, the government's provided strong evidence in aggravation. Specifically, the government introduced Appellant's prior nonjudicial punishment for marijuana use followed by a vacation action for additional misconduct—reflecting Appellant's demonstrated low rehabilitative potential. (JA at 30.) Appellant's transporting and conspiring to transport five aliens—one of whom was a repeat criminal offender—coupled together with the evidence of Appellant's prior misconduct reflect that his offense was on the higher end of the severity spectrum for his crimes.

Even assuming Appellant's maximum sentence computation is correct, he received less than half of the potential five year punishment. Based on the military judge's maximum sentence computation of 25 years, the 24 months confinement Appellant received was approximately eight percent of the potential punishment. Due to the minimal punishment Appellant received this Court should be assured that Appellant's sentence was not impacted by the error because as the CCA noted, the military judge was sentencing Appellant for the *"same set of operative facts*." 2024 CCA LEXIS at *60. This is especially true where the CCA noted even if they had conducted a sentence reassessment, they would have "concluded the military judge would have sentenced Appellant to the same term of confinement

even under Appellant's suggested maximum punishment calculation." Id. Therefore, this Court should find that the sentence was not substantially influenced by any potential error and that Appellant is not entitled to relief.

In sum, this Court should find that the military judge properly calculated the applicable maximum sentence in accordance with long-settled federal law and deny Appellant's assertion of error. Even if this Court decides the issue is nonwaivable and determines there was error, this Court should find that there was no prejudice to Appellant.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the decision of the Court of Criminal Appeals.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and transmitted by electronic means with the consent of the counsel being served via email to michael.bruzik@us.af.mil on 21 March 2025.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because: This brief contains 10465 words. This brief complies with the typeface and type style requirements of Rule 37.

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