IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*, v. **ANN R. MARIN PEREZ** Staff Sergeant (E-5) United States Air Force *Appellant*.	**BRIEF ON BEHALF OF APPELLANT** Crim. App. Dkt. No. ACM S32771 USCA Dkt. No. 25-0238/AF November 21, 2025

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

SAMANTHA M. CASTANIEN,
Major, U.S. Air Force
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, NAF, MD 20762
240-612-4770
samantha.castanien.1@us.af.mil
U.S.C.A.A.F. Bar No. 37280

INDEX

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Rules and Regulations

Other Authorities

ISSUE PRESENTED

Whether the Air Force Court of Criminal Appeals erred when it affirmed a conviction through exceptions and substitutions after finding that "the military judge erred in accepting Appellant's plea to the specification as drafted."

INTRODUCTION

With her family in a financial bind following a car accident, Staff Sergeant (SSgt) Ann R. Marin Perez sought an additional job as a house cleaner. JA at 77-78. Through this second job, she met NM and cleaned her home periodically. *Id*. But as bills began to mount, SSgt Marin Perez stole six pieces of jewelry from NM to relieve some financial pressure on her family. JA at 78-79. She sold those pieces, among other jewelry, for a total of $1,650.00 at various pawn shops. JA at 32-33, 36. The six pieces were recovered and appraised at a value of $21,300.00. JA at 21. The Government charged SSgt Marin Perez with larceny, and she elected to plead guilty. JA at 18, 52, 66.

But during her court-martial, a substantial conflict over the value of the stolen jewelry arose. JA at 7; *see* JA at 141-43 (reopening the *Care*[1] inquiry). A defense exhibit revealed that the charged value, stemming from the appraisal, was not the actual property value, but an inflated value based on insurance factors. JA at 50. The actual value of the property was much less than $21,300.00—*at most*, half the

[1] *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247 (C.M.A. 1969).

appraised value. *Id*. The military judge attempted to reconcile the discrepancy but failed when he only focused on whether SSgt Marin Perez believed the value of the property was over $1,000.00, rather than the value the Government charged: "about $21,300.00." JA at 7, 18; *see* JA at 142 (discussing the statutory breakdown).

Based on the unresolved conflict over the property value, the Air Force Court of Criminal Appeals (Air Force Court) found "there is a substantial basis to question whether the value of the stolen property was 'about $21,300.00' as charged. To that extent, [the lower court found] the military judge erred in accepting [SSgt Marin Perez's] plea to the specification as drafted." JA at 7. But rather than set aside the findings and sentence following this conclusion, the Air Force Court used exceptions and substitutions to "modify" the specification and "affirm only so much of the finding of guilty" that SSgt Marin Perez stole jewelry "of a value of more than $1,000.00." JA at 7 (citing *United States v. English*, 79 M.J. 166, 122 n.5 (C.A.A.F. 2019); and then citing *United States v. Hale*, 77 M.J. 598, 607 (A.F. Ct. Crim App. 2018), *aff'd*, 78 M.J. 268 (C.A.A.F. 2019)).

But the Air Force Court's use of exceptions and substitutions exceeded the Air Force Court's authority under Article 66, Uniform Code of Military Justice (UCMJ), and violated the basic tenants of due process by broadening the specification and circumventing *Care*. *United States v. Lubasky*, 68 M.J. 260, 264-65 (C.A.A.F. 2010); *English*, 79 M.J. at 120. Under the facts of this case, there was

only one solution after the Air Force Court determined that the military judge erred in accepting the plea: setting aside the plea. This Court should find the Air Force Court erred and then, considering judicial economy, set aside the findings and sentence.

STATEMENT OF STATUTORY JURISDICTION

SSgt Marin Perez's approved sentence included a bad-conduct discharge. JA at 163. Accordingly, the Air Force Court had jurisdiction pursuant to Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3)(2018) (as amended by the William M. (Mac) Thornberry National Defense Authorization Act [(NDAA)] for Fiscal Year 2021, Pub. L. No. 116-283, § 542(b), 134 Stat. 3388, 3611 (2021), and the James M. Inhofe NDAA for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395, 2582 (2022)).[2] This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3), jurisdiction (as amended by § 542(c) of the William M. Thornberry NDAA for Fiscal Year 2021 and § 539A(c) of the NDAA for Fiscal Year 2022).

[2] The amendment of Article 66, UCMJ, subsections (d)(1)(A) and (e), enacted by section 539E of the NDAA for Fiscal Year 2022, Pub. L. No. 117-81, § 539E, 135 Stat. 1541, 1700 (2021), applies only to cases in which all findings of guilty are for offenses occurring after December 27, 2023. *Id.* at § 539E(f), 135 Stat. at 1706. That amendment is inapplicable to this case where the offense occurred between on or about February 24, 2023, and on or about March 11, 2023. JA at 18.

RELEVANT AUTHORITIES

The Fifth Amendment of the Constitution, in pertinent part, provides: "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

Article 45(a), UCMJ, 10 U.S.C. § 845(a), provides:

> Irregular and Similar Pleas. If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

Article 59(b), UCMJ, 10 U.S.C. § 859(b), provides: "Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense."

Article 66, UCMJ, 10 U.S.C. § 866, in pertinent part, provides:

> (d) Duties.
>
> (1) Cases appealed by accused.
>
> (A) In general. In any case before the Court of Criminal Appeals under subsection (b), the Court may act only with respect to the findings and sentence as entered into the record under section 860c of this title (article 60c). The Court may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with subparagraph (B).

(B) Factual sufficiency review.

(i) In an appeal of a finding of guilty under subsection (b), the Court may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.

(ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to-

(I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and

(II) appropriate deference to findings of fact entered into the record by the military judge.

(iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

. . . .

(f) Limits of Authority.

(1) Set aside of findings.

(A) In general. If the Court of Criminal Appeals sets aside the findings, the Court

(i) may affirm any lesser included offense; and

(ii) may, except when prohibited by section 844 of this title (article 44), order a rehearing.

Article 67(c), UCMJ, 10 U.S.C. § 867(c), in pertinent part, provides:

(1) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to

(A) the findings and sentence set forth in the entry of judgment, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals;

(B) a decision, judgment, or order by a military judge, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals; or

(C) the findings set forth in the entry of judgment, as affirmed, dismissed, set aside, or modfied [sic] by the Court of Criminal Appeals as incorrect in fact under section 866(d)(1)(B) of this title (article 66(d)(1)(B)).

. . . .

(4) The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

Article 121(a), UCMJ, 10 U.S.C. § 921(a), in pertinent part, provides:

Any person subject to this chapter who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind

(1) with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, steals that property and is guilty of larceny . . . .

Rule for Courts-Martial (R.C.M) 910, in pertinent part, provides:

(a) Alternatives.

(1) In general. An accused may plead as follows:

(A) guilty;

(B) not guilty of an offense as charged, but guilty of a named lesser included offense;

(C) guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; or

(D) not guilty. A plea of guilty may not be received as to an offense for which a sentence of death is mandatory.

. . . .

(e) Determining accuracy of plea. The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea. The accused shall be questioned under oath about the offenses.

. . . .

(h) Later action.

. . . .

> (2) Statements by accused inconsistent with plea. If after findings but before the sentence is announced the accused makes a statement to the court-martial, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge shall inquire into the providence of the plea. If, following such inquiry, it appears that the accused entered the plea improvidently or through lack of understanding of its meaning and effect a plea of not guilty shall be entered as to the affected charges and specifications.

R.C.M. 918, in pertinent part, provides:

(a) General findings. The general findings of a court-martial state whether the accused is guilty of each charge and specification. If two or more accused are tried together, separate findings as to each shall be made.

> (1) As to a specification. General findings as to a specification may be:
>
> > (A) guilty;
> >
> > (B) not guilty of an offense as charged, but guilty of a named lesser included offense;
> >
> > (C) guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any;
> >
> > (D) not guilty only by reason of lack of mental responsibility; or
> >
> > (E) not guilty.

Exceptions and substitutions may not be used to substantially change the nature of the offense or to increase the seriousness of the offense or the maximum punishment for it. . . .

STATEMENT OF THE CASE

A military judge sitting as a special court-martial convicted SSgt Marin Perez, United States Air Force, pursuant to her pleas, of one charge and one specification of larceny in violation of Article 121, UCMJ, 10 U.S.C. § 921. JA at 103. The military judge sentenced her to be reduced to the grade of E-1, to be confined for four months, and to be discharged from the service with a bad-conduct discharge. JA at 163. The convening authority took no action on the findings or sentence but waived all automatic forfeitures for a specified period for the benefit of SSgt Marin Perez's spouse and children. JA at 17.

At the Air Force Court, SSgt Marin Perez raised two assignments of error, including whether her plea was provident. JA at 2. The Air Force Court agreed that there was a substantial basis to question whether the value of the stolen property was "about $21,300.00" as charged. JA at 7. The Air Force Court found the military judge erred in accepting SSgt Marin Perez's plea, but "affirmed[ed] the finding of guilty to the specification by exceptions and substitutions." JA at 7 ("Therefore, we affirm the findings here by excepting the words and figures 'about $21,300.00' and substituting therefor the words 'more than $1,000.00.'"). The Air Force Court found, "The findings, as modified, are correct in law." JA at 8 (citing Article 66(d), UCMJ, 10 U.S.C. § 866(d) (*Manual for Courts-Martial, United States* (2024 ed.))).

The Air Force Court reassessed the sentence and found that SSgt Marin Perez "would have received the same sentence" for stealing property worth "more than $1,000.00." JA at 8. Thereafter, "the findings, as modified, and the sentence, as reassessed" were affirmed. JA at 9.

SSgt Marin Perez timely petitioned this Court for review on August 8, 2025, and, in accordance with this Court's order, subsequently filed the supplement to the petition for grant of review on September 2, 2025. This Court granted review on October 16, 2025. SSgt Marin Perez moved for additional time to file the grant brief on October 20, 2025, which this Court granted on October 22, 2025.

STATEMENT OF FACTS

A. After being hired as a house-cleaner, SSgt Marin Perez stole six pieces of jewelry from NM, which were later recovered.

SSgt Marin Perez first started cleaning NM's home on December 23, 2022. JA at 110. This was shortly after SSgt Marin Perez's husband was in a car accident. JA at 49, 78. That incident created financial pressure on the family, so SSgt Marin Perez sought additional employment outside of the Air Force to help cover the family's costs. JA at 77-78.

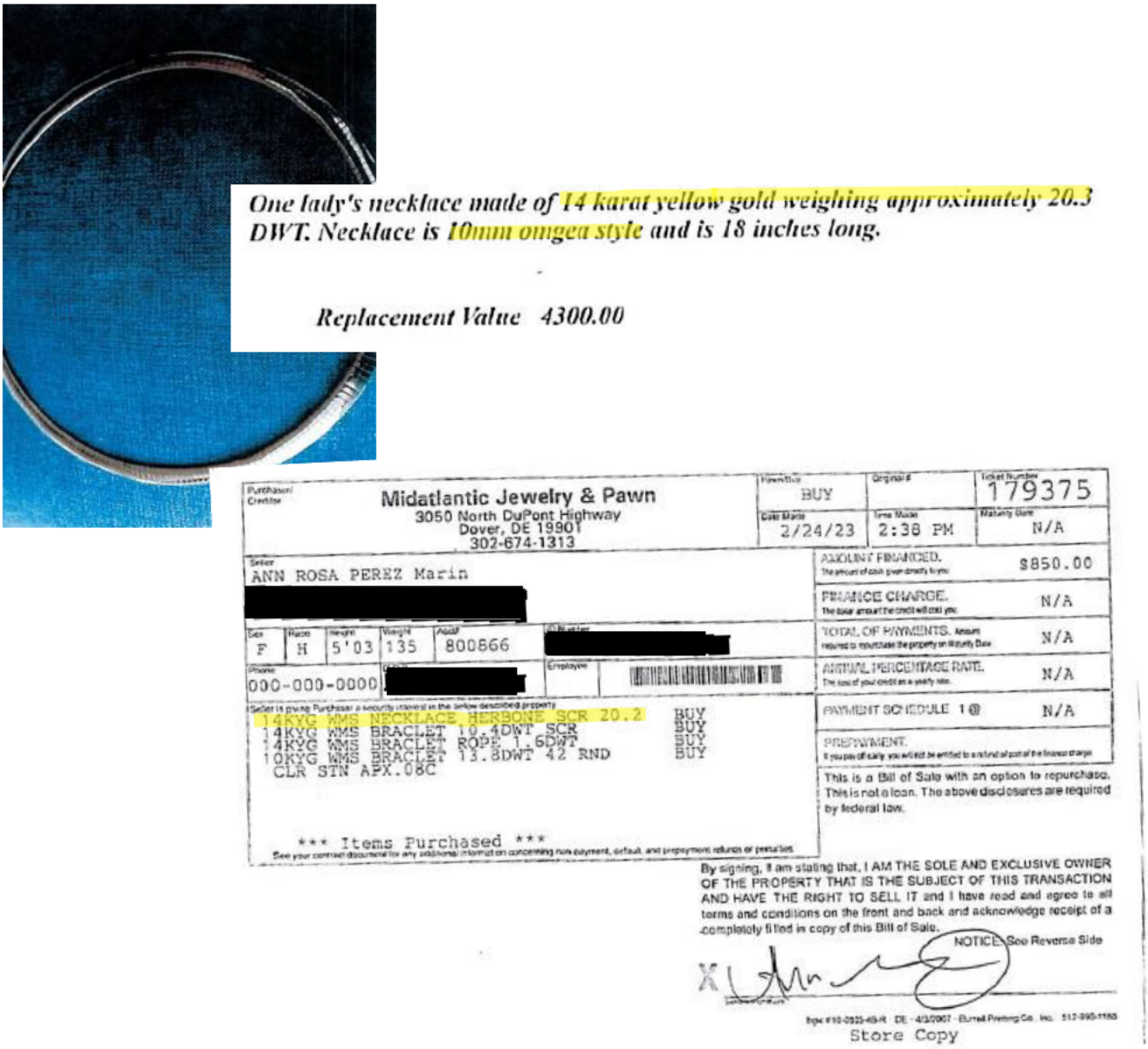
On February 24, 2023, SSgt Marin Perez took six pieces of jewelry from NM's home. JA at 78, 81. She intended to sell those items, along with some of her own jewelry, to generate more money for her family. JA at 78-79, 164. She took two

necklaces, three bracelets, and a pair of earrings. JA at 25-30, 78. SSgt Marin Perez received $1,650 from everything that she sold. JA at 32-33, 36, 78.

When NM noticed the missing jewelry, she was able to recover the six pieces with the help of local law enforcement. JA at 21. NM then took those six items to Mr. David Lewkowitz, of Jeweler's Lupe Incorporated, who performed an appraisal. JA at 21, 41-46. The appraisal provided that the six pieces were valued at $21,300.00, total. *Id*.

The six pieces of jewelry were never specifically matched to the documents attached to the stipulation of fact. But based on the descriptions, the following photos, receipts, and appraisal amounts likely correspond to each piece:

(1) The omega style necklace[3] was appraised at $4,300.00 and corresponds to the pawn shop receipt with a total sale of $850.00. JA at 25, 32, 41 (highlighting added).



One lady's necklace made of 14 karat yellow gold weighing approximately 20.3 DWT. Necklace is 10mm omgea style and is 18 inches long.

Replacement Value 4300.00

Midatlantic Jewelry & Pawn
3050 North DuPont Highway
Dover, DE 19901
302-674-1313

BUY | 179375
2/24/23 | 2:38 PM | N/A

ANN ROSA PEREZ Marin
[redacted]

F | H | 5'03 | 135 | 800866 | [redacted]

000-000-0000 | [redacted]

14KYG WMS NECKLACE HERBONE SCR 20.2 BUY
14KYG WMS BRACLET 10.4DWT SCR BUY
14KYG WMS BRACLET ROPE 1.6DWT BUY
10KYG WMS BRACLET 13.8DWT 42 RND BUY
CLR STN APX.08C

*** Items Purchased ***

AMOUNT FINANCED $850.00
FINANCE CHARGE N/A
TOTAL OF PAYMENTS N/A
ANNUAL PERCENTAGE RATE N/A
PAYMENT SCHEDULE 1@ N/A
PREPAYMENT

This is a Bill of Sale with an option to repurchase. This is not a loan. The above disclosures are required by federal law.

By signing, I am stating that, I AM THE SOLE AND EXCLUSIVE OWNER OF THE PROPERTY THAT IS THE SUBJECT OF THIS TRANSACTION AND HAVE THE RIGHT TO SELL IT and I have read and agree to all terms and conditions on the front and back and acknowledge receipt of a completely filled in copy of this Bill of Sale.

NOTICE See Reverse Side

X [signature]

Store Copy

[3] An "omega style" necklace is "made of metal plates that are wrapped around a wire or mesh base. They're similar to herringbones . . . ." Rishabh, *What are Omega Chains and How to Wear Them?*, HOUSE OF JEWELLRY BLOG (Nov. 9, 2021) https://houseofjewellery.com/blog/what-are-omega-chains-and-how-to-wear-them/.

(2) The 14-karat yellow gold bracelet below was appraised at $2,000.00 and corresponds to the pawn shop receipt with a total sale of $850.00. JA at 25, 32, 44 (highlighting added).

One lady's bracelet made of 14 karat yellow gold weighing approximately 10.4 DWT . Bracelet is 7.5 in long and 10mm wide. Bracelet is 10mm wide.

Replacement Value 2000.00

Midatlantic Jewelry & Pawn
3050 North DuPont Highway
Dover, DE 19901
302-674-1313

Pawn/Buy: BUY | Original # | Ticket Number: 179375
Date Made: 2/24/23 | Time Made: 2:38 PM | Maturity Date: N/A

Seller: ANN ROSA PEREZ Marin [redacted]

Sex	Race	Height	Weight	Age
F	H	5'03	135	800666

Phone: 000-000-0000 [redacted] | Employee | [redacted]

Seller is giving Purchaser a security interest in the below described property

14KYG WMS NECKLACE HERBONE SCR 20.2	BUY
14KYG WMS BRACLET 10.4DWT SCR	BUY
14KYG WMS BRACLET ROPE 1.6DWT	BUY
10KYG WMS BRACLET 13.8DWT 42 RND CLR STN APX.08C	BUY

*** Items Purchased ***

See your contract documents for any additional information concerning non-payment, default, and prepayment refunds or penalties

AMOUNT FINANCED. The amount of cash given directly to you	$850.00
FINANCE CHARGE. The dollar amount the credit will cost you.	N/A
TOTAL OF PAYMENTS. Amount required to repurchase the property on Maturity Date	N/A
ANNUAL PERCENTAGE RATE. The cost of your credit as a yearly rate.	N/A
PAYMENT SCHEDULE 1@	N/A
PREPAYMENT. If you pay off early, you will not be entitled to a refund of part of the finance charge.	

This is a Bill of Sale with an option to repurchase. This is not a loan. The above disclosures are required by federal law.

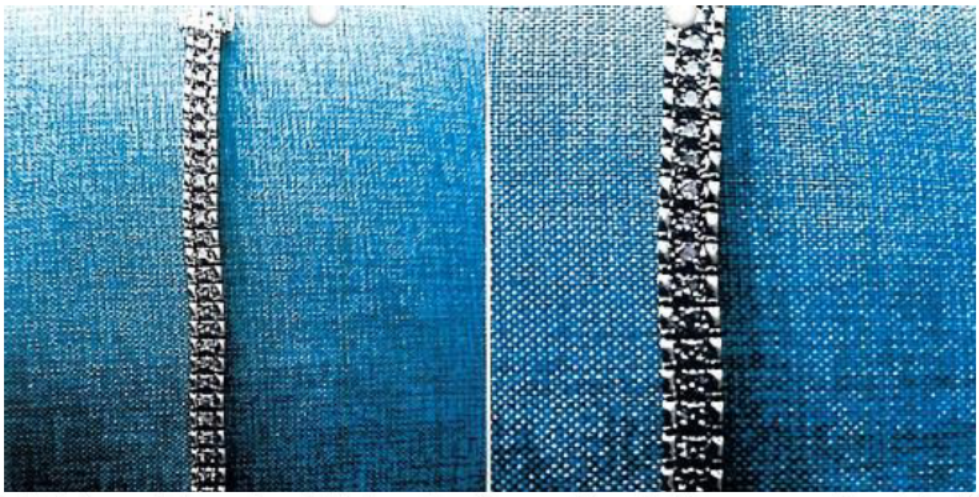
By signing, I am stating that, I AM THE SOLE AND EXCLUSIVE OWNER OF THE PROPERTY THAT IS THE SUBJECT OF THIS TRANSACTION AND HAVE THE RIGHT TO SELL IT and I have read and agree to all terms and conditions on the front and back and acknowledge receipt of a completely filled in copy of this Bill of Sale.

NOTICE See Reverse Side

X [signature]

Store Copy

(3) The diamond bracelet below was appraised at $4,000.00 and corresponds to the pawn shop receipt with a total sale of $850.00. JA at 26, 32, 42 (highlighting added).



One lady's bracelet made of 10 karat yellow gold weighing approximately 13.9 DWT and containing the following stones: All diamonds are Light top browns.

51 round brilliant cut diamonds measuring approximately
Carat : 5.00
Color : K
Clarity : SI2

Replacement Value 4000.00

Midatlantic Jewelry & Pawn
3050 North DuPont Highway
Dover, DE 19901
302-674-1313

BUY | 2/24/23 | 2:38 PM | Ticket Number 179375 | Maturity Date N/A

Seller: ANN ROSA PEREZ Marin [redacted]

Sex F | Race H | Height 5'03 | Weight 135 | Age 800866 | ID Number [redacted]

Phone 000-000-0000 | DOB [redacted] | Employee

Seller is giving Purchaser a security interest in the below described property

14KYG WMS NECKLACE HERBONE SCR 20.2 BUY
14KYG WMS BRACLET 10.4DWT SCR BUY
14KYG WMS BRACLET ROPE 1.5DWT BUY
10KYG WMS BRACLET 13.8DWT 42 RND BUY
CLR STN APX.08C

*** Items Purchased ***

See your contract document for any additional information concerning non-payment, default, and prepayment refunds or penalties

AMOUNT FINANCED. The amount of cash given directly to you	$850.00
FINANCE CHARGE. The dollar amount the credit will cost you	N/A
TOTAL OF PAYMENTS. Amount required to repurchase the property on Maturity Date	N/A
ANNUAL PERCENTAGE RATE. The cost of your credit as a yearly rate.	N/A
PAYMENT SCHEDULE 1 @	N/A
PREPAYMENT. If you pay off early, you will not be entitled to a refund of part of the finance charge	

This is a Bill of Sale with an option to repurchase. This is not a loan. The above disclosures are required by federal law.

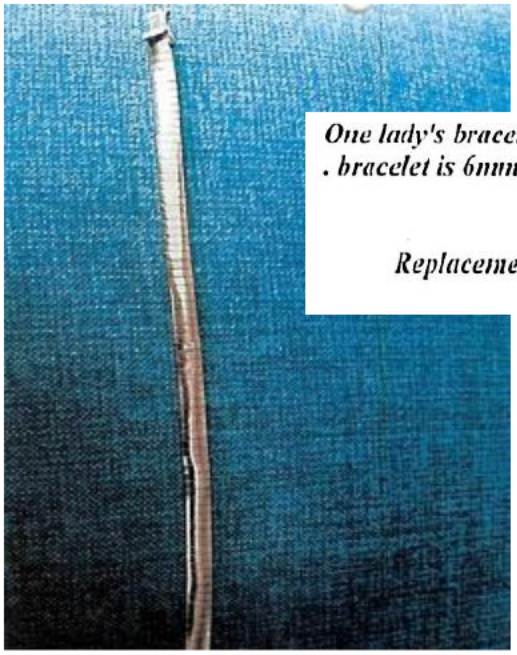
By signing, I am stating that, I AM THE SOLE AND EXCLUSIVE OWNER OF THE PROPERTY THAT IS THE SUBJECT OF THIS TRANSACTION AND HAVE THE RIGHT TO SELL IT and I have read and agree to all terms and conditions on the front and back and acknowledge receipt of a completely filled in copy of this Bill of Sale.

NOTICE: See Reverse Side

X [signature]

Store Copy

(4) The omega style (*see supra* n.3) bracelet below was appraised at $1,600.00 and corresponds to the pawn shop receipt with a total sale of $250.00. JA at 27, 36, 43 (highlighting added);[4] *see also* JA 28 (depicting another photo of the bracelet).



One lady's bracelet made of 14 karat yellow gold weighing approximately 8.0 DWT . bracelet is 6mm wide and 7.5 inches long. bracelet is a omgea style.

Replacement Value 1600.00

THE TRADING POST
4008 DUPONT HWY
DOVER, DE 19901

(302) 538-5198

Bill of Sale

Customer #4323001
ANN ROSA MARIN PEREZ
[redacted]

ID: DE Drivers License
ID#: [redacted]

Sex: F
Race: AFRICAN...
Height: 0' 63"
Weight: 135
Hair: BLACK
Eyes: BROWN
DOB: [redacted]

#: 7947
Page: 1 of 1
Date: 03/08/2023
EMP: KAG

		Purchased
NECKLACE	0 NECKLACE JEWELRY NMF, #NSF, 14KT, 13.50 Grams; NECKLACE	0.00
BRACELET	0 BRACELET JEWELRY NMF, #NSF, 14KT, 12.40 Grams; BRACELET	0.00
NECKLACE	0 NECKLACE JEWELRY NMF, #NSF, 7.00 Grams; GOLD OVER 925 SILVER	0.00

250.00

[4] 8.0 DWT (pennyweight) converted to grams is 12.4414 grams. *What does DWT Mean in Gold Terms*, GOLDFELLOW (Sep. 28, 2021), https://www.goldfellow.com/dwt-meaning.

(5) The diamond heart style necklace below was appraised at $6,500.00 and corresponds to the pawn shop receipt with a total sale of $550.00. JA at 29, 33, 45 (highlighting added).[5]

One lady's necklace made of 14 karat yellow gold weighing approximately 21.4 DWT and containing the following stones:

111 round brilliant cut diamonds measuring approximately
Carat : 3.5
Color : I
Clarity : SI1

Replacement Value 6500.00

Midatlantic Jewelry & Pawn
3050 North DuPont Highway
Dover, DE 19901
302-674-1313

Pawn/Buy: BUY
Ticket Number: 179505
Date Made: 3/11/23
Time Made: 12:00 PM
Maturity Date: N/A

Seller: ANN ROSA PEREZ Marin
[redacted]

Sex	Race	Height	Weight	Age#
F	H	5'03	135	800866

ID Number: [redacted]
Phone: 000-000-0000
D.O.B.: [redacted]
Employee:

Seller is giving Purchaser a security interest in the below described property.
14KYG WMS NECKLACE W/ EARR. 25.2DWT BUY
HEARTS 135 RND CLR STN APX.03C

*** Items Purchased ***
See your contract document for any additional information concerning non-payment, default, and prepayment refunds or penalties.

AMOUNT FINANCED. The amount of cash given directly to you	$550.00
FINANCE CHARGE. The dollar amount the credit will cost you	N/A
TOTAL OF PAYMENTS. Amount required to repurchase the property on Maturity Date	N/A
ANNUAL PERCENTAGE RATE. The cost of your credit as a yearly rate	N/A
PAYMENT SCHEDULE 1 @	N/A
PREPAYMENT. If you pay off early, you will not be entitled to a refund of part of the finance charge.	

This is a Bill of Sale with an option to repurchase. This is not a loan. The above disclosures are required by federal law.

By signing, I am stating that, I AM THE SOLE AND EXCLUSIVE OWNER OF THE PROPERTY THAT IS THE SUBJECT OF THIS TRANSACTION AND HAVE THE RIGHT TO SELL IT and I have read and agree to all terms and conditions on the front and back and acknowledge receipt of a completely filled in copy of this Bill of Sale.

NOTICE: See Reverse Side

X [signature]
Seller Signature

bjc #10-0505-48-R · DE · 4/2007 · Burrell Printing Co., Inc. · 512-993-1188

Store Copy

[5] The receipt appears to depict the combined weight and diamonds of the necklace and earring set.

(6) The diamond heart style earrings below were appraised at $2,900.00 and correspond to the pawn shop receipt with a total sale of $550.00. JA at 30, 33, 46 (highlighting added).

One lady's pair of earrings made of 14 karat yellow gold weighing approximately 2.6 DWT and containing the following stones: Earrings are dangle heart style

24 round brilliant cut diamonds measuring approximately
Carat : .75
Color : I
Clarity : SI1

Replacement Value 2900.00

Purchaser/Creditor: Midatlantic Jewelry & Pawn
3050 North DuPont Highway
Dover, DE 19901
302-674-1313

Pawn/Buy: BUY
Original #:
Ticket Number: 179505
Date Made: 3/11/23
Time Made: 12:00 PM
Maturity Date: N/A

Seller: ANN ROSA PEREZ Marin
[redacted]

Sex	Race	Height	Weight	Acct#
F	H	5'03	135	800866

ID Number: [redacted]
Phone: 000-000-0000
D.O.B.: [redacted]
Employer:

Seller is giving Purchaser a security interest in the below described property.
14KYG WMS NECKLACE W/ EARR .25.2DWT BUY
HEARTS 135 RND CLR STN APX.03C

*** Items Purchased ***
See your contract document for any additional information concerning non-payment, default, and prepayment refunds or penalties.

AMOUNT FINANCED. The amount of cash given directly to you.	$550.00
FINANCE CHARGE. The dollar amount the credit will cost you.	N/A
TOTAL OF PAYMENTS. Amount required to repurchase the property on Maturity Date.	N/A
ANNUAL PERCENTAGE RATE. The cost of your credit as a yearly rate.	N/A
PAYMENT SCHEDULE 1 @	N/A
PREPAYMENT. If you pay off early, you will not be entitled to a refund of part of the finance charge.	

This is a Bill of Sale with an option to repurchase. This is not a loan. The above disclosures are required by federal law.

By signing, I am stating that, I AM THE SOLE AND EXCLUSIVE OWNER OF THE PROPERTY THAT IS THE SUBJECT OF THIS TRANSACTION AND HAVE THE RIGHT TO SELL IT and I have read and agree to all terms and conditions on the front and back and acknowledge receipt of a completely filled in copy of this Bill of Sale.

NOTICE: See Reverse Side

X [signature]
Seller Signature

bpc #10-0305-48-R · DE · 4/2/2007 · Burrell Printing Co., Inc. · 512-593-1188
Store Copy

B. SSgt Marin Perez pleaded guilty to stealing the six pieces of jewelry, but a material conflict over the value of the property emerged at trial.

SSgt Marin Perez pleaded guilty to larceny without exceptions and substitutions. JA at 66. During her providence inquiry, she admitted the value of the jewelry, based on the pawn receipt, was over $1,000. JA at 78-79. She did not initially admit that the value was "about $21,300.[00]," which is the value the Government charged. *Compare* JA at 78-79, *with* JA at 18, *and* JA at 21. The military judge asked whether SSgt Marin Perez reviewed the appraisal, which valued the jewelry at "about $21,300[.00]," and she confirmed she had. JA at 84. He followed up by asking,"[D]o you have confidence in that appraisal that . . . that was the value of the property?" JA at 85. SSgt Marin Perez spoke with her counsel and responded yes. *Id*. The military judge repeated the question: "[A]gain, you don't have personal knowledge, but based upon reviewing the evidence and discussing with your defense counsel, you are confident that the value of the property was about $21,300?" *Id*. SSgt Marin Perez once again said yes. *Id*.

Following the guilty plea colloquy, the military judge accepted SSgt Marin Perez's plea as provident and found her guilty of stealing jewelry of a value of about $21,300.00. JA at 18, 103.

During sentencing, the defense submitted a letter from Mr. Lewkowitz, the original appraiser, which was admitted. JA at 50, 125, 128. In the letter, Mr. Lewkowitz explained that the appraisal value was not the actual market value of the

property. JA at 50. He revealed that the appraisal value was a calculated value that took into consideration various insurance factors and doubled the "proposed value." *Id*. He did not provide an actual value for any of the jewelry, but clarified that the value of the property was less than $21,300.00. *Id*.

Based on this letter, the military judge reopened the providence inquiry. JA at 141. The military judge determined that Mr. Lewkowitz did not assert any specific value, which was accurate, but the military judge failed to recognize how inflated the value of the property was based on Mr. Lewkowitz's statements. *Compare* JA 50 (showing the property was at least doubled in value), *with* JA at 141-43 (explaining the letter was "wishy-washy" on value). Rather than focusing on the conflicting values, the military judge focused on the statutory breakdown for the punishment levels of a larceny. JA at 142. He asked whether SSgt Marin Perez agreed that the value of the jewelry was at least over $1,000.00. *Id*. Consistent with her statements previously, she said yes. *Id*. The military judge ended his inquiry and found the plea remained provident. JA at 143. At no point during the court-martial did the military judge ever read the definition of "value" to SSgt Marin Perez.

C. The Air Force Court found the military judge erred in accepting SSgt Marin Perez's plea because of the conflict over the value, but the lower court nevertheless affirmed by using exceptions and substitutions.

On appeal, the Air Force Court found that the military judge failed to reconcile a conflict over a material fact in the record: the value of the property. JA at 7. The

Air Force Court concluded that "the military judge erred in accepting [her] plea to the specification as drafted." *Id*. But rather than setting aside the plea due to the error, the Air Force Court used exceptions and substitutions to swap out the charged value, "about $21,300.[00]," for a new value of "more than $1,000.[00]." *Id*.

The Air Force Court did not use a lesser included offense analysis, despite both parties discussing whether a lesser included offense was a possibility during briefing. Specifically, the Government argued, "[T]his Court can affirm the conviction as to the lesser included offense of larceny of non-military property with a value of *$1,000 or less*." United States' Answer to Assignments of Error at 24, May 9, 2025 (emphasis added). SSgt Marin Perez responded that the plea must be set aside because the value of the property was never established such that SSgt Marin Perez could knowingly plead guilty to the value. Reply Br. on Behalf of Appellant at 6-8, May 13, 2025. She also asserted that if the Air Force Court affirmed the "lesser included offense" offered by the Government, the sentence should nevertheless be set aside because the value of the property had dramatically changed. *Id*. at 9.

After modifying the findings, the Air Force Court reassessed the sentence, assuming "the value of the stolen property was substantially in excess of $1,000.00." JA at 7-8. The Air Force Court issued the same sentence: a bad-conduct discharge, confinement for four months, and reduction to E-1. JA at 8.

SUMMARY OF ARGUMENT

After finding the military judge erred in accepting SSgt Marin Perez's plea "to the specification as drafted," there was only one remedy available here: setting aside the findings and the sentence. This is because there was no lesser included offense that could be affirmed. The Air Force Court's decision to employ "exceptions and substitutions" ignored this Court's holding in *Lubasky*, contravened *English*, and exceeded its statutory authority under Article 66, UCMJ. Further, by swapping the specific value charged that SSgt Marin Perez intended to plead to, with a generic, unspecified value, the Air Force Court broadened the specification and circumvented *Care*. Additionally, the Air Force Court engaged in fact-finding to "modify" the specification in this manner, which also exceeded the lower court's authority under Article 66, UCMJ. Because there is only one remedy under the facts of this case, this Court should answer the granted question in the affirmative and set aside the findings and the sentence.

ARGUMENT

The Air Force Court erred when it affirmed SSgt Marin Perez's conviction through exceptions and substitutions after finding that "the military judge erred in accepting [her] plea to the specification as drafted."

I. Standard of Review.

The scope of an appellate court's authority is a legal question this Court reviews de novo. *English*, 79 M.J. at 121 (first citing *United States v. Bennitt*, 74

M.J. 125, 128-29 (C.A.A.F. 2015); then citing *Lubasky*, 68 M.J. at 264-65; and then citing *United States v. Rodriguez*, 66 M.J. 201, 203 (C.A.A.F. 2008)).

II. The Air Force Court found SSgt Marin Perez's plea improvident.

The Air Force Court found that the military judge failed to resolve an apparent inconsistency over an "essential element" of larceny: value. JA at 7; *see United States v. Thompson*, 27 C.M.R. 119, 121 (C.M.A. 1958) (citing *United States v. Steward*, 20 C.M.R. 247 (C.M.A. 1955)) ("Value is an essential element of . . . larceny."); *see also Manual for Courts-Martial*, United States (2019 ed.), pt. IV, ¶ 64.c.(1)(g)(i) [hereinafter *MCM*] ("Value is a question of fact to be determined on the basis of all the evidence admitted."). The Government charged a "certain value," the more specific charging scheme under larceny, and selected a value of "about $21,300." *MCM*, pt. IV, ¶ 64.b.(1)(c); JA at 18; *see* JA at 76 (showing the military judge advised SSgt Marin Perez that the *element* for the value of the property was about $21,300.00). SSgt Marin Perez attempted to plead to the Charge and Specification as drafted, i.e., admitting she stole about $21,300.00 worth of jewelry. JA at 66. But then the discrepancy about value surfaced at sentencing. JA at 141. When the discrepancy appeared, the military judge never ensured that SSgt Marin Perez was still knowingly and voluntarily pleading guilty to the specification as charged.

"If an accused 'sets up matter inconsistent with the plea' at any time during the proceeding, the military judge must either resolve the apparent inconsistency or reject the plea." *United States v. Saul*, __ M.J. __, No. 24-0098/AF, 2025 CAAF LEXIS 578, at *7 (C.A.A.F. July 21, 2025) (quoting *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996) (quoting Article 45(a), UCMJ)). This is because where an accused has not been properly advised of the elements or where the accused's acts do not constitute the offense to which she is pleading guilty, the plea is not voluntary. *Id.* at *6-7 (first citing *Care*, 40 C.M.R. at 253; and then citing R.C.M. 910(e) (2019 ed.)) (describing the principles behind accepting a plea of guilty). It is these inconsistencies, couched in ensuring a knowing and voluntary guilty plea, that create the legal or factual basis to overturn a plea on appeal. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996).

Once the Air Force Court found that the military judge failed to resolve the apparent inconsistency, it should have set aside the plea. *Saul*, __ M.J. __, No. 24-0098/AF, 2025 CAAF LEXIS 578, at *7. Instead, it did everything this Court denounced in *English* and *Lubasky.*

III. The Air Force Court exceeded its statutory authority by using "exceptions and substitutions" to affirm the findings when, here, the only possible remedy was setting aside the findings and sentence.

The Air Force Court committed a series of intertwined errors in attempting to affirm SSgt Marin Perez's conviction. First, it misunderstood the fundamental

tenants of *English* and the holding from *Lubasky* that "exceptions and substitutions" is not an appellate court tool. *English*, 79 M.J. at 119 (citing *Lubasky*, 68 M.J. 261). This led the Air Force Court to abandon *English* and do exactly what this Court previously admonished: broaden a specification beyond the theory of liability presented to the factfinder. *Id*. at 122. The lower court's attempt to save the plea exacerbated this due process concern by finding as fact information about the value of the property that SSgt Marin Perez did not knowingly and voluntarily agree to, contrary to *Care*. By using exceptions and substitutions, creating a generic specification, and circumventing *Care*, the Air Force Court further exceeded its authority by conducting a quasi-factual-sufficiency analysis, rather than assessing whether the plea could remain provident when the military judge erred in accepting the plea to the specification as drafted.

The series of errors reveal there is no lesser included offense the Air Force Court could affirm upon remand and no possible way to "narrow" the specification consistent with *English* or *Care*. Consequently, the only possible remedy here, where the "military judge erred in accepting [the] plea to the specification as drafted," is to set aside the findings and sentence. Article 67(c)(1)(A), UCMJ, and judicial economy permit this Court to do so now, rather than remand.

A. *English*'s "narrowing" of a specification on appeal is distinct from using "exceptions and substitutions" and is guided by two fundamental principles.

"Narrowing" a specification is proper on appeal if done in accordance with *English*, but finding by "exceptions and substitutions" on appeal is improper. *Lubasky*, 68 M.J. at 264-65. When a finding of guilt is made on the charge and specification as drafted and an inconsistency between pleadings and proof remains on appeal, the only option appellate courts have is to either reject the findings or affirm a lesser included offense. *Id*. While R.C.M. 918(a)(1) authorizes a finding of guilty by exceptions and substitutions at the *trial* level to address some differences between pleading and proof, Article 59(b), UCMJ, prevents an appellate court from doing so. *Id*. at 265. On this point alone, the Air Force Court erred by using exceptions and substitutions to affirm the conviction.

Here, a discrepancy over value could have been rectified at trial either through the military judge resolving the conflict, or by rejecting the initial plea and allowing SSgt Marin Perez to plead by exceptions and substitutions. R.C.M. 910(e) (dictating how the military judge must reject the plea where a substantial conflict appears). But on appeal, this factual discrepancy over the element of value is subject to only a lesser included offense analysis, *Lubasky*, 68 M.J. 264-65, or, if possible based on the record, a "narrowing" of the offense consistent with *English*. 79 M.J. at 120. The

Air Force Court did not use a lesser included offense analysis and failed in trying to "narrow" the specification in accordance with *English*.

English addressed a Court of Criminal Appeals' (CCA's) decision to alter the charging language on appeal to match the evidence at trial when that modified charging language was not presented to the factfinder for consideration. *English*, 79 M.J. at 119. The Government had charged a specific type of "unlawful force" for sexual assault: "grabbing her head with his hands." *Id.* The CCA found that there was no evidence the appellant had "grabbed her head with his hands," but that "there was sufficient evidence to prove the appellant committed the sexual act by unlawful force." *Id*. at 120. "Rather than dismissing the specification as factually insufficient," the CCA attempted to "narrow" the specification and excepted the specific words about "grabbing her head with his hands" to affirm based on the remaining language in the specification. *Id*. This Court reversed that decision. *Id*. at 119.

In discussing "narrowing" the scope of the offense, *English* gave two guiding principles, which the Air Force Court disregarded here. The first is the source of authority. To "narrow the scope" of the language in the specification is to affirm only so much of the specification as is correct in law and fact pursuant to Article 66, UCMJ. *English*, 79 M.J. at 122 n.5.[6] The second principle is that a CCA cannot

[6] In the footnote, this Court cited an earlier part of the slip opinion to reference back to the lower court's statutory authority under Article 66(c), UCMJ. *Compare English*, 79 M.J. at 122 n.5 (citing "*supra* p.6") with *id.* at 121 (discussing the lower

except language from a specification that changes the offense from the specific "to a generic, and thus broader, charge that was not presented at trial." *English*, 79 M.J. at 120. Doing so would exceed a CCA's authority and violate an appellant's constitutional due process rights. *Id*. (first citing *Lubasky*, 68 M.J. at 265; then citing *Dunn v. United States*, 442 U.S. 100, 106-07 (1979); and then citing *United States v. Riley*, 50 M.J. 410, 415-16 (C.A.A.F. 1999)).

This Court gave two examples for what "narrowing" a specification would look like to be consistent with due process and Article 66, UCMJ; both focused on striking portions of a specification. In *United States v. Piolunek*, 74 M.J. 107, 112 (C.A.A.F. 2015), it was lawful for the CCA to affirm as legally sufficient only nineteen of twenty-two charged images of child pornography, thus striking some of the specific images from the specification. *English*, 79 M.J. at 120. Similarly, in *Rodriguez*, 66 M.J. at 203, it was lawful for the CCA to strike "on divers occasions" from the specification and affirm only one instance of the offense. *English*, 79 M.J. at 120. In both examples, this Court highlighted that striking this kind of language from a specification did not broaden it and thus did not raise due process concerns.

This was the entire point of *English*. By striking the specific force charged, "grabbing her head with his hands," the CCA expanded the specification from a

---

court's authority under Article 66, UCMJ). Although amended, the former Article 66(c), UCMJ, language is now in Article 66(d)(1)(A), UCMJ: "The Court may affirm only such findings of guilty as the Court finds correct in law, and in fact . . . ."

specific use of force charged to any type of force conceivable—a theory of liability not submitted to the factfinder and which created a due process problem. *Id*. Some crime was committed, with some force, but not the force, and therefore not the crime, charged. Despite *English* being clear on this point, this is exactly what the Air Force Court did here.

B. The Air Force Court's analysis confuses and violates the due process principle explained in *English*.

The Air Force Court's analysis, when dissected, reveals several compounding errors. First, the lowers court's conclusion that it could "affirm the finding of guilty to the specification by exceptions and substitutions" based on the record is plainly erroneous. JA at 7. "Exceptions and substitutions" is not the correct legal principle. *Lubasky*, 68 M.J. at 265. But even if it were, the Air Force Court's explanation for why it could affirm by "narrowing" the specification was nonetheless faulty and compounded the error.

In an explanatory parenthetical for *English*, the Air Force Court reasoned that "[CCAs] may affirm a conviction by exceptions and substitutions when [they] narrow[] the finding on appeal." JA at 7. But this overlooks the guiding principles behind *English*. *English* was always about striking portions of a specification, as seen in *Piolunek* and *Rodriguez*—never about substituting. Substituting charged language on appeal offends due process "[b]ecause [appellate courts] cannot affirm a criminal conviction on the basis of a theory not presented." *Chiarella v. United*

States, 445 U.S. 222, 236 (1980) (first citing *Rewis v. United States*, 401 U.S. 808, 814 (1971); and then citing *Dunn*, 442 U.S. at 106). Moreover, as explained in *English*, excepting language from a specification can also impermissibly broaden the offense. "Narrowing" a specification can only happen if doing so does not broaden the charge beyond what was presented at trial. *English*, 79 M.J. at 122 n.5.

The Air Force Court attempts to make up for its incorrect characterization of *English* by citing *Hale*, a published Air Force Court case from 2018. JA at 7 (citing *Hale*, 77 M.J. at 607). The Air Force Court determined that pursuant to Article 66, UCMJ, CCAs have "the authority to make exceptions and substitutions to the findings on appeal, 'so long as [they] do not amend a finding on a theory not presented to the trier of fact.'" *Id*. *Hale* cites R.C.M. 918(a)(1), *United States v. McCracken*, 67 M.J. 467, 468 (C.A.A.F. 2009), and *Riley*, 50 M.J. at 415, for the Article 66, UCMJ, authority and the due process mandate the Air Force Court cited here. While the latter clause involving the due process requirement is correct, the citations *Hale* employs for the "CCA's authority" here is without foundation.

First, R.C.M. 918 is not applicable. *Lubasky*, 68 M.J. at 265 ("R.C.M. 918(a)(1) . . . is directed at the factfinder: R.C.M. 918(a)(1) does not grant us the authority [to correct variance by exceptions and substitutions on appeal]."). Second, while *McCraken* and *Riley* are apparently the source for Air Force Court's due process point, these cases are inapplicable here because they are about *lesser*

included offenses: "an appellate court may not affirm an *included* offense on a 'theory not presented to the' trier of fact." *McCracken*, 67 M.J. at 467-68 (quoting *Riley*, 50 M.J. at 415) (emphasis added). Here, the Air Force Court did not do a lesser included offense analysis, making *Hale* inapposite. Furthermore, a lesser included offense analysis is distinct from what *English* reaffirms[7] and does not, inherently, have the same due process concerns because a lesser included offense "is a subset of the greater offense alleged." *United States v. Medina*, 66 M.J. 21, 27 (C.A.A.F. 2008); *Schmuck v. United States*, 489 U.S. 705, 716 (1989) ("[T]he elements of the lesser offense are a subset of the elements of the charged offense.").

Article 66, UCMJ, has never provided the CCAs the authority to make exceptions and substitutions to the findings on appeal. Rather, a CCA may only affirm as much of a finding of guilty that is correct in law and in fact when doing so does not broaden the scope of specification to a theory not presented to the factfinder. Had the Air Force Court recognized the source of this legal principle, it would have realized it made the same error that the CCA made in *English*: by substituting the

[7] In a footnote, *English* indicated the power to affirm a lesser included offense was separate, though ostensibly related to the "narrowing" authority. 79 M.J. at 120 n.3 (citing Article 59(b), UCMJ). Today, the statutory authority to affirm a lesser included offense is also in Article 66(f)(1)(A)(i), UCMJ. Notably, this new section is titled "[l]imits of authority," is triggered when findings are set aside, and does not include "modifying" or using "exceptions or substitutions." *Compare* Article 66(f)(1)(A), UCMJ, *with* JA at 2, 4, 8-9 (using a form of the word "modify" and "exceptions and substitutions" repeatedly).

specific value, it made a broader specification that SSgt Marin Perez did not knowingly and voluntarily plead guilty to.

C. The Air Force Court committed the same error as the CCA in *English*.

By substituting the value, the plain reading of the substituted language has an identical effect as what occurred in *English*. In *English*, the specific force alleged was removed, rendering the force any conceivable thing—rather than what the Government charged and presented to the factfinder. *English*, 79 M.J. at 121-22.

Here, the Air Force Court committed the same error by removing the specific value of the property: it rendered the value any conceivable number over $1,000.00, including an amount over "about $21,300.00" because "a value of more than $1,000.00" has no upper limit. *See* JA at 7 ("[W]e affirm the findings here by excepting the words and figures 'about $21,300.00' and substituting therefor the words 'more than $1,000.00.'"). This indeterminate, generic value was not what the Government charged, JA at 18, nor is it what SSgt Marin Perez agreed to plead guilty to. JA at 52 (showing the plea agreement to the charged value of "about $21,300.00"); *id.* at 66 (pleading guilty to the specification as charged); *see id.* at 76 (showing the military judge advising SSgt Marin Perez of the elements, to include the value of "about $21,300.00"). SSgt Marin Perez was never advised of another value that was consistent with her original plea to the specification as charged. *See* JA at 143 (agreeing to stay with her plea based on questions about the statutory

breakdown, rather than because she was properly advised on the actual value of the property and how that related to the charged value).

The Air Force Court exceeded its authority under Article 66, UCMJ, by broadening the specification through an indeterminate substitution that was not based on SSgt Marin Perez's knowing and voluntary guilty plea.

D. The substitution of value also was predicated on an erroneous finding of fact, revealing *English* cannot be properly applied in this case.

The record is unclear what the value of the jewelry is, though the Air Force Court somehow found as fact "under any scenario presented during [SSgt Marin Perez's] guilty plea that the value of the stolen jewelry was *substantially in excess* of $1,000.00." JA at 7 (emphasis added). But SSgt Marin Perez never agreed the value of the jewelry was "substantially in excess of $1,000.00." Rather, she consistently hedged the value to drive it close to $1,000.00.

First, during her *Care*, she only admitted a value of $1,650.00: "At a pawn shop, . . . I received $1,650 for all the jewelry and therefore I do believe and admit that Ms. [NM]'s jewelry was a greater value of $1,000." JA at 78; *see* JA at 79 ("I received approximately $1,650 from the pawn shop so I believe that exceeds $1,000."). Later, when the *Care* was reopened, she only admitted the value of the jewelry was over $1,000.00—not "substantially" over. JA at 142. And she only did so based on how the judge delineated the statutory minimum and maximum punishments through his questioning:

> MJ: Let me ask you first, Staff Sergeant Marin Perez, are you confident, based upon your discussion with counsel, reviewing the evidence in this case, that the value of the property was *at least $1000 or greater*?
>
> ACC: Yes, sir.
>
> MJ: So that's the statutory as far the breakdown in the military. It's less than a $1000 or — a $1000 or less or more than $1000, and so I may not have asked the questions though. So *you agree that it's more than $1000 in price*?
>
> ACC: Yes, Your Honor.

JA at 142 (emphasis added). There was no other inquiry or discussion about the value of the property. *See* JA at 20-46 (showing the stipulation of fact only supported the charged value of $21,300.00). The Air Force Court erroneously determined "the military judge confirmed this fact," that the value was "substantially in excess of $1,000.00" when he reopened the providence inquiry. JA at 7. As shown above, he did not.

A CCA is not permitted to find facts not drawn from the plea inquiry, or the stipulation of fact, to affirm a conviction. *See United States v. Carlson*, 59 M.J. 475, 476 (C.A.A.F. 2004) (finding a CCAs fact-finding authority could not resolve whether child pornography depicted real minors or not because the colloquy did not discuss whether the images contained "real" or "virtual" minors.). Here, SSgt Marin Perez never agreed, knowingly or voluntarily, that the value of the property, as the Air Force Court found, was "substantially in excess of $1,000.00." Instead, once the conflict over the value arose, the military judge only clarified the statutory

breakdown. He did not explain the definition of value and how that related to the charging scheme, the facts, and the value the Government had charged. The Air Force Court's fact-finding dodged the military judge's shortcomings at trial and was plainly erroneous and unsupported by the record, contrary to the mandate in Article 66, UCMJ, to only affirm findings of guilt that are correct in law.

This fact-finding exceeded the Air Force Court's authority in this case for the same reason *English*'s "narrowing" principle cannot be applied in this case. This is a guilty plea where changing the facts would create unresolved inconsistencies that would have otherwise required the plea to be set aside. Article 45(a), UCMJ; R.C.M. 910(e), (h)(2). *English* cannot operate on this case to "narrow" the offense to a value SSgt Marin Perez agreed to, like $1,650.00, because this "narrowing" will always be inconsistent with the original charge that she was advised upon and intended to plead to. And while "excepting" the "about $21,300.00" value may remove that inconsistency, it also removes an entire element and circumvents the requirement that a plea can only be "truly voluntary" where the accused "possesses an understanding of the law in relation to the facts." *Care*, 40 C.M.A. at 251.

Swapping out the specific charged value with any specific lower value, like $1,650, circumvents *Care*. *See Saul*, __ M.J. __, No. 24-0098/AF, 2025 CAAF LEXIS 578, at *6-7 ("[T]he military judge must explain each of the elements of an offense to the accused and question the accused to ensure that the accused's acts or

omissions constitute the offense to which the accused is pleading guilty."). Value is an element of the offense that had to be pleaded to and was not just some sign-posting for the statutory breakdown in punishment. *Thompson*, 27 C.M.R. at 121; JA at 7, 142-43. The record does not support that SSgt Marin Perez was ever properly advised on this element, the definition of value, or how that term related to the charge and the facts of her case, especially after the letter from Mr. Lewkowitz (the appraiser). *See Saul*, __ M.J. __, No. 24-0098/AF, 2025 CAAF LEXIS 578, at *6-7. Furthermore, because the value affects sentencing possibilities, this means that the plea agreement, what SSgt Marin Perez believed she was entering into and why, fundamentally changed because the severity of the offense changed too. Substituting values where the factual predicate does not meet the charge as pleaded to changes the offense, undermines *Care*, and violates Articles 45 and 66, UCMJ. Because of this, *English* cannot operate on this case to "narrow" the specification to a lower valued larceny.

E. The Air Force Court's use of the word "modified" is either inartful or another example of it exceeding its statutory authority.

The Air Force Court used the word "modified" four times in its opinion to describe what it did. JA at 2, 8-9. If the Air Force Court's use of the word "modified" is a reference to "modify" in Article 66(d)(1)(B)(iii), UCMJ, this was error.

"Modify[ing] the finding" is available in factual sufficiency review, but that section is not applicable to this case. 10 U.S.C. § 866(d)(1)(B)(iii). Because this is a

guilty plea case, "the issue must be analyzed in terms of providence of [the] plea, not sufficiency of the evidence." *Faircloth*, 45 M.J. at 174. Article 45(a), UCMJ, coupled with R.C.M. 910(e), govern the factual basis for the plea: the military judge must ensure there is a "factual basis for the plea" and the accused must "be convinced of, and able to describe all the facts necessary to establish guilt." Therefore, a CCA "modifying" the findings through the factual sufficiency review authority in Article 66, UCMJ, is not only inapplicable, but it also runs counter to the purpose of the plea colloquy: that the accused provides the factual basis to ensure a knowingly and voluntarily plea. This goes hand-in-hand with being able to "find as fact" only that which is supported by the *Care* and consistent with the charge. *Carlson*, 59 M.J. at 476.

It is not clear from the Air Force Court opinion if the lower court invoked its factual sufficiency authority when it used the word modify because the references to Article 66, UCMJ, are broad. But coupled with the unsupported, erroneous factual finding about the value of the property being "substantially in excess of $1,000.00," it appears the Air Force Court believed it could modify the findings under Article 66(d), UCMJ, in some fashion. Any modification, whether through Article 66(d)(1)(B), UCMJ, or *English*'s "narrowing" principle, is error here. The Air Force Court exceeded its authority to do any modification when the value of the property

was never resolved by the military judge and SSgt Marin Perez never provided the factual predicate to sustain a conviction for what the Government charged.

Additionally, "modifying" the specification in such a manner to make the plea "provident" on something with which the accused was never charged nor advised upon revives the "closely related offense" doctrine this Court has abandoned. *United States v. Morton*, 69 M.J. 12, 13 (C.A.A.F. 2010). Instead, under such circumstances, a guilty plea can only survive if an accused's plea supported a finding of guilty to a lesser included offense. *Id*. at 16. But "modifying" the specification to conform it to the accused's conflicting statements during a guilty plea would change the specification into something other than what the accused intended to voluntarily and knowingly plead to.

Altogether, after finding the military judge failed to reconcile a substantial conflict in the record, the Air Force Court erred in using exceptions and substitutions and "modifying" the specification in a way that broadened the offense to something SSgt Marin Perez never knowingly and voluntarily pleaded guilty to.

IV. This Court should set aside the findings because there is no other resolution to this case when the Air Force Court found the military judge erred in accepting the plea to the specification as drafted.

The Air Force Court had two options after finding the military judge erred in accepting the plea: set aside the plea entirely or affirm a lesser included offense. *Lubasky*, 68 M.J. at 264-65; *Morton*, 69 M.J. at 16. It erred by doing neither.

To be sure, though, there is no lesser included offense to affirm. In *Lubasky*, this Court held "there is no authority for the proposition that larceny from one entity is [a lesser included offense] of larceny from another entity." 68 M.J. at 265 (citing *Medina*, 66 M.J. at 25 ("One offense is not 'necessarily included' in another unless the elements of the lesser included offense are a subset of the elements of the charged offense." (quoting *Schmuck*, 489 U.S. at 716))). Similarly, a larceny of a lower value is not a lesser included offense of a specifically charged higher-valued larceny. Larceny is the same crime regardless of the value alleged. 10 U.S.C. § 921. Value is an element that must be proven, whether it is "some value," "$1,000.00," or "$21,300.00." But proving the specific value charged is proof of an aggravating factor—it does not change the elements. *Compare MCM*, pt. IV, ¶ 64.d.(1)(a) (setting the maximum punishment of a larceny of property valued under $1,000), *with MCM*, pt. IV, ¶ 64.d.(1)(c) (increasing the maximum punishment for a larceny of property valued over $1,000). The "lesser offense" of a lower valued larceny is not a subset of the same larceny charged incorrectly. *See Medina*, 66 M.J. at 25 (citing *Schmuck*, 489 U.S. at 716) (reciting the "elements test" for lesser included offenses, which requires the "lesser offense" have elements that are a *subset* of the "greater offense"). There is not a lesser included offense to affirm here where the elements are not subsets of each other.

Because there is no lesser included offense, the conviction must be set aside due to the unresolved conflict over value. *Saul*, __ M.J. __, No. 24-0098/AF, 2025 CAAF LEXIS 578, at *14-15. Value is an element of the offense, and SSgt Marin Perez was never properly advised about the definition or how that term relates to the charge and the facts of her case. *Id.* at *6-7 ("[T]he military judge must explain each of the elements of an offense to the accused and question the accused to ensure that the accused's acts or omissions constitute the offense to which the accused is pleading guilty."). This Court set aside the plea in *Saul* because, pursuant to Article 45, UCMJ, the military judge was required to reject the guilty plea when the unresolved inconsistency appeared. *Id*. at *14-15. Therefore, here, as in *Saul*, where the military judge failed to properly reconcile the value of the property, the plea should be set aside. And this Court should do so.

This Court has authority to set aside the plea. Article 67(c)(1)(A), UCMJ. And this Court should do so here because setting aside the plea is the only possible outcome. "[I]t would be a classic waste of resources for an appellate court to remand the case for consideration of [a] clearly meritorious error, rather than simply to redress the wrong, right then and there." *United States v. Welker*, 44 M.J. 85, 91 (C.A.A.F. 1996). Judicial economy advises this Court to exercise its authority to correct all the errors stemming from the Air Force Court's decision to affirm the plea through exceptions and substitutions where "the military judge erred on accepting

[SSgt Marin Perez's] plea to the specification as drafted." JA at 7. Because SSgt Marin Perez was not properly advised on the value of the property and the Government charged the wrong value of the property, this plea could never have been provident. Thus, this Court should overturn the Air Force Court's decision and set aside the conviction rather than remanding.

CONCLUSION

The Air Force Court erred in using exceptions and substitutions on appeal to affirm SSgt Marin Perez's conviction. Based on this record, there is no lesser included offense to affirm and no possible way to "narrow" the specification in a manner consistent with *English* or *Care*. This Court, therefore, should answer the granted question in the affirmative and set aside the findings and sentence.

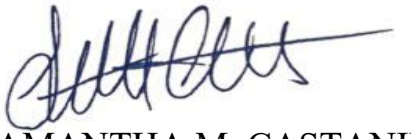
Respectfully submitted,

SAMANTHA M. CASTANIEN
Major, U.S. Air Force
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, NAF, MD 20762
240-612-4770
samantha.castanien.1@us.af.mil
U.S.C.A.A.F. Bar No. 37280

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Rule 24(b) because it contains 8,572 words.

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



SAMANTHA M. CASTANIEN
Major, U.S. Air Force
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, NAF, MD 20762
240-612-4770
samantha.castanien.1@us.af.mil
U.S.C.A.A.F. Bar No. 37280

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 November 21, 2025.

SAMANTHA M. CASTANIEN
Major, U.S. Air Force
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, NAF, MD 20762
240-612-4770
samantha.castanien.1@us.af.mil
U.S.C.A.A.F. Bar No. 37280