IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee,

v.

LEO J. NAVARRO AGUIRRE
Airman First Class (E-3),
United States Air Force,
Appellant.

USCA Dkt. No. 24-0146/AF

Crim. App. Dkt. No. ACM 40354

BRIEF ON BEHALF OF APPELLANT

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Whether Airman First Class Navarro Aguirre's conviction for wrongful Ambien use is legally sufficient when: (1) he had a valid prescription for Ambien, and (2) the basis for his conviction was a medically-known side effect.

II.

Whether Airman First Class Navarro Aguirre's guilty plea for reckless driving was provident when he took his prescribed dose of Ambien, fell asleep in his bed, and "the next thing [he] remember[ed] is being behind the wheel of [his] car."

Statement of Statutory Jurisdiction

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

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

Statement of the Case

On March 26, 2022, a Military Judge sitting as a general court-martial at Joint Base Lewis-McChord, Washington, convicted Appellant, Airman First Class (A1C) Leo J. Navarro Aguirre, pursuant to his pleas, of one charge and one specification of failure to obey a lawful order in violation of Article 92, UCMJ, 10 U.S.C. § 892, and one charge and one specification of wrongful use of oxycodone in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, and one charge and one specification of reckless driving in violation of Article 113, UCMJ, 10 U.S.C. § 913. Joint Appendix (JA) at 002. Contrary to his pleas, a panel of officer and enlisted members convicted A1C Navarro Aguirre of one charge and one specification of wrongful use of Ambien in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, and one charge with one specification of assault consummated by a battery and one specification of aggravated assault, both in violation of Article 128, UCMJ, 10 U.S.C. § 928.[2] *Id.*

The Military Judge sentenced A1C Navarro Aguirre to a reprimand, reduction to E-1, forfeiture of all pay and allowances, two years and two months of confinement, and a bad-conduct discharge. *Id.*

[2] A1C Navarro Aguirre was acquitted of other charged specifications.

The Convening Authority took no action on the findings. *Id*. The Convening Authority suspended the first six months of the adjudged forfeiture of total pay and allowances from the date of the entry of judgment and ordered it to be remitted without further action, unless the suspension was previously vacated. *Id.* The collection of the remaining total pay and allowances would begin at the end of the period of suspension, or sooner if vacated. *Id*. The Convening Authority also approved A1C Navarro Aguirre's request for waiver of all automatic forfeitures for a period of six months and directed them to A1C Navarro Aguirre's spouse. *Id.* The Convening Authority approved the remainder of the sentence. JA at 002–03. The Air Force Court affirmed the findings and the sentence. JA at 019.

Statement of Facts

A. The initial *Care*[3] inquiry for reckless driving described Airman First Class Navarro Aguirre's use of prescription Ambien.

A1C Navarro Aguirre's Ambien use forms the basis for both his wrongful use charge under Article 112a, UCMJ, and his reckless driving charge under Article 113, UCMJ. JA at 086–87. A1C Navarro Aguirre

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

pled guilty to reckless driving except for the words "and aerosol inhalants." JA at 071–72. A1C Navarro Aguirre did *not* plead guilty to wrongful Ambien use. JA at 069.

During the *Care* inquiry for reckless driving, A1C Navarro Aguirre explained that a nurse practitioner "prescribed Ambien the day before . . . to help [him] sleep." JA at 072. A1C Navarro Aguirre worked a standard shift of eight to ten hours the day he took the Ambien, which ended between 1430 and 1630. JA at 073, 110. He took the "prescribed dose of one pill" because he "hadn't slept in almost two-days." JA at 072–73. A1C Navarro Aguirre fell asleep in his bed and the next thing he remembered was being in the driver's seat of his car with police officers talking to him. JA at 073. This occurred around the 1800 hour. JA at 095. He recalled feeling "dazed, groggy, slow, and having a hard time understanding the police officers." JA at 080. The Military Judge initially accepted his guilty plea but re-opened it after the Government's case-in-chief for additional inquiry. JA at 082, 140.

B. Both parties offered further evidence regarding Airman First Class Navarro Aguirre's Ambien use and the charged reckless driving incident.

Because A1C Navarro Aguirre did *not* plead guilty to the words "and aerosol inhalants," the Government called four witnesses to develop the facts surrounding A1C Navarro Aguirre's alleged reckless driving. JA at 088, 094, 100, 105. The responding law enforcement officer said that A1C Navarro Aguirre admitted, "Yeah I took me some Ambien." JA at 099. No further discussion of Ambien took place. *Id.* The paralegal who photographed A1C Navarro Aguirre's car—75-days after the incident—found a written prescription for the Ambien in the car. JA at 040, 101–02, 104. The Government did not find an Ambien bottle or pills in the car. JA at 032–40; *see also* JA at 122, 129.

The Defense Counsel pre-admitted the Food and Drug Administration (FDA) warning label associated with Ambien with no Government objection. JA at 041–66, 084.

The nurse practitioner who prescribed the Ambien to A1C Navarro Aguirre testified that A1C Navarro Aguirre had "a medical purpose" and an "authorization" to use Ambien on the charged date. JA at 114. Typically, Ambien should be used "30 minutes before bedtime," but "some

people have shift work, so sometimes it can be different times of day." JA at 116. The nurse practitioner also stated that the use of Ambien an hour or two before bedtime does not invalidate the prescription or make it "illegal." JA at 117.

C. The Defense moved twice for a finding of not guilty on the wrongful use of Ambien.

Under R.C.M. 917, the Defense Counsel moved for a finding of not guilty for the unlawful use of Ambien. JA at 119. Defense Counsel argued that not only did the Government fail to show that A1C Navarro Aguirre's use of Ambien was wrongful, but "there is significant evidence to the contrary in the form of the prescription provided." *Id.* The Government conceded that A1C Navarro Aguirre had a valid prescription for Ambien. JA at 086, 119.

The Government responded with two broad points. First, the Government argued the use was wrongful because the Ambien was not taken "right before bed." JA at 119. Defense Counsel countered with the nurse practitioner's testimony that if the correct dose was taken, the timing of the use would not "invalidate the [p]rescription or make the use illegal." JA at 120. The second argument the Government made was that a piece of paper showing A1C Navarro Aguirre's prescription was seen in

his car, he told the cop he took Ambien, and he was in his military uniform when pulled over. JA at 121. The Government suggested this was circumstantial evidence of wrongful use. JA at 121–22. The Government conceded, "We don't have any eyewitnesses or any testimony or rather recorded statements from Airman Navarro himself saying 'I openly admit I am not using this for the correct purpose.'" JA at 121. In denying the motion, the Military Judge said:

> The government provided the testimony of [M.D.], [M.C.], [E.P.], and [A.S.] to establish the manner in which the accused was allegedly driving, the time of day it was, what he was wearing, whether he was on shift work, statements allegedly made by the accused to [M.C.], and photographs of the accused's vehicle at a later time.

JA at 124.

The Military Judge instructed the members that "[u]se of a controlled substance is not wrongful if the controlled substance is prescribed by a doctor and the use of the substance is for the medical purpose prescribed." JA at 127. The members found A1C Navarro Aguirre not guilty of the words "and aerosol inhalants" for the reckless driving charge but found him guilty of wrongful use of Ambien. JA at 130.

After the verdict on wrongful Ambien use, the Defense Counsel

moved the Court to reconsider the R.C.M. 917 ruling. JA at 131–36. The Defense asked the Military Judge to consider the *Care* inquiry as part of its request for reconsideration, but the military judge did not consider the *Care* inquiry. JA at 132, 143. The Military Judge denied the Defense's motion for reconsideration because "the Court finds that the substance was prescribed to assist in sleeping, but it was for sleeping at night or at least for when sleep would be uninterrupted for several hours." JA at 137.

D. The Military Judge re-opened the *Care* inquiry to address inconsistencies between the guilty plea for reckless driving and information in the FDA Ambien Information Sheet.

Based on the "subject of the [R.C.M. 917 reconsideration] motion" and the FDA Ambien Information Sheet, the Military Judge re-opened the *Care* inquiry. JA at 137. The Military Judge recognized that there was "something of a defense of automatism, so if someone has sort of involuntary action, so if they have a seizure or an involuntary act, then there's no reason for the law to criminalize that." *Id.* This issue was principally rooted in the FDA Ambien Information Sheet and its reference to "sleep-driving" as a medically known side effect. JA at 138. The Military Judge was concerned that A1C Navarro Aguirre was sleeping while driving and thus did not know he was driving. *Id.*

A1C Navarro Aguirre expressed belief that he was in physical control of the car, even though he was under the influence of Ambien. JA at 140–41. When the Military Judge asked him why he believed he was in control of the car, A1C Navarro Aguirre replied in three ways: First, he had to take certain actions to get into the car and then to drive the car (put shoes on, get car keys, start the car, etc.); second, from witness testimony he knew he was driving the car; and third, when his memory "kicks back in" it "didn't feel like waking up from sleep." JA at 141. He said this despite not "remember[ing] the facts" and the fact that this was his first time taking Ambien. JA at 072–73, 142. A1C Navarro Aguirre believed he was "aware" of certain voluntary actions like honking and music playing; he "believe[d] those [were] voluntary actions." JA at 143. Based on A1C Navarro Aguirre's additional statements, the Military Judge accepted his plea as provident. *Id.*

E. The Air Force Court affirmed the findings.

In its legal and factual sufficiency analysis for the wrongful use of Ambien, the Air Force Court correctly noted, "Appellant chose to inform the members of his guilty pleas at the onset of the litigated findings." JA at 018. However, "his explanation of taking the prescribed dose while in

his apartment after arriving home from work, for the purposes of taking a nap, were facts not in evidence before the panel as to the offense of wrongful use of Ambien." *Id.* The Air Force Court acknowledged that the evidence the Government admitted to the factfinder was "circumstantial." *Id.* The court declined to consider information from the *Care* inquiry. JA at 019.

As to the providence of A1C Navarro Aguirre's guilty plea, the Air Force Court noted, "This assignment of error questions whether, despite his plea at trial, Appellant committed an involuntary act when he drove his vehicle recklessly." JA at 015. However, the Air Force Court then stated, "Whether the Ambien caused involuntary 'actus reus' on Appellant's part was not raised by *evidence* introduced at trial and was explicitly denied by Appellant." *Id.* It concluded, "We will not speculate on the existence of facts that might invalidate a plea especially where the matter raised post-trial contradicts an appellant's expressed admission on the record." *Id.* (citation omitted). The Air Force Court affirmed the findings and the sentence. JA at 019.

Summary of the Argument

The UCMJ "requires that a guilty plea be in accordance with actual facts" because an accused must be, "in fact, guilty." *United States v. Davenport*, 9 M.J. 364, 366-67 (C.M.A. 1980). A providence inquiry that does not show a consistent factual basis is insufficient to support a finding of guilty. A1C Navarro Aguirre stands convicted of two offenses despite significant evidence that he was not—in fact—guilty because of the side effects of Ambien. Instead of looking at the facts holistically and "whether the record evidence could *reasonably* support a finding of guilt beyond a reasonable doubt," both the Military Judge and the Air Force Court engaged in a restrictive reading of the facts that failed to resolve the blatant factual inconsistencies. *Jackson v. Virginia*, 443 U.S. 307, 318 (1979) (emphasis added).

A1C Navarro Aguirre's conviction for wrongful use of Ambien is legally insufficient because his use was not wrongful. He had a valid prescription for Ambien, a drug that is known to cause complex sleep behaviors including sleep driving. The Government's evidence did not prove that his use of Ambien was against his prescription, and it relied on innocuous circumstances that are consistent with experiencing a

known side effect. The legal insufficiency becomes starker in light of A1C Navarro Aguirre's statements from the *Care* inquiry, which the Court must consider as part of its consideration of the entire record. He indicated he took Ambien at home and last remembered lying down in his bed; the next thing he remembered is being in his car and speaking with a police officer. This is consistent with lawfully using a prescribed drug and experiencing a known side effect, not wrongful use.

Likewise, A1C Navarro Aguirre's guilty plea to reckless driving is improvident because it failed to resolve inconsistencies in the evidence. His driving was not reckless because the side effects of Ambien caused him to not know what he was doing. This inconsistency caused the Military Judge to reopen the *Care* inquiry after receiving evidence of the side effects of Ambien. But he still accepted the guilty plea based on A1C Navarro Aguirre's statements about how he knew he was driving. These statements did not establish why his actions were reckless, which requires a "culpable disregard" for the "foreseeable consequences to others." JA at 071–72. Without reconciling the inconsistency between actions A1C Navarro Aguirre did not know he was doing and the requirement for reckless conduct, the guilty plea is improvident.

Argument

I.

A1C Navarro Aguirre's conviction for wrongful Ambien use is legally insufficient because (1) he had a valid prescription for Ambien and (2) the basis for his conviction was a medically-known side effect.

Standard of Review

This Court reviews issues of legal sufficiency de novo. *United States v. Harman*, 68 M.J. 325, 327 (C.A.A.F. 2010).

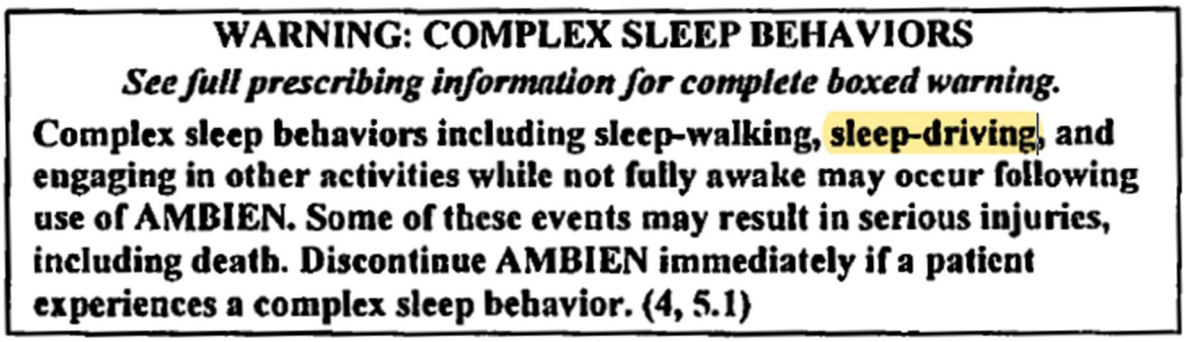
Law and Analysis

With or without the evidence from A1C Navarro Aguirre's *Care* inquiry, the evidence is legally insufficient to support a conviction for wrongful use of Ambien. For legal sufficiency, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any *rational* trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319; *see also United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)) (applying the same legal sufficiency test). A conviction is legally insufficient—even with some evidence presented—if it falls below the lower limit of evidentiary sufficiency. *Jackson*, 443 U.S. at 320.

A. A1C Navarro Aguirre was a victim of sleep driving, not an Ambien abuser.

The elements for unlawful use of a controlled substance under Article 112a(b), UCMJ, 10 U.S.C. § 912a(b) are: (1) that the accused used a controlled substance; and (2) the use was wrongful. "Wrongful" means that use is done "without legal justification or authorization." *2019 MCM*, Part IV, ¶ 51(c)(5). Here, A1C Navarro Aguirre had a prescription to use Ambien, giving him legal justification and authorization to do so. JA at 067. Thus, to be legally sufficient, the evidence had to prove A1C Navarro Aguirre's use of Ambien was somehow wrongful despite his valid prescription.

The evidence did not show A1C Navarro Aguirre's use of Ambien was wrongful. Rather, it revealed that he suffered from a side effect of Ambien known as "Sleep-driving." JA at. 043–44, 061–62. A warning at the beginning of the Full Prescribing Information on the FDA Ambien Information Sheet identifies "sleep-driving" as a risk of Ambien use:



JA at 043 (emphasis added).

The FDA Ambien Information Sheet further explains that "complex sleep behaviors," such as "sleep-driving," can occur on the very *first* use of Ambien. JA at 044. A1C Navarro Aguirre picked up his prescription on September 30, 2021, and the charged conduct occurred on October 1, 2021. JA at 020, 113. It can be surmised from those dates that this was his first use of Ambien. *See also* JA at 072–73. This Court should find that there was insufficient evidence of wrongful use given that A1C Navarro Aguirre suffered from an involuntary medical reaction after his first use of the medication.

The FDA Ambien Information Sheet also explains that a person "may get up out of bed *while not being fully awake* and do an activity that *[they] do not know [they] are doing*." JA at 064 (emphasis added). The drug maker's explanation that an individual does not know what they are doing undercuts the Government's main arguments for wrongfulness.

It argued A1C Navarro Aguirre "was found high driving on the roads at 6:00 o'clock in the afternoon, an hour and a half later, in his military uniform not even at home yet." JA at 133. Based on these circumstances, the Government advanced the conclusion that "the accused was getting high before ever even getting home." *Id.* The record is devoid of evidence showing that this was the case; instead, the Government encouraged the court-martial to draw an irrational conclusion without accounting for the mind-altering side effects of lawful Ambien use. The circumstances highlighted by the Government do not show wrongful use because they are consistent with A1C Navarro Aguirre experiencing known side effects that caused him to do things he did not know he was doing. Thus, the conclusion advanced by the Government was irrevocably contradicted by the FDA Ambien Information Sheet, and it failed to establish wrongfulness beyond a reasonable doubt.

Determining wrongfulness based on a drug's effect is not reasonable, fair, or rational. This is what the Military Judge did when he found wrongfulness because of "the manner in which the accused was allegedly driving." JA at 124, 136. This reasoning departs from the key question of whether the use itself was wrongful. The effects of a

prescription drug do not show a person wrongfully used it, especially when those effects are known side effects of the prescription drug. Given A1C Navarro Aguirre's valid prescription for Ambien and its known side effects, this Court should reject any reasoning that attempts to establish wrongfulness based on the effects of the drug.

Similarly, considering the time of day to find wrongfulness is not a reasonable interpretation of the evidence. The nurse practitioner who prescribed Ambien for A1C Navarro Aguirre testified that if a person who has a prescription for Ambien takes it an hour or two hours before bedtime, the prescription would not be invalidated or make the use "illegal." JA at 117. Her further testimony that people can take Ambien at different times based on their schedules essentially established that there is no particular time at which a patient must take Ambien. JA at 116. Despite this, the Military Judge denied the R.C.M. 917 motion based on "the time of day it was." JA at 124. This went directly against the testimony of the nurse practitioner. On reconsideration, the Military Judge denied the motion for the same reasons, further stating, "[T]he Court finds that the substance was prescribed to assist in sleeping, *but it*

was for sleeping at night or at least sleeping for when sleep would be uninterrupted for several hours." JA at 137 (emphasis added).

The Military Judge's conclusion went against the evidence. The nurse practitioner never stated that the prescription was for "sleeping at night," and she acknowledged that people can take it at different times of the day. JA at 116. Moreover, there was no evidence that A1C Navarro Aguirre was not prepared to sleep uninterrupted for several hours when he took Ambien. His shift had ended for the day, so he could have slept that long if he had not experienced the known side effect of sleep driving. JA at 137.

The rest of the Government's evidence does not even offer a foothold for a rational factfinder to find wrongfulness, even when viewed in a light most favorable to the Government. A1C Navarro Aguirre only told the police officer, "Yeah I took me some Ambien." JA at 099. He did not say when or where he took it. Likewise, the fact that A1C Navarro Aguirre was wearing a t-shirt from his military uniform does not prove wrongfulness because he could have worn it when going to sleep or put it back on while under the influence of Ambien. Finally, the fact that the Government found the prescription paperwork in the car 75-days after

the charged timeframe does not indicate A1C Navarro Aguirre used Ambien in his car, nor does it rationally or reasonably support a finding of guilt beyond a reasonable doubt. That evidence only further confirmed that A1C Navarro Aguirre had a valid prescription.

A theory that A1C Navarro Aguirre drove around for at least two-hours before he was observed does not serve to "*fairly* . . . resolve conflicts in the testimony, to weigh the evidence, and to draw *reasonable* inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319 (emphasis added). This Court has the FDA Ambien Information Sheet as evidence, which states that sleep-driving is a real phenomenon. JA at 064. As such, this Court should find that A1C Navarro Aguirre's use was not wrongful. Rather, the fair and reasonable explanation, even in the light most favorable to the Government, is that A1C Navarro Aguirre was sleep-driving after lawfully using his prescribed medication. Under these circumstances, no rational factfinder could find that A1C Navarro Aguirre's use of Ambien was wrongful beyond a reasonable doubt. His conviction is legally insufficient.

B. This Court considers the entire record, including any *Care* inquiry, as part of its legal sufficiency analysis, and statements from the *Care* inquiry confirm that Airman First Class Navarro Aguirre's Ambien use was not wrongful.

The evidence is legally insufficient to support the conviction for wrongful use of Ambien without considering statements from the *Care* inquiry. Adding in those statements, which this Court should do under the plain meaning of both the applicable statute and precedent, bolsters this conclusion by demonstrating that A1C Navarro Aguirre's Ambien use was not wrongful. During the *Care* inquiry for the reckless driving offense, A1C Navarro Aguirre stated that he remembered taking Ambien at his house and falling asleep in his bed. JA at 073. This contravenes any notion of wrongful use. But the Air Force Court declined to consider this evidence when performing its review of the findings under Article 66, UCMJ, 10 U.S.C. § 866. JA at 019.

The Air Force Court, and subsequently this Court, must consider the *Care* inquiry as part of reviewing the "entire record" as required by the statute. 10 U.S.C. § 866 (2018).[4] Article 66,UCMJ, states, "The Court

[4] The earliest offense for which A1C Navarro Aguirre was convicted was 9 May 2020. As such, this Court should conduct legal and factual sufficiency reviews under the 2019 *Manual for Courts-Martial* version of Article 66, UCMJ. *See* William M. (Mac) Thornberry National Defense

[of Criminal Appeals] may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the *entire record*, should be approved." 10 U.S.C. § 866(d)(1) (2018) (emphasis added). While the statute goes on to say that "the Court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses," none of the statutory language suggests it can ignore certain evidence. *Id.* This extends to this Court's legal sufficiency reviews because this Court is reviewing findings "as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." Article 67(c)(1)(A), UCMJ, 10 U.S.C. § 867(c)(1)(A) (2018).

This Court has made clear that the words "entire record" mean the "record of trial and allied papers." *United States v. Jessie*, 79 M.J. 437, 440 (C.A.A.F. 2020) (citations and quotations omitted). This Court further indicated in a footnote that "in reviewing the legal and factual

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Authorization Act (NDAA) for Fiscal Year 2021, Pub. L. 116-283, § 542(e)(2), 134 Stat. 3388, 3612–13 (2021) (setting the effective date of changes to Article 66, UCMJ, to require that every offense occur after the date of the law's enactment, which was 1 January 2021).

sufficiency of the evidence, a CCA may consider only admitted evidence found in the record of trial." *Jessie*, 79 M.J. at 440 n.6. Information from A1C Navarro Aguirre's *Care* inquiry satisfies the plain meaning of both standards. It is information in the record of trial, meaning it is part of the "entire record." *Id.* at 440. Likewise, it is evidence found in the record of trial in that it is testimony given under oath in open court. JA at 070 (A1C Navarro Aguirre being sworn before *Care* inquiry). Indeed, testimony from a *Care* inquiry may be the primary or the only evidence upon which an accused is found guilty of an offense, especially when, as here, the accused pleads guilty without a stipulation of fact. *Id.* Since testimony from the *Care* inquiry is evidence that is in the record of trial, it is appropriate for appellate courts to consider it when determining legal and factual sufficiency.

In reaching the opposite conclusion, the Air Force Court relied heavily on the reasoning in *United States v. Flores*, 69 M.J. 366 (C.A.A.F. 2011). JA at 019. *Flores* is readily distinguishable because it dealt with a different phase of the judicial process. In *Flores*, this Court held that it was error for a trial counsel to refer to statements made during a providence inquiry to prove a separate offense. 69 M.J. at 369–70. The

bounds for using statements from a *Care* inquiry at trial do not control the consideration of those statements on appeal. Congress plainly directed military appellate courts to consider the "entire record," which includes statements from a *Care* inquiry. Article 66, UCMJ, 10 U.S.C. § 866 (2018). Because of this different standard, the holding in *Flores* regarding the use of statements at trial is not applicable to appellate review.

The facts from A1C Navarro Aguirre's *Care* inquiry cast further doubt on whether his use of Ambien was wrongful. Specifically, he testified that (1) he took the "prescribed dose of one pill;" (2) he "fell asleep in bed in [his] apartment;" (3) this was the first time he took Ambien; (4) he "was not in complete control of [his] faculties;" and (5) he recalled that "after a little while, [he] fell asleep in bed in [his] apartment. The next thing [he] remember[s] is being behind the wheel of [his] car . . . A police car was behind [him]. The police officers talked with [him]." JA at 072–73, 079; *see also* JA at 113. The facts that A1C Navarro Aguirre had a valid prescription, used the prescription in a proper way (i.e., to help him fall asleep at home), and experienced medically-known side effects do not

"reasonably support a finding of guilt beyond a reasonable doubt." *Jackson*, 443 U.S. at 318.

The law should not be so dim as to require a reviewing court to ignore evidence in the record of trial that flatly contradicts a finding of guilty. A1C Navarro Aguirre's statements during his *Care* inquiry provide an uncontested account of his proper use of lawfully prescribed Ambien. In response, the Government can offer only insinuation based on innocuous circumstances like the shirt he was wearing or the time of day he experienced significant side effects. Thus, the record warrants reversal of this conviction.

II.

A1C Navarro Aguirre's guilty plea for reckless driving was improvident because he took his prescribed dose of Ambien, fell asleep in his bed, and "the next thing [he] remember[ed] is being behind the wheel of [his] car."

Standard of Review

This Court reviews a military judge's decision to accept a guilty plea for an abuse of discretion; however, this Court reviews de novo the military judge's legal conclusion that an appellant's plea was provident. *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005); *United States*

v. Eberle, 44 M.J. 374, 375 (C.A.A.F. 1996). A military judge abuses his discretion when there is a "substantial basis" in law and fact "for questioning the guilty plea." *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

Law and Analysis[5]

A. The Military Judge's basis in law for accepting the guilty plea was erroneous.

A conviction based on a legal standard that does not constitute an offense is legally insufficient. *United States v. Shavrnoch*, 49 M.J. 334, 338-39 (C.A.A.F. 1998). Moreover, Article 45, UCMJ, 10 U.S.C. § 845, requires a guilty plea be rejected when inconsistent matters arise that cannot be resolved. Here, the Military Judge disregarded the definition of "recklessness," providing a "substantial basis" in law for this Court to question the guilty plea. *Prater*, 32 M.J. at 436. Specifically, "recklessness" requires a "culpable disregard" for the "foreseeable consequences to others." JA at 071–72; *see also 2019 MCM*, Part IV, ¶ 51(c)(7).

[5] As the facts and legal considerations significantly overlap for both issues, A1C Navarro Aguirre requests that this Court consider the arguments he made for legal sufficiency in Issue I for Issue II as well.

Here, A1C Navarro Aguirre experienced a medical side effect the first time he took his prescribed medication. He was not "fully awake and [did] an activity that [he did] not know [he was] doing." JA at 064. He could not have a culpable disregard for the foreseeable consequences because he was unaware of what he was doing. He also did not know he was susceptible to sleep-driving because this was his first time taking Ambien. JA at 020, 113. Even the drug maker educates the public that an individual who has this side effect does "not know" what they "are doing." JA at 064. As such, A1C Navarro Aguirre was not "reckless."

Black's Law Dictionary defines "reckless" slightly differently, but with the same result:

> Characterized by the creation of a substantial and unjustifiable risk of harm to others and *by a conscious* (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash. Reckless conduct is more than mere negligence: it is a gross deviation from what a reasonable person would do.

Reckless, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added). A1C Navarro Aguirre did not have the state of mind to have "a conscious . . . disregard for or indifference to that risk" because this was an involuntary, medical side effect. *Id.* The Military Judge understood the concept—"so if they have a seizure or an involuntary act, then there's no

reason for the law to criminalize that"—but failed to apply it here. JA at 137.

Even though the Military Judge recognized the tension between the *mens rea* and this defense of automatism, his resolution was to leave it unresolved. JA at 137. He never instructed on or asked A1C Navarro Aguirre about automatism. JA at 140–43. "[I]n the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur." *United States v. Torres*, 74 M.J. 154, 156 (C.A.A.F. 2015) (quoting *United States v. Apfelbaum*, 445 U.S. 115, 131 (1980)). "Accordingly, an accused cannot be held criminally liable in a case where the actus reus is absent because the accused did not act voluntarily, or where *mens rea* is absent because the accused did not possess the necessary state of mind when he committed the involuntary act." *Id.* at 157. Here, A1C Navarro Aguirre was asleep and unconscious; therefore, his actions align with automatism, not recklessness. The Military Judge's misapplication of a recklessness *mens rea* and his failure to ask questions that resolved the conflict created by evidence of automatism is incurable because "[a]n essential aspect of informing Appellant of the nature of the offense is a correct definition of legal

concepts." *United States v. Negron*, 60 M.J. 136, 141 (C.A.A.F. 2004) (finding the plea improvident because the military judge used an incorrect definition of "obscene"). The Military Judge's failure to resolve the inconsistencies rendered the providence inquiry insufficient under Article 45, UCMJ, 10 U.S.C. § 845.

B. Both the Military Judge and the Air Force Court failed to consider the entire record in violation of this Court's precedent.

"In determining the providence of appellant's pleas, it is uncontroverted that an appellate court must consider the entire record in a case." *United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995). Re-opening the *Care* inquiry after the Government's case-in-chief was the correct decision because, as the Military Judge stated, "some of the information in Defense Exhibit Alpha refers to a possible side effect of Ambien being sleep driving." JA at 137. Despite the propriety of this acknowledgment, the Military Judge made two fatal errors during the cursory requestioning of A1C Navarro Aguirre that followed: He considered some facts from the findings but not others, and he failed to consider "how the law relates to [the] facts." *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008) (citing *Care*, 40 C.M.R. at 250–51).

1. The Military Judge failed to consider and question A1C Navarro Aguirre on all the facts.

While the Military Judge considered the FDA Ambien Information Sheet from the cases-in-chief to re-open the *Care* Inquiry, he failed to consider other important facts from the case-in-chief. For instance, he did not consider the nurse practitioner's testimony from the case-in-chief that Ambien can be taken anytime during the day because "some people have shift work, so sometimes it can be different times of day." JA at 116. This suggests that A1C Navarro Aguirre was not reckless from the outset of his conduct by taking Ambien after his shift ended but before a traditional bedtime—traditional at least for someone who had not been sleep-deprived for two days like A1C Navarro Aguirre. JA at 072–73.

The Military Judge also failed to consider that the FDA Ambien Information Sheet stated that "abnormal thinking" had been reported in patients taking "sedative/hypnotics, including Ambien." JA at 045. Visual and auditory hallucinations can occur. *Id.* Additionally, the FDA Ambien Information Sheet indicated that some studies have shown that patients had a "significant decrease" in the recall of information the next day for information that was presented to them during "peak drug effect (90 minutes post dose)." JA at 061. The "significant decrease" was

actually "anterograde amnesia." *Id.* This type of amnesia "is memory failure for information presented after consumption of the drug." Seema Khaneja & Max Senal, *Attorneys Textbook of Medicine*, 108.30, 108.34(1d) (3rd Ed. 2024). [6] Thus, it is not a surprise that A1C Navarro Aguirre stated that after he fell asleep, the "next thing" he remembered was "being behind the wheel of [his] car" with a police car parked behind him. JA at 073.

Having read the FDA Ambien Information Sheet and re-opened the *Care* inquiry, it was error to still find the plea provident because the Military Judge knew from an exhibit that Ambien users may experience "anterograde amnesia." JA at 061. Moreover, A1C Navarro Aguirre already told the Military Judge that he did not have "any memory"

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[6] *See also* Stacey Wood & Bushan S. Agharkar, *Traumatic Brain Injury in Criminal Litigation*, 84 UMKC L. REV. 373, 415 (2015) (explaining that "anterograde amnesia . . . impairs [the] ability to learn new information after [an] injury"); Steven M. Smith, *Nonobviousness—The Shape of Things to Come: Invisible Assumptions and the Unintentional Use of Knowledge and Experiences in Creative Cognition*, 12 LEWIS & CLARK L. REV. 509, 513 (2008) ("These patients [with anterograde amnesia] are poor at recollecting recently experienced events. For example, they can recall few, if any words from a list read only minutes before the recall test, and, in fact, they may not even remember having read the list of words at all.")

between going to sleep in his bed and talking to the police officers. JA at 073–74. The military judge was responsible for resolving these inconsistencies, but did not ask appropriate follow-up questions.

The Military Judge's arbitrary selection of what facts to ask during the re-questioning is a substantial basis to question the plea. Similarly, the Air Force Court appeared to indicate that it would not consider all the facts: "We will not speculate on the existence of facts that might invalidate a plea especially where the matter raised post-trial contradicts an appellant's expressed admission on the record." JA at 016 (citing *Johnson*, 42 M.J. at 445). That court's subsequent statement that "the record lacks evidence Appellant was sleep driving" is not an accurate reflection of the evidence. *Id.* The evidence in the record shows A1C Navarro Aguirre took a prescribed medication for which sleep driving is a known side effect, and the next thing he remembers after falling asleep in his bed is being in his car and speaking to a police officer. JA at 062, 064, 072–73. Based on these facts, it is a reasonable inference that he was sleep driving. The Military Judge abused his discretion in what he chose—and did not choose—to consider during the re-opening of the *Care* inquiry. The Air Force Court sanctioned this abuse of discretion.

2. The Military Judge failed to properly consider how the law relates to the facts.

"The providence of a plea is based not only on the accused's understanding and recitation of the factual history of the crime, but also on an understanding of how the law relates to those facts." *Medina*, 66 M.J. at 26 (citing *Care*, 40 C.M.R. at 250–51). The Military Judge failed to realize that A1C Navarro Aguirre was describing a side effect of Ambien usage. From this description, the Military Judge should have realized that A1C Navarro Aguirre's inferences about what he had done were insufficient to establish that his conduct was reckless. The Military Judge should have been much more skeptical when re-opening the *Care* inquiry in light of the evidence of side effects of Ambien and the defense of automatism. The *Care* inquiry needed to do more than establish that A1C Navarro Aguirre was driving; it needed to establish that his conduct was reckless. Considering the evidence of his legal prescription use and its known side effects, the *Care* inquiry did not establish the recklessness of his conduct because it indicated he did not know what he was doing at the time.

A1C Navarro Aguirre's answers to the Military Judge's questions indicated that he was not sure what happened but was speculating. For

example, when the Military Judge asked him why he thought he was in control of the vehicle, A1C Navarro Aguirre stated that he remembered taking his shoes off before getting into bed, so he "would have had to" put on his shoes before he started driving. JA at 141. By using the third conditional grammar tense ("would have had to") A1C Navarro Aguirre was implicitly stating that he had no actual memory of what happened. To continue answering the question, he relied on the phrase "from witness testimony" twice. *Id.* In response to another question, he stated, "so it's possible that I went out and drive [*sic*] voluntarily" and "I think that was my motive." *Id.* Given A1C Navarro Aguirre's equivocal answers that indicate a lack of awareness at the time of his actions, this Court has a substantial basis to question the providence of the plea to reckless conduct.

It is also important to recognize that A1C Navarro Aguirre lacked the knowledge and qualifications to make certain conclusions. For example, A1C Navarro Aguirre stated, in regard to memory and sleep, "[I]t feels more like I just wasn't storing what was going on. Kind of feels like a blackout." JA at 141. He also said, "[U]pon coming to, it didn't feel like I was asleep. Just felt more like my memory just kind of kicks back

in for a period." JA at 142. While A1C Navarro Aguirre could express his feelings as he remembered them, he was not qualified to opine on whether he was sleeping and how his memory was functioning under Ambien. Those are questions better suited for experts. *See* Mil. R. Evid. 701–702; *see also United States v. Tyler*, 17 M.J. 381, 385 (C.M.A. 1984) (discussing how specialized knowledge about the effects of drugs is a matter of expert testimony). A1C Navarro Aguirre's speculation about why he thought his conduct was voluntary was not enough to show he acted recklessly under these circumstances. The Military Judge should have realized this when he was considering "how the law relates to those facts." *Medina*, 66 M.J. at 26 (citing *Care*, 40 C.M.R. at 250–51).

The Air Force Court affirmed this error, stating, "Whether the Ambien caused involuntary 'actus reus' on Appellant's part was not raised by *evidence* introduced at trial and was explicitly denied by Appellant." JA at 015. The evidence introduced at trial raised enough doubt in the Military Judge's mind that he had to re-open the *Care* inquiry, so there *was* evidence introduced at trial. Ultimately, the Air Force Court made the same mistake as the Military Judge by believing A1C Navarro Aguirre could recognize and ultimately disregard

medically known side effects based on his feelings and a compromised memory of events.

Accepting A1C Navarro Aguirre's assertions about what he must have done to prove recklessness is not an appropriate application of the law to the facts. His inferences about his conduct do not establish the requisite *mens rea* of recklessness, and those inferences are not enough to overcome the strong likelihood, rooted in evidence, that he was experiencing a known side effect of a prescribed medication. Thus, his guilty plea to reckless driving was improvident.

Conclusion

A1C Navarro Aguirre requests that this Court set aside the finding of guilty as to Specification 2 of Charge II and dismiss that Specification with prejudice. Further, A1C Navarro Aguirre requests that this Court set aside the findings of guilty as to Charge III and its Specification.

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Government Trial and Appellate Operations Division at AF.JAJG.AFLOA.Filng.Workflow@us.af.mil on December 6, 2024.

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CERTIFICATE OF COMPLIANCE WITH RULES 24(b) & 37

This supplement complies with the type-volume limitation of Rule 24(b) because it contains 7,225 words.

This brief complies with the typeface and type-style requirements of Rule 37 because it has been prepared using Microsoft Word with Century Schoolbook 14-point typeface.

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