IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellant*	))))	UNITED STATES' BRIEF IN SUPPORT OF THE CERTIFIED ISSUES
v.	))	Crim. App. No. S32776
Staff Sergeant (E-5) **HANNES MARSCHALEK** United States Air Force *Appellant.*	))))	USC Dkt. No. 26-0221/AF 24 July 2026

BRIEF ON BEHALF OF THE UNITED STATES

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United States Air Force	)	24 July 2026
Appellee.	)	

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

ISSUES PRESENTED

I.

CAN AN ACCUSED WAIVE A CLAIM OF PREEMPTION UNDER ARTICLE 134, UCMJ?

II.

DID APPELLEE WAIVE HIS PREEMPTION CLAIM THROUGH EITHER HIS UNCONDITIONAL GUILTY PLEA OR THE WAIVE ALL WAIVABLE MOTIONS PROVISION IN HIS PLEA AGREEMENT, OR BOTH?

III.

IF APPELLEE DID NOT WAIVE HIS PREEMPTION CLAIM, WAS THE ARTICLE 134, UCMJ, OFFENSE TO WHICH APPELLEE PLEADED GUILTY PREEMPTED BY ARTICLE

120C, UNDER A PLAIN ERROR STANDARD OR OTHERWISE?

INTRODUCTION

While stationed overseas in the United Kingdom (UK), Appellee would stand naked near the doorway of his off-base residence. He admitted that the potential for someone to see him naked was "sexually exciting" to him and, "[k]nowing that someone could see him naked was part of the reason he opened the door." (JA at 142.) Multiple witnesses reported to UK police that they saw a naked man at Appellee's residence. (JA at 80.) One of the victims who saw Appellee naked was a 16-year-old girl. (Id.)

The Air Force initially charged Appellee with two specifications of indecent exposure under Article 120c, UCMJ, for exposing his penis to the public, and one specification of indecent conduct under Article 134, UCMJ, for masturbating in view of the public. (JA at 67.) But Appellee offered to plead guilty instead to the one specification of indecent conduct, alleging, by exceptions and substitutions, that, on divers occasions, he stood naked in his residence in view of the public. (JA at 74.) He also offered to waive all waivable motions. (JA at 75.)

Appellee requested that, in exchange for his plea, the Government would dismiss the two indecent exposure specifications under Article 120c with prejudice and cap Appellee's potential confinement at 270 days. (JA at 74.) The convening authority accepted Appellee's offer for the plea agreement. (JA at 78.)

At his court-martial, Appellee never raised the issue of preemption and was convicted, pursuant to his plea and plea agreement, of the single indecent conduct specification under Article 134. He was sentenced to a bad conduct discharge, confinement for two months, and reduction to E-1. (JA at 68.)

On appeal, Appellee switched gears and claimed for the first time that the Article 134 specification for which he had offered and agreed to plead guilty was preempted by Article 120c, indecent exposure. Despite having bargained for dismissal of the Article 120c specifications with prejudice, he argued that he should have been charged under Article 120c all along – just as the Government had initially done. (JA at 67.)

The Air Force Court of Criminal Appeals (AFCCA) agreed with Appellee. It found that preemption was an issue of subject-matter jurisdiction that could not be waived and that Appellee's conviction was indeed preempted by Article 120c. (JA at 5.) AFCCA set aside the findings and sentence and dismissed the indecent conduct charge and specification. (JA at 10.) Although the Government specifically asked in a motion for reconsideration for AFCCA to authorize a rehearing, the lower court denied that request. (JA at 3, 10, 43.) As a result, Appellee now stands convicted of nothing at all.

AFCCA erred in its interpretation of the law, and its decision should be reversed. The certified issues ask, *inter alia*, whether preemption under Article

134 can be waived and whether Appellee waived his preemption claim in this case. This Court should conclude, based on current Supreme Court precedent, that preemption is nonjurisdictional and therefore waivable and that Appellee waived his preemption claim under the facts of this case.

<u>STATEMENT OF STATUTORY JURISDICTION</u>

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d), UCMJ. This Court has jurisdiction to review this case under Article 67(a)(2), UCMJ.

<u>RELEVANT AUTHORITIES</u>

In relevant part, Article 120c, UCMJ, 10 U.S.C. § 92[1]c⍰ – Other sexual misconduct provides:

a. *Text of Statute*

> (c) INDECENT EXPOSURE. - Any person subject to this chapter who intentionally exposes, in an indecent manner, the genitalia, anus, buttocks, or female areola or nipple is guilty of indecent exposure and shall be punished as a court-martial may direct.
>
> (d) DEFINITIONS – In this section:
>
>> (6) INDECENT MANNER. - The term "indecent manner" means conduct that amounts to a form of immorality relating to

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[1] Appellee's offenses occurred in 2022. (JA at 71). Unless otherwise stated, all references to the UCMJ are to the versions in the <u>Manual for Courts-Martial</u>, United States (2019 ed.) (<u>MCM</u>).

> sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

b. *Elements.*

(6) *Indecent Exposure*

> (a) That the accused exposed his or her genitalia, anus, buttocks, or female areola or nipple;
>
> (b) That the exposure was in an indecent manner; and
>
> (c) That the exposure was intentional.

In relevant part, Article 134, UCMJ, 10 U.S.C. § 934 – General Article, provides:

a. *Text of Statute*

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court. As used in the preceding sentence, the term "crimes and offenses not capital" includes any conduct engaged in outside the United States, as defined in section 5 of title 18, that would constitute a crime or offense not capital if the conduct had been engaged in within the special maritime and territorial

jurisdiction of the United States, as defined in section 7 of title 18.

c. *Explanation.*

(5) *Limitations on Article 134.*

(a) *Preemption Doctrine.* The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132. For example, larceny is covered in Article 121, and if an element of that offense is lacking—for example, intent—there can be no larceny or larceny-type offense, either under Article 121 or, because of preemption, under Article 134. Article 134 cannot be used to create a new kind of larceny offense, one without the required intent, where Congress has already set the minimum requirements for such an offense in Article 121.

In relevant part, Article 134, UCMJ, 10 U.S.C. § 934 – Indecent Conduct provides:

b. *Elements*.

(1) That the accused engaged in certain conduct;

(2) That the conduct was indecent; and

(3) That, under the circumstances, the conduct of the accused . . . (ii) was of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) "Indecent" means that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and

tends to excite sexual desire or deprave morals with respect to sexual relations.

(2) Indecent conduct includes offenses previously proscribed by "Indecent acts with another" except that the presence of another person is no longer required. For purposes of this offense, the words "conduct" and "act" are synonymous. For child offenses, some indecent conduct may be included in the definition of lewd act and preempted by Article 120b(c).

In relevant part, Rule for Courts-Martial (R.C.M.) 907 provides:

(b) *Grounds for dismissal.* Grounds for dismissal include the following:

(1) *Nonwaivable grounds.* A charge or specification shall be dismissed at any stage of the proceeding if the court-martial lacks jurisdiction to try the accused for the offense.

(2) *Waivable grounds.* A charge or specification shall be dismissed upon motion made by the accused before the final adjournment of the court-martial in that case if:

. . .

(E) The specification fails to state an offense.

In relevant part, R.C.M. 910, Pleas[2] provides:

(j) *Waiver.* Except as provided in paragraph (a)(2) of this rule, a plea of guilty that results in a finding of guilty waives any objection, whether or not previously raised, as to the factual issue of guilt of the offense(s) to which the

[2] R.C.M. 910 was amended by Exec. Order 14103, 88 Fed. Reg. 50535 (2 August 2023).

> plea was made and any non-jurisdictional defect as to the offense(s) to which the plea was made that occurred prior to the plea.

STATEMENT OF THE CASE

On 25 October 2023, a military judge acting as a special court-martial found Appellee guilty, in accordance with his plea, of indecent conduct in violation of Article 134, UCMJ. The military judge sentenced Appellee to a bad conduct discharge, 60 days confinement, and a reduction to the grade of E-1. (JA at 68). The Convening Authority took no action on the findings or sentence. (Id.)

AFCCA overturned the findings and sentence on the grounds that Appellee's conviction under Article 134 was preempted by Article 120c, indecent exposure, and that a claim of preemption cannot be waived by a guilty plea. (JA at 3). The Court then dismissed Charge II and its specification. The Government moved for reconsideration. While voicing its disagreement with the merits of the Court's opinion, the Government focused its motion for reconsideration on the Court's dismissal of the charge, requesting instead that the Court authorize a rehearing or other trial under R.C.M. 810. (JA at 44). AFCCA granted the motion for reconsideration but affirmed its dismissal of the charge and specification without authorizing a rehearing. (JA at 3, 66). But this time, Chief Judge Johnson concurred *dubitante* in the decision to dismiss the charge and specification without authorizing a rehearing. (JA at 10.) Chief Judge Johnson believed that "the most appropriate remedy would be to authorize a rehearing," but concurred in dismissing the charge and specification "in the interest of judicial economy and timely appellate review." (JA at 13-14).

STATEMENT OF THE FACTS

While stationed at Royal Air Force Lakenheath, Appellee lived off-base in a local neighborhood with a daily commuter road, Station Road, to the local train station running along the back of his house. (JA at 79, 142, 147, 151). Appellee knew that his back doorway was visible from Station Road and "people walked and drove on the road and, therefore, could see me if they looked at my house while passing." (JA at 142).

Appellee would strip himself naked and open his front and back doors. (JA at 141, 146). Appellee stood in the doorway with his naked body on full display for any passersby on Station Road to see for 10 to 20 seconds, and he completed this ritual on more than one occasion. (JA at 81, 141-142, 146).

In the stipulation of fact, Appellee admitted that AB and LB, who was a 16-year-old minor at the time, would have testified to seeing him standing at or near his doorway naked while they passed by the back of his house while walking on Station Road. (JA at 80).

During his Care[3] inquiry, Appellee explained that standing naked in the doorway where someone might see him "sexually excited" Appellee, and he did so for the "sexual reason" of "potentially being seen." (JA at 142, 152-154, 156). Appellee believed being seen naked "could have been perceived by others as vulgar, obscene, and repugnant" and "could have tended to excite sexual desire or deprave the morals of people passing by on Station Road." (JA at 143).

Appellee admitted that his conduct was of a nature to bring discredit on the armed forces because the local nationals who saw him standing naked in his doorway would think less of the United States' military and his "behavior was not good for [the armed forces]'s overall reputation." (Id.)

Charges and Plea Offer

The Government initially charged Appellee with one charge and two specifications of indecent exposure in violation of Article 120c, UCMJ, and one charge and one specification of indecent conduct under Article 134, UCMJ:

> CHARGE I: Violation of the UCMJ, Article 120c
>
> Specification 1: [Appellee] did, at or near Littleport, Ely, United Kingdom, on or about 9 August 2022, intentionally expose his genitalia in an indecent manner, to wit: standing outside of his residence exposing his penis to the public.
>
> Specification 2: [Appellee] did, at or near Littleport, Ely, United Kingdom, on or about 26 September 2022,

[3] United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

> intentionally expose his genitalia in an indecent manner, to wit: standing outside of his residence exposing his penis to the public.
>
> Charge II: Violation of the UCMJ, Article 134
>
> Specification: [Appellee] did, at or near Littleport, Ely, United Kingdom, on or about 9 August 2022, commit indecent conduct, to wit: standing outside of his residence masturbating in view of the public, and that said conduct was of a nature to bring discredit upon the armed forces.

(JA at 71-73).

The charges were referred to a special court-martial. (JA at 72).

On 20 October 2023, Appellee offered to plead guilty by exceptions and substitutions to Charge II and its specification as follows:

> Specification: [Appellee] [d]id, at or near Littleport, Ely, United Kingdom, *on divers occasions between on or about 9 August 2022 and on or about 4 October 2022,* commit indecent conduct, to wit: standing *at or near the door* of his residence *naked* in view of the public, and that said conduct was of a nature to bring discredit upon the armed forces.

(JA at 74) (emphasis added).

In exchange for his offer to plead guilty, Appellee would plead not guilty to Charge I and its two specifications of indecent exposure under Article 120c, which would be withdrawn and dismissed with prejudice.[4] (JA at 75). Appellee also

[4] At the time of Appellee's court-martial, the Department of Defense Instruction (DoDI) regarding sex offender registration prescribed different requirements for Article 120c indecent exposure offenses and Article 134 indecent conduct

secured a confinement minimum and maximum of 30 to 270 days (out of a possible 365-day special court-martial maximum) and bargained for the right to argue his plea agreement in mitigation. (Id.) Appellee also agreed to waive all waivable motions. (Id.)

AFCCA's Opinion

Citing United States v. Robbins, 52 M.J. 159, 160 (C.A.A.F. 1999) and its own precedent in United States v. Jones, 66 M.J. 704, 706 (A.F. Ct. Crim. App. 2008), a two-judge majority of AFCCA held that Appellee's claim of preemption was not waived by his guilty plea. (JA at 5.) AFCCA found that the basis for the preemption doctrine is that a preempted allegation under Article 134 "fails to state an offense" and "therefore, presents 'a question of subject-matter jurisdiction . . . and . . . cannot be waived.'" (Id.) (citing Robbins, 52 M.J. at 160-161).

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convictions. A special court-martial conviction under Article 120c, indecent exposure, required the member to register with appropriate authorities in the jurisdiction in which he would reside. DoDI, 1325.07, *Administration of Military Correctional Facilities and Clemency and Parole Authority*, 11 March 2013, Incorporating Change 4, 19 August 2020, Appendix 4 to Enclosure 2, para. 1- 2, and Table 6. The DoDI also required DoD officials to inform the appropriate authorities in the offender's jurisdiction of residence when the offender was released from confinement. Id. at para 2. There were no such reporting requirements for a conviction under Article 134, indecent conduct. Id. at Table 6.

SUMMARY OF THE ARGUMENT

This Court should reverse AFCCA's decision and hold that preemption is not a matter of subject-matter jurisdiction, it is waivable, and Appellee waived it in this case with his guilty plea.

In its opinion, AFCCA erroneously relied on this Court's decision in Robbins. But Robbins' holding was limited to cases charged under Article 134, Clause 3, and did not hold that preemption is a question of subject-matter jurisdiction for cases charged under Article 134, Clauses 1 and 2. In fact, the weight of authorities, especially the Supreme Court's intervening decision in United States v. Cotton, 535 U.S. 625, 630-32 (2002), supports that preemption under Article 134 is not jurisdictional at all.

Nothing in the plain language of Article 134 purports to limit a court-martial's jurisdiction to hear a case. At most, Article 134 limits which UCMJ Article the Government can use to charge misconduct made punishable by the Code. As long as an accused was charged under any Article of the UCMJ, as Appellee was here, the court-martial has jurisdiction to try him. *See, e.g.,* Forbes v. Phelan, 153 F.4th 73, 82 (D.C. Cir. 2025). Any objection that a specification should have charged a different UCMJ offense and its elements only goes to the merits of the case and is nonjurisdictional. Id. (citing Cotton, 535 U.S. at 630-32).

The preemption doctrine essentially asks whether a charge failed to state an offense. Forbes, 153 F.4th at 73. Under Cotton, United States v. Humphries, 71 M.J. 209 (C.A.A.F. 2012), and R.C.M. 907(b)(2)(E), failure to state an offense is not a question of subject-matter jurisdiction, and it can be forfeited or waived. Because failure to state an offense does not implicate subject-matter jurisdiction, preemption must also be nonjurisdictional.

In the event this Court believes that Robbins still governs this case, it should overturn Robbins. Intervening Supreme Court decisions and subsequent federal case law call into question Robbins' holding that preemption involving assimilation errors is jurisdictional. And the rest of the stare decisis factors also favor overturning the decision.

Once this Court establishes that preemption is nonjurisdictional and therefore waivable, it should hold that Appellee's unconditional guilty plea to indecent conduct under Article 134 waived his preemption claim by operation of law. An unconditional guilty plea waives any nonjurisdictional defect as to the offense. R.C.M. 910(j). Further, since preemption is waivable, Appellee waived the issue through the "waive all waivable motions" clause in his plea agreement.

Finally, even if this Court reaches the merits of the preemption issue, Appellee is not entitled to relief because the offense charged under Article 134 was not preempted by Article 120c. Indecent nudity and indecently exposing a specific body part are not the same thing, and there is no evidence Congress intended to prohibit the Government from charging indecent nudity under Article 134, indecent conduct.

And even assuming preemption error, Appellee suffered no prejudice to any substantial right through the military judge's acceptance of his guilty plea for an offense crafted by Appellee to capture his own misconduct. Article 45(c), UCMJ. Appellee drafted, offered, and pleaded guilty to a specification of indecent conduct under Article 134 to avoid criminal liability for two specifications of indecent exposure under Article 120c and to limit the maximum possible sentence. He suffered no prejudice from receiving the conviction he successfully bargained for and is not entitled to relief.

Under any of the above theories, AFCCA erred, and this Court should reverse its decision.

ARGUMENT

I.

SERVICEMEMBERS CAN WAIVE PREEMPTION BECAUSE IT IS NOT A QUESTION OF SUBJECT-MATTER JURISDICTION.

Standard of Review

This Court reviews whether an issue is jurisdictional de novo. United States v. King, 83 M.J. 115, 120 (C.A.A.F. 2023).

Law and Analysis

The preemption doctrine, as articulated by the President in Article 134, UCMJ, MCM, Part IV, para. 91.c.(5)(a), provides that the government may not use Article 134 to charge conduct that is already covered by Articles 80 through 132. The law regarding the preemption doctrine, and jurisdiction in general, underwent several relevant developments starting in 1999.

This Court's decision in United States v. Robbins (1999)

This Court addressed preemption and subject-matter jurisdiction in Robbins. There, the appellant pleaded guilty to involuntary manslaughter under an Ohio statute assimilated into Article 134 under the Assimilative Crimes Act (ACA), 18 U.S.C. § 13(a). But the appellant then challenged his plea as improvident under the preemption doctrine, claiming that the Ohio statute was preempted by Articles 118 and 119, UCMJ, and therefore that the Ohio statute was improperly assimilated. In a limited holding, this Court held, "*[i]n this case,* the issue relates to subject-matter jurisdiction. If the offense was *improperly assimilated*, it was not cognizable by a court-martial. Thus, we hold that the preemption issue was not waived by the guilty plea or appellant's failure to raise it at trial." Robbins, 52 M.J. at 160 (emphasis added). This Court did not elaborate on how improper assimilation created a jurisdictional issue which rendered the offense not cognizable by a court-martial. Id., *see* Forbes, 153 F.4th at 87 n.3 (Robbins "held without elaboration that an improper assimilation was a jurisdictional defect").

The Supreme Court's decision in United States v. Cotton (2002)

After this Court decided Robbins, the Supreme Court issued Cotton, which held that defects in a charging instrument "do not deprive a court of its power to adjudicate a case." 535 U.S. at 630. Jurisdiction is "the court's statutory or constitutional *power* to adjudicate the case" or to "hear the case." Id. "Subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." Id. A federal court "which has jurisdiction of all crimes cognizable under the authority of the United States acts equally within its jurisdiction . . . whether its decision is right or wrong." Lamar v. United States, 240 U.S. 60, 65 (1916).

When considering a fact missing from an indictment that would enhance the statutory maximum sentence, the Supreme Court held that defects in the charging instrument do not deprive a court of jurisdiction. Cotton, 535 U.S. at 630. This is because a federal court "has jurisdiction of all crimes cognizable under the authority of the United States . . . [and] the objection that the indictment does not charge a crime against the United States goes only to the merits of the case." Id. at 631 (citing Lamar, 240 U.S. at 65). In reaching this holding, the Supreme Court overruled Ex parte Bain, 121 U.S. 1 (1887), to the extent that case found "that a defective indictment deprives a court of jurisdiction." Id. The Court rejected Bain's "elastic concept of jurisdiction" because it was incompatible with what "the term 'jurisdiction' means today." Id. at 630. In Cotton, the Supreme Court found that the issue of a defective indictment had been forfeited and thus reviewed it for plain error. Id. at 631.

AFCCA's decision in United States v. Jones (2008)

Following Robbins and Cotton, AFCCA decided Jones, 66 M.J. at 706. While Robbins focused only on improperly assimilated charges under Article 134, Clause 3, AFCCA attributed this Court's holding more expansively to apply to cases charged under Article 134, Clauses 1 and 2: "[P]reemption relates to a question of subject-matter jurisdiction . . . and cannot be waived by either a plea or failure to object." Id. at 706. As in Robbins, AFCCA did not explain how preemption, even for offenses brought under Clauses 1 and 2, was jurisdictional. Jones contained no discussion of Cotton, which had said subject-matter jurisdiction "involves a court's power to hear a case," and a defect in an indictment "goes only to the merits of the case." Cotton, 535 U.S. at 630.

This Court's decision in United States v. Humphries (2012)

In Humphries, this Court addressed the jurisdictional nature of claims of failure to state an offense. 71 M.J. 209. This Court noted that although the then-existing R.C.M. 907(b)(1)(B) (2008 ed.) stated that a specification that failed to state an offense shall be dismissed at any stage of the proceeding, the "legal basis" for the rule had been "ero[ded]." Id. at 212. This Court highlighted (1) Cotton's reversal of Bain, which meant there was no deprivation of jurisdiction through a defective charging instrument, and (2) that "court-martial jurisdiction depends solely on the accused's status as a member of the armed forces" without requiring a "service connection" to the offense. Id. at 213 (citing Cotton, 535 U.S. at 630-32; Solorio v. United States, 483 U.S. 435, 450-51 (1987)). This Court then reviewed the forfeited objection for failure to state an offense for plain error.

Change to R.C.M. 907(b) (2016)

In 2016, failure to state an offense was changed from a "nonwaivable" to a "waivable" motion to dismiss in R.C.M. 907(b). Exec. Order 13730, 81 Fed. Reg. 33331 (20 May 2016). This amendment was made to conform with Humphries. Drafter's Analysis, MCM, A21-57 (2016 ed.)

Court of Criminal Appeals Split

In contrast to Jones, the Army Court of Criminal Appeals (ACCA) held that Robbins's jurisdictional restriction was limited to cases brought under Article 134, Clause 3, through the ACA. United States v. Guardado, 75 M.J. 889, 900 (A. Ct. Crim. App. 2016), *rev'd on other grounds,* 77 M.J. 90 (C.A.A.F. 2017).[5] Thus,

[5] In United States v. Guardado, this Court did not address ACCA's jurisdictional analysis of preemption and waiver because the offenses at issue involved novel and enumerated offenses under Article 134, so the preemption doctrine was

the court found that "the preemption doctrine, at least when applied outside of the ACA, is not a question of subject-matter jurisdiction." Id. at 901. The court reasoned that the jurisdictional issue in Robbins was based on the statutory interpretation of 18 U.S.C. § 13, the ACA, and thus limited to the ACA, not Article 134 in general. ACCA explained, "one element of the ACA is that the conduct in question has *not* been 'made punishable by any enactment of Congress.'" Id. "Thus, the ACA has as an element of the offense that the conduct is not otherwise proscribed by federal law. That is, the ACA makes the preemption issue an element of the offense." Id. (internal quotation marks omitted). Because this element was "unique" to the ACA, the court found Robbins was limited to application of the ACA under Article 134. However, ACCA did not address Cotton or Humphries in its analysis.

In four cases preceding Appellee's case, AFCCA explicitly upheld its decision in Jones that preemption remained a question of jurisdiction but never discussed Humphries or Cotton. *See* United States v. Hill, 2016 CCA LEXIS 291, at *4 (A.F. Ct. Crim. App. May 9, 2016); United States v. Costianes, 2016 CCA LEXIS 391, at *4 (A.F. Ct. Crim. App. June 30, 2016); United States v. Bailey,

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inapplicable. 77 M.J. 90, 95 (C.A.A.F. 2017). This Court concluded a novel offense was "barred" by an offense already enumerated under Article 134 because it "fail[s] to state an offense under the UCMJ." Id. at 96. At that time, failure to state an offense could not be waived, R.C.M. 907 (MCM, 2012 ed.), and was therefore preserved for appeal.

2017 CCA LEXIS 639, at *7 (A.F. Ct. Crim. App. Sep. 26, 2017) (adhering to stare decisis from Jones and explicitly rejecting ACCA's interpretation of Robbins in Guardado); United States v. Dominguez-Sandoval, 2022 CCA LEXIS 203, at *16 (A.F. Ct. Crim. App. Mar. 31, 2022). However, between Bailey and Dominguez-Sandoval, AFCCA twice reviewed unobjected-to preemption for plain error. United States v. Harrower, 2018 CCA LEXIS 46, at *17 (A.F. Ct. Crim. App. Jan. 26, 2018); United States v. Poynor, 2018 CCA LEXIS 367, at *5 (A.F. Ct. Crim. App. May 2, 2018), *pet. denied*, 78 M.J. 104 (C.A.A.F. 2018) (petition included review of AFCCA's finding there was no preemption under plain error without reference to whether preemption was a question of subject-matter jurisdiction). Neither case addressed Jones or whether preemption was a question of subject-matter jurisdiction, which would have precluded forfeiture and analysis under plain error. Cotton, 535 U.S. at 630.

Appellee's Case

Resolution of Appellee's case turns on whether the preemption doctrine is nonjurisdictional. If it is nonjurisdictional, then Appellee could have waived the issue under R.C.M. 907(b), and there would be no preemption error for an appellate court to correct. Disregarding more recent Supreme Court cases and federal law, AFCCA continued to erroneously expand Robbins to conclude that all preemption under Article 134 is jurisdictional and cannot be waived. This Court should correct AFCCA's errors for the reasons below.

A. Article 134 confers jurisdiction to hear an offense brought under it.

1. *There is no limit on jurisdiction in the text of Article 134*

Congress provided the scope of a court-martial's jurisdiction to hear offenses under Article 134 in the plain language of the text. Article 134 says the disorders and neglects described therein, though not specifically mentioned elsewhere in the code, "shall be taken cognizance of by a general, special, or summary court-martial . . . and shall be punished at the discretion of that court." Article 134 "covers a broad range of conduct that . . . might 'injure the reputation of' the armed forces." United States v. Grijalva, 84 M.J. 433, 435 (C.A.A.F. 2024) (citing MCM pt. IV, para. 91.c.(3)). Under Cotton's understanding of jurisdiction, the preemption doctrine does not limit whether the court-martial can hear a case at all. It only goes toward the merits of the case: whether the specification alleged an offense under the Code. In other words, the preemption doctrine asks whether the Government chose the correct Article to charge.

The plain language of Article 134 does not contain negative language limiting the jurisdiction of a court-martial. It only limits which Article can be used for certain conduct over which the court-martial already has jurisdiction. In Solorio, the Supreme Court stated that "the scope of court-martial jurisdiction over offenses committed by servicemen was a matter reserved for Congress." 483 U.S. at 440. When charged offenses "are each described in the UCMJ, . . . it is not disputed that the court-martial . . . possessed the statutory authority to try [an accused] on the . . . specifications." Id. at 439. Thus, the only question to be asked is whether a court-martial has jurisdiction over certain conduct one way or another.

Reading the Code as a whole, courts-martial have jurisdiction over offenses described *either* in Articles 80 through 132 *or* in Articles 133 and 134 and charged under any of those Articles. If conduct was improperly charged under Article 134, when it should have been charged under one of Articles 80 through 132, then that merely solidifies that the court-martial *does* have subject-matter jurisdiction under those other enumerated articles. Nothing in the plain language of Article 134 suggests that a court-martial loses jurisdiction completely if the Government charged a servicemember under the wrong article of the UCMJ.

2. *Preemption limits the use of Article 134, not the jurisdiction of a court-martial.*

Examining the parameters of the preemption doctrine solidifies that it is not jurisdictional. "The preemption doctrine limits the general article's expansive scope, prohibiting application of Article 134 to conduct covered by Articles 80 through 132." United States v. Avery, 79 M.J. 363, 366 (C.A.A.F. 2020) (internal citation and quotations omitted). In analyzing preemption, this court considers (1) "whether Congress intended to limit prosecution for wrongful conduct within a particular area or field to offenses defined in specific articles of the Code; . . . [and (2)] whether the offense charged is composed of a residuum of elements of a specific offense." Grijalva, 84 M.J. at 435-36 (internal citation omitted).

Neither of these questions turns on whether the court-martial has the power to hear the case. Cotton, 535 U.S. at 630. The preemption analysis merely dictates what substantive law the court-martial is to apply. Whether Congress intended for an offense to be brought under Articles 80 through 132 or left Article 134 to fill in the gap, the court-martial has jurisdiction to adjudicate the case so long as the other requirements under R.C.M. 201(b) are met.

3. *Preemption goes to the merits, not jurisdiction, of the case.*

A recent case from the D.C. Circuit Court of Appeals helpfully explains the requirement for subject-matter jurisdiction in federal courts, including courts-martial. Forbes, 153 F.4th at 82. In that case, Forbes, a military member, was charged at a court-martial under Article 134 with a Virginia statute assimilated under the ACA. But Forbes challenged the specification as being improperly assimilated and preempted by Article 120, because the Virginia statute omitted a "bodily harm" element included in Article 120. Id. The court observed that a federal court has "subject-matter jurisdiction to adjudicate a criminal case so long as 'an indictment or information alleges the violation of a crime set out . . . in one of the . . . statutes defining federal crimes.'" Id. (citing United States v. Jabr, 4

F.4th 97, 102 (D.C. Cir. 2021)). This is because "[t]he jurisdictional inquiry . . . asks only whether the information alleges the violation of a federal crime, not whether the facts it alleges in fact constitute such a violation." Id. An objection that a specification does not include all the required elements of a crime "goes only to the merits of the case." Id. (citing Cotton, 535 U.S. at 631).

The D.C. Circuit went on to describe that, in the military context, the only additional requirement is that the accused was a member of the armed forces at the time of the offense. Id. (citing Solorio, 483 U.S. at 435). Courts-martial have the ability to hear a case if "(1) the defendant was a member of the military at the time of the offense charged; and (2) the military set out a charge identifying the article of the UCMJ the defendant is accused of violating." Id. A "dispute over the adequacy of the specification to state an element of the offense goes to the merits . . . it does not deprive a . . . court of jurisdiction to hear it." Id. (internal citations and quotations omitted).

According to the D.C. Circuit, this principle applies equally to offenses brought under Article 134. In Forbes, when a charge was brought under Article 134, the court-martial had subject-matter jurisdiction to "adjudicate th[e] charge." Id. Claims of improper assimilation and preemption are not jurisdictional, but instead "are merits defenses because they challenge the sufficiency of the conduct described in the specification to establish the elements of the crime." Id. at 86.

The D.C. Circuit described Forbes' preemption complaint that charging under Article 120 eliminated the burden to prove the bodily harm element as "an implicit denial that his conduct caused bodily harm." The argument that the charged offense "lightened [the Government's] evidentiary burden . . . is just a challenge to the sufficiency of the specification to describe an element of alleged criminal conduct, which . . . does not divest the military court of jurisdiction to hear the case." Id. at 87-88.

The same logic from Forbes applies here. Appellee complains that the specification of indecent conduct under Article 134 lacks the intent element required under indecent exposure in Article 120c. That argument maintains that an element of the crime is missing, which is "a challenge to the sufficiency of the specification" that does not "divest the military court of jurisdiction" under Cotton and Humphries. Id. at 87-88. Thus, even if Appellee's preemption argument was correct, the court-martial still had jurisdiction over Appellee's case.

4. *Choice-of-forum preemption may raise a question of jurisdiction, but choice-of-law preemption does not.*

In illuminating contrast to Appellee's case, the Supreme Court has held that preemption *is* considered a question of jurisdiction when Congress has assigned a particular forum to hear the case. In Int'l Longshoremen's Ass'n v. Davis, the Court explained that when Congress placed a claim within the "exclusive domain of" a federal agency, a state court's jurisdiction to hear that claim is preempted.

476 U.S. 380, 391 (1986). But the Court made clear that preemption is not always jurisdictional. "Choice-of-forum" preemption is jurisdictional, while "choice-of-law question[s]" are not. Id; *see also* Town of Carbondale v. GSS Props., Ltd. Liab. Co., 169 P.3d 675 (Colo. 2007) (explaining that "if the alleged preemption would simply alter the applicable substantive law governing the case, then preemption is [not jurisdictional and therefore] waivable").

Here, there is no "choice-of-forum" issue when a charge is brought under Article 134 or an earlier enumerated offense in the UCMJ – a court-martial can hear the case if either category of offenses is alleged. *See* Article 17, UCMJ. Instead, the preemption doctrine implicates a choice of substantive law: Article 134 (or an assimilated statute) versus one of Articles 80 through 132. Thus, the choice-of-law issue presented by the military preemption doctrine is nonjurisdictional, whereas choice-of-forum preemption is jurisdictional.

5. *The true test for jurisdiction is whether an offense is charged under any article of the UCMJ, not whether the Government chose the right article to charge.*

Other courts have espoused the same reasoning as in Forbes, and their decisions support that charging an accused under the wrong UCMJ article does not deprive a court-martial of jurisdiction. When the Government charges any offense under the UCMJ, jurisdiction attaches to that offense. The explanation for why jurisdiction exists was articulated by the 10th Circuit in United States v. Twitty, 859 Fed. Appx. 310, 313 (10th Cir. 2021). When assessing whether a statute was improperly assimilated under the ACA and whether that was a jurisdictional issue, the Court noted that "two alternatives" exist:

> (1) the ACA properly assimilated the [state] statute because the [state] statute does not punish approximately the same behavior as federal law; or
>
> (2) the ACA did not properly assimilate the [state] statute because both state and federal statutes seek to punish approximately the same behavior.
>
> Under option one, the district court would have jurisdiction under the ACA. Under option two, the district court would have jurisdiction under the federal statutes.

Id.

"[J]urisdictionally, whether the government charged the offense under the ACA or another provision of federal law did not matter." Id.

In Forbes, the D.C. Circuit echoed Twitty's position. 153 F.4th at 87. The court described the "general ineffectiveness" of claiming that improper assimilation is jurisdictional:

> A meritorious argument that an analogous federal law punishes approximately the same conduct as the putatively assimilated state offense would likely succeed in establishing federal jurisdiction to hear the case under the analogous federal law. So jurisdictionally, whether the government charged the offense under the [Assimilative Crimes Act] or another provision of federal law [does] not matter.

Id. (citing Twitty, 859 F. App'x at 313 (internal quotation marks omitted)).

The same reasoning has also been applied to novel versus enumerated offenses under Article 134, which is a similar concept to preemption. ACCA explained in Guardado: "if certain conduct is prohibited by Clause 1 or 2 of Article 134, then Article 134 conveys subject-matter jurisdiction over that conduct, which is what subject-matter jurisdiction is." 75 M.J. at 901. It is "circular" reasoning to say that "an Article 134 offense *lacks* subject-matter jurisdiction over a general disorder offense because [another] Article 134 offense *has* subject-matter jurisdiction over the offense." Id.

The same logic from Twitty, Forbes, and Guardado applies to charging a Clause 1 or 2 offense under Article 134 rather than an offense enumerated in Articles 80 through 132, such as in Appellee's case. Either (1) the Government properly charged Appellee with indecent conduct under Article 134, UCMJ, or (2) the Government improperly charged the case under Article 134, when it should have been charged under Article 120c, indecent exposure. Under option (1), the court-martial had jurisdiction under Article 134; under option (2), the court-martial had jurisdiction under Article 120c. But either way, the court-martial had jurisdiction over the offense. And since preemption was not a jurisdictional issue, it could be waived.

In sum, this Court should adopt the D.C. Circuit's persuasive reasoning in Forbes and hold that when a specification alleges a violation of Article 134 against an accused who was a member of the armed forces at the time of the offense, the court-martial has jurisdiction to hear the case. And since preemption is nonjurisdictional, it may be waived under R.C.M. 907(b).

B. The preemption doctrine is based in failure to state an offense, which is a waivable issue.

1. ***Both preemption and failure to state an offense consider whether vital elements are missing from the specification.***

A claim that an offense charged under Article 134 is preempted by an enumerated UCMJ article is the same thing as a claim that the specification fails to state an offense. As the D.C. Circuit characterized it, such a preemption argument "challenges the sufficiency of the conduct described in the specification to establish the elements of the crime." Forbes, 153 F.4th at 73. And because failure to state an offense has been waivable under the MCM since 2016, preemption should also be waivable.

ACCA, the Navy-Marine Corps Court of Criminal Appeals (NMCCA), and AFCCA agree that the basis for preemption lies in failure to state an offense.[6] *See*

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[6] While the Government agrees that the basis for preemption is failure to state an offense, NMCCA and AFCCA incorrectly relied on Robbins for that premise. Robbins said preemption of an improperly assimilated offense was a question of subject-matter jurisdiction without further reference to whether it also failed to state an offense. 52 M.J. at 160.

United States v. Taylor, 2007 CCA LEXIS 176, at *21 n.7 (N-M Ct. Crim. App. May 23, 2007) (citing Robbins); Hill, 2016 CCA LEXIS 291, at *4 (citing Robbins); Costianes, 2016 CCA LEXIS 391, at *3-4 (citing Robbins); United States v. McDonald, 2020 CCA LEXIS 101, at *10 (A. Ct. Crim. App. Mar. 31, 2020). *See also* United States v. Seeto, 2021 CCA LEXIS 185, at *14 (A.F. Ct. Crim. App. Apr. 21, 2021) (military judge and trial defense counsel understood a motion to dismiss due to preemption was "for failure to state an offense.") The lower court decision in Forbes also considered preemption under Article 134 as failure to state an offense, citing Costianes, 2016 CCA LEXIS 391, and treated it as nonjurisdictional under Cotton and Humphries. Forbes v. Del Toro, 2022 U.S. Dist. LEXIS 218655, at *14 (D.D.C. Dec. 5, 2022). And addressing preemption claims prior to Cotton, the 11th Circuit in United States v. Tomeny described preemption as jurisdictional because it "effectively claim[s] that the indictment failed to charge a legitimate offense." 144 F.3d 749, 751 (11th Cir. 1998).

The test for whether a specification states an offense asks if the specification alleged "every element of the offense either expressly or by necessary implication, so as to give the accused notice and protect him against double jeopardy." Id. Similarly, a core issue of preemption is often whether the specification under Article 134 removed an element from an earlier enumerated offense. *See* United States v. Kick, 7 M.J. 82, 85 (C.M.A. 1979). In other words, preemption asks whether the Article 134 offense failed to allege a vital element from an enumerated UCMJ offense and thereby failed to state the complete offense as captured in the UCMJ.

2. *This Court considers intra-Article 134 preemption as failure to state an offense and should consider the traditional preemption doctrine the same way.*

This Court should also compare the preemption doctrine to its most analogous claim[7] – the President's intra-Article 134 limitation on charging a novel offense under Article 134 only when "conduct by an accused does not fall under any of the enumerated Article 134 offenses."[8] MCM, pt IV ¶ 91.c.(6)(a). Like the preemption doctrine, this Court has read the President's language in ¶ 91.c.(6)(a) as limiting the Government's ability to charge "novel" offenses under Article 134. "[I]f an offense is 'already listed inside [Article 134's] framework,' it may not be charged as a 'novel' general disorder offense." United States v. Gleason, 78 M.J. 473, 475 (C.A.A.F. 2019) (alterations in original) (citing Guardado, 77 M.J. at 95). Intra-Article 134 preemption and the preemption doctrine both stem from similar concerns. They exist to prevent the Government from removing a "vital element"

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[7] "A *similar limitation* [to preemption] prevents the government from charging conduct under a novel Article 134, UCMJ, specification where that conduct is already criminalized by an enumerated Article 134, UCMJ, offense." Avery, 79 M.J. at 366 n.2 (emphasis added).

[8] For ease of understanding, this concept will be referred to as intra-Article 134 preemption.

from an enumerated offense and "improperly reduc[ing] its burden of proof." Gleason, 78 M.J. at 475; United States v. Norris, 8 C.M.R. 36, 39 (C.M.A. 1953) (Government may not use Article 134 to "eliminate vital elements" from the earlier articles). As a result, they should have very similar analyses.

When addressing intra-Article 134 preemption, this Court based its analysis in failure to state an offense. Gleason, 78 M.J. at 475; Guardado, 77 M.J. at 96; United States v. Reese, 76 M.J. 297, 303 (C.A.A.F. 2017). If intra-Article 134 preemption is based in failure to state an offense because it removes a vital element from an earlier offense, then so too should the preemption doctrine.

Because preemption is based in failure to state an offense, and failure to state an offense is nonjurisdictional, preemption is nonjurisdictional, and it may be waived under R.C.M. 907(b)(2)(E).

C. Robbins should be overturned because improper assimilation is not a question of subject-matter jurisdiction.

Appellee's case did not involve an offense brought to a court-martial under Article 134 through the ACA, and thus, this Court need not overturn Robbins to overrule AFCCA in this case. But if this Court disagrees and finds that Robbins controls Appellee's case, this Court should reconsider Robbins's holding that preemption, as applied to cases brought under Article 134 through the ACA, is still a question of subject-matter jurisdiction. If Robbins is no longer good law with respect to preemption and jurisdiction, then the premise upon which AFCCA based its opinion in Jones is likewise no longer good law and should be abrogated.

Under the first stare decisis factor[9], Robbins' application of Supreme Court caselaw was poorly reasoned. This Court analyzed Lewis v. United States, 523 U.S. 155 (1998) in conducting a preemption analysis for cases brought under Article 134 through the ACA. However, Lewis did not hold that improper assimilation under the ACA was an issue of subject-matter jurisdiction. The Court found that a particular state offense was preempted by federal law but allowed the conviction to stand because the same elements of the federal offense were proven through the state offense. Id. at 172. This was in essence a prejudice analysis. Affirming the conviction and remanding for resentencing only belied the argument that improper assimilation was a question of subject-matter jurisdiction. Had it been jurisdictional, the Supreme Court would have instead dismissed the case for lack of jurisdiction. *See also* Forbes, 153 F.4th at 86 (explaining why Lewis supports that improper assimilation is nonjurisdictional). Since Robbins' outcome was contrary to the Supreme Court's treatment of the issue in Lewis, it was poorly reasoned.

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[9] When conducting a stare decisis analysis, a court weighs four factors: (1) whether the prior decision is unworkable or poorly reasoned; (2) any intervening events; (3) the reasonable expectations of servicemembers; and (4) the risk of undermining public confidence in the law. United States v. Quick, 74 M.J. 332, 336 (C.A.A.F. 2015).

Under the second stare decisis factor, intervening case law supports the argument that improper assimilation is not a question of subject-matter jurisdiction. Robbins predated Cotton in 2002 and Humphries in 2012. As explained above, Cotton and Humphries have brought "discipline" to what was formerly an "elastic" concept of jurisdiction – it is only the court's ability to hear the case. 535 U.S. at 631. In Humphries, this Court recognized that the term "jurisdictional" is only applicable to matters that "govern[] a court's adjudicatory capacity." 71 M.J. at 213. And as the D.C. Circuit has recognized approvingly, Humphries aligns with the approach of the Supreme Court, which since Cotton, adheres to the principle that jurisdiction means only "a court's power to hear a case." Forbes, 153 F.4th at 86, n.3 (citing Cotton, 535 U.S. at 630.) Robbins' expansive understanding of jurisdiction is no longer supported under current law.

More recent, post-Robbins cases have adopted the approach from Lewis. As the Fifth Circuit commented, "[t]he nonjurisdictional character of any assimilation error is reinforced, if not directly ruled on, by [Lewis], which merely reversed and remanded for resentencing after the Court found an improper assimilation." United States v. Key, 599 F.3d 469, 476-77 (5th Cir. 2010). The 5th Circuit accordingly reviewed improper assimilation for plain error and found the offense at issue was not improperly assimilated. Id. at 477-478.

Relying on Lewis and Key, the logic from Twitty applies to this scenario. 859 Fed. Appx. at 313. Whether an offense is brought to a federal court under the ACA or a specific federal law, the federal court had jurisdiction to hear the case: "jurisdictionally, whether the government charged the offense under the ACA or another provision of federal law did not matter." Id. Twitty compared the "challenge to assimilation" to "a challenge to an indictment . . . [which] is not jurisdictional." Id. These cases determined that improper assimilation does not deprive a court of its ability to hear a case and cut against Robbins's argument that improper assimilation made an offense not cognizable by a court-martial. Intervening case law supports overturning Robbins.[10]

For the third stare decisis factor, servicemembers should not be able to reasonably rely on the concept that preemption is jurisdictional, and therefore not waivable, because it merely encourages sandbagging. This is true for both litigated and guilty plea scenarios, but certainly in the latter. An accused should not be allowed to enjoy the benefits of a favorable plea deal by agreeing to plead guilty to an offense and then turn around and claim it was preempted on appeal. If Appellee knew of the now-argued preemption issue when he offered his plea and gained

[10] This intervening case law also indicates that ACCA's Guardado analysis regarding preemption being jurisdictional for Article 134, Clause 3 was erroneous. *See* 75 M.J. at 900.

dismissal with prejudice of the "correct" specifications, this Court should not encourage such bait-and-switch tactics.

Finally, under the fourth factor, public confidence would be undermined if Robbins remains good law. An accused should not be able to plead guilty unconditionally but then have his conviction aside on the grounds that a different offense better captured his misconduct. This is especially so considering the other types of errors which are waivable, such as failure to state an offense, double jeopardy, and multiplicity. R.C.M. 907(b). Members of the public will lose faith in the military justice system when it is prone to produce outcomes such as this one: a military member offers to plead guilty to an offense, secures dismissal with prejudice of other sexual offenses, successfully attacks his guilty plea on appeal on the grounds that he actually should have been charged with the dismissed offenses all along, and ends up with no conviction or punishment at all for his indecent sexual behavior. A holding that preemption issues are nonjurisdictional and waivable would prevent unjust outcomes such as this. The need to foster public confidence in the military justice system supports overturning Robbins and enabling servicemembers to waive the issue of preemption.[11]

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[11] Public confidence in the military justice system will also not be diminished by overturning Robbins and allowing preemption to be waived, because in some scenarios waiver might benefit the accused. An accused might prefer to be charged with an Article 134 offense that might ordinarily be preempted by an

Conclusion

This Court should follow the guidance provided in Cotton and its previous holding in Humphries to "bring some discipline to the use of the term" jurisdiction. 71 M.J. at 213. This Court should find that preemption, at least with respect to Clauses 1 and 2 offenses, is not a question of subject-matter jurisdiction and can be waived. This will ensure the fair and efficient administration of justice by allowing courts-martial to proceed on the merits of Article 134 offenses while still inherently allowing an accused to object based on the preemption doctrine. It will also prevent unjust enrichment of servicemembers who "secure a favorable plea agreement, plead guilty as promised, and then attack the same conviction on appeal." United States v. Sanchez, 81 M.J. 501, 504 (A. Ct. Crim. App. 2021).

II.

APPELLEE WAIVED HIS PREEMPTION CLAIM THROUGH BOTH HIS UNCONDITIONAL GUILTY PLEA AND THE WAIVE ALL WAIVABLE MOTIONS PROVISION IN HIS PLEA AGREEMENT.

Additional Facts

In his stipulation of fact, Appellee agreed the court-martial had jurisdiction over him. (JA at 79).

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enumerated UCMJ article because the Article 134 offense appears less serious or would carry a lesser punishment.

Standard of Review

This Court reviews whether an accused waived an issue de novo. King, 83 M.J. at 120.

Law and Analysis

A. Appellee waived preemption by operation of law through his unconditional guilty plea.

A waiver by operation of law happens when a procedural rule or precedent provides that an objection is automatically waived upon the occurrence of a certain event and that event has occurred. United States v. Day, 83 M.J. 53, 56 (C.A.A.F. 2022), *see, e.g.*, United States v. Swift, 76 M.J. 210, 217-18 (C.A.A.F. 2017). "[A] *waiver by operation of law* may result from an unconditional guilty plea. We have held that '[a]n unconditional guilty plea generally waives all defects which are neither jurisdictional nor a deprivation of due process of law.'" Day, 83 M.J. at 56 (emphasis in original) (citing United States v. Schweitzer, 68 M.J. 133, 136 (C.A.A.F. 2009)). In concert with this Court's precedent, R.C.M. 910(j) was amended in 2023, stating that guilty pleas waived any objection for any nonjurisdictional defects to the offense. Exec. Order 14103, 88 Fed. Reg. 50535 (2 August 2023). Significantly, "[w]aiver [can] occur by operation of law even in the absence of intentional relinquishment." United States v. Bench, 82 M.J. 388, 393 (C.A.A.F. 2022) (citing United States v. Jones, 78 M.J. 37, 44 (C.A.A.F. 2018)).

Here, both a procedural rule (R.C.M. 910(j)) and precedent (Day, Jones) provide that an objection to a nonjurisdictional defect is automatically waived upon the occurrence of a certain event – in this case, an unconditional guilty plea. That event has occurred – Appellee pleaded guilty unconditionally. Appellee thus waived any claim of preemption by operation of law because preemption is not a jurisdictional defect. Appellee was not required to intentionally abandon the right to make a preemption claim, so it matters not whether Appellee believed preemption was or was not waivable at the time of his trial. Even in the absence of intentional relinquishment, Appellee waived his preemption claim through his unconditional guilty plea. R.C.M. 901(j); Day, 83 M.J. at 56; Bench, 82 M.J. at 393.

There is no evidence that Appellee was misadvised regarding his guilty plea and the preemption doctrine. Neither trial counsel nor the military judge made any kind of comment on the record or in the plea agreement to indicate that a claim of preemption or failure to state an offense would be preserved for appeal following Appellee's guilty plea. *Cf.* Day, 83 M.J. at 57 (a military judge's erroneous advisement that failure to state an offense would not be waived by the guilty plea precluded waiver) (citing United States v. Stewart, 43 C.M.R. 112 (C.M.A. 1971)). In his stipulation of fact, Appellee explicitly admitted that the court-martial possessed jurisdiction over him. (JA at 79.) This admission proves that both

Appellee and his counsel knew jurisdiction was required. Yet, they never challenged the charge under the preemption doctrine. Furthermore, nothing in the record suggests Appellee would have rejected the plea agreement had he known it waived his preemption claim. Therefore, this Court should conclude that Appellee waived his preemption issue by operation of law with his unconditional guilty plea and should reverse AFCCA's decision on that ground.

B. Appellee waived preemption through the waive all waivable motions provision of his plea agreement.

Appellee also waived his preemption claim through the waive all waivable motions provision in his plea agreement. When an accused agrees to waive all waivable motions in a plea agreement, the accused "voluntarily relinquished his rights at trial and on appeal to raise waivable motions." United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009).

By the time of Appellee's court-martial in 2023, preemption was not a jurisdictional defect because it is based in failure to state an offense. Cotton stripped failure to state an offense of its jurisdictional status, which Humphries explicitly applied to the military. 535 U.S. at 630-631; 71 M.J. at 213. Robbins's holding that preemption under Article 134 was jurisdictional was likewise abrogated by Cotton and Humphries. *See* Forbes, 2022 U.S. Dist. LEXIS 218655, at *13-14; Forbes, 153 F.4th at 87 n.3. Then, R.C.M. 907 was amended to reflect this change in the understanding of jurisdiction. Exec. Order 13730, 81 Fed. Reg.

33331, as captured in the 2019 MCM, removed failure to allege an offense from R.C.M. 907(b)(1), nonwaivable grounds, and placed it in R.C.M. 907(b)(2)(E), waivable grounds.

Since Appellee agreed to waive all motions that were waivable under the Rules for Courts-Martial (JA at 75), and preemption was waivable under R.C.M. 907(b)(2)(E) at the time of his trial, he waived his preemption claim through his plea agreement. This Court should reverse AFCCA's decision finding otherwise.

Conclusion

Through either his unconditional guilty plea or his provision to waive all waivable motions in his plea agreement, Appellee waived the issue of preemption. Because this was a valid waiver, there is no error for this court or AFCCA to correct on appeal. United States v. Davis, 79 M.J. 329, 331 (C.A.A.F. 2020) (citation omitted). AFCCA no longer has the ability to pierce waiver under Article 66(d)(1)(A).[12] United States v. George, 2024 CCA LEXIS 224, at *3 (A.F. Ct. Crim. App. June 7, 2024) (citing United States v. Coley, 2024 CCA LEXIS 127, at *9 (A. Ct. Crim. App. Mar. 13, 2024)). Because Appellee could and did waive the preemption issue, the Court should overturn AFCCA's ruling setting aside Appellee's conviction as preempted.

[12] *See* United States v. Chin, 75 M.J. 220, 223 (C.A.A.F. 2016); *see also* Pub. L. 116-283, § 542(b)(1)(A), 134 Stat. 3388, 3661-62 (1 Jan. 2021).

III.

APPELLEE'S CONVICTION FOR INDECENT CONDUCT WAS NOT PREEMPTED UNDER PLAIN ERROR OR OTHERWISE.

Additional Facts

During the sentencing portion of Appellee's court-martial, the Government admitted into evidence text messages between Appellee and two of his female acquaintances, T and P. In those messages, Appellee laughingly admitted to "flashing" passersby by taking his clothes off and going to the window of his house while they passed. (JA at 96-97). While offered, but not admitted into evidence during the sentencing portion of Appellee's trial, the Government possessed additional text messages between Appellee and P wherein he discussed his desire to have sex with P in "public" where people "could see," and described sexual acts in public as "exciting." (JA at 99, 103). On 10 July 2022, Appellee texted P a photo of himself lying on his stomach outside with his bare buttock visible and explained he was "tanning my naked body." (JA at 100). He texted P wondering, "You think anyone will see me tanning? 4 girls just walked by and didn't notice lol." (JA at 5).

Standard of Review

Courts review a military judge's decision to accept a guilty plea for an abuse of discretion. United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008). But questions of law arising from the guilty plea are reviewed de novo. Id. "Whether Articles 80 through 132, UCMJ, preempt a specification alleging a violation of Article 134, UCMJ, is a question of law" that courts review de novo. Grijalva, 84 M.J. at 435.

Appellate courts review forfeited issues for plain error. Davis, 79 M.J. at 331. "Under a plain error analysis, the accused has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." United States v. Davis, 76 M.J. 224, 230 (C.A.A.F. 2017). When the first prong of a plain error analysis – whether there was error at all – is a question of law, it is reviewed de novo. Id. at 229.

Law and Analysis

If preemption is a question of subject-matter jurisdiction that cannot be waived or forfeited, then this Court reviews de novo whether the charge of indecent conduct under Article 134 was preempted by indecent exposure under Article 120c.[13] Then the Court determines under the circumstances whether the

[13] "A jurisdictional defect goes to the underlying authority of a court to hear a case. Thus, a jurisdictional error impacts the validity of the entire trial and mandates reversal." United States v. Alexander, 61 M.J. 266, 269 (C.A.A.F. 2005) (citing United States v. Perkinson, 16 M.J. 400, 402 (C.M.A. 1983). If this Court concludes that preemption is a matter of subject-matter jurisdiction *and* that this offense was preempted, reversal was mandatory. To the extent that Article 45(c)

military judge abused his discretion in accepting the guilty plea. Even under a de novo review, this Court should find that Appellee's Article 134 conviction for indecent conduct was not preempted.

In the alternative, if preemption is waivable, but Appellee only forfeited his objection under the circumstances of this case, then this Court reviews whether the military judge committed plain error by accepting Appellee's plea as provident. *See* Humphries, 71 M.J. 209; United States v. Ballan, 71 M.J. 28, 34 (C.A.A.F. 2012). Because preemption asks whether there was a substantial basis in law to question the plea, the first question under plain error would still be reviewed de novo. Assuming Appellee's guilty plea was improvident under Article 45(a), the error is harmless if the variance does not materially prejudice the substantial rights of the accused. Article 45, UCMJ; United States v. Navarro Aguirre, 86 M.J. 43, 55 (C.A.A.F. 2025).

Assuming Appellee forfeited, rather than waived, any objection to preemption by failing to raise preemption at trial, there was no plain or obvious error to Appellee in the military judge's acceptance of the guilty plea. And even if there were plain and obvious error, Appellee suffered no prejudice by pleading guilty to the offense he crafted and offered to plead guilty to under Article 134.

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requires prejudice to a substantial right, the United States agrees that being convicted by a court-martial that had no jurisdiction is prejudicial.

A. There was no error because Appellee's charge of indecent conduct under Article 134 was not preempted by indecent exposure under Article 120c.

An offense under Article 134 is preempted if Congress intended an earlier enumerated UCMJ article to "cover the entire field." Grijalva, 84 M.J. at 435. "[S]imply because the offense charged under Article 134, UCMJ, embraces all but one element of an offense under another article does not trigger operation of the preemption doctrine. . . . [I]t must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way." Kick, 7 M.J. at 85 (C.M.A. 1979). To determine if Congress preempted charging the offense under Article 134, this Court asks two questions: (1) "whether Congress intended to limit prosecution for wrongful conduct within a particular area or field to offenses defined in specific articles of the Code; . . . [and (2)] whether the offense charged is composed of a residuum of elements of a specific offense." Grijalva, 84 M.J. at 435 (citing United States v. Wright, 5 M.J. 106, 110-11 (C.M.A. 1978). "An offense listed in Articles 80 through 132, UCMJ, will *only* preempt an Article 134, UCMJ, offense if" those two questions are answered in the affirmative. Avery, 79 M.J. at 366 (emphasis added). Congressional intent "may be discerned 'through direct legislative language or express legislative history.'" Grijalva, 84 M.J. at 435-436 (citing United States v. Anderson, 68 M.J. 378, 387 (C.A.A.F. 2010)).

The Government acknowledges that the specifications of indecent exposure under Article 120c and indecent conduct under Article 134 are similar in this case.

But as alleged, they are distinct offenses, and Article 120c did not preempt Article 134.

The traditional test for preemption under Kick is applicable in this case. Unlike in Grijalva, the elements in this case are different. *Cf.* 84 M.J. at 439 (when the elements between the Article 134 and earlier enumerated offense "are essentially the same, . . . we see no need to delve into legislative history to ascertain anything further about the intent of Congress.")

1. ***Indecent conduct, as charged here, is not made up of a residuum of elements of indecent exposure because being naked and specifically exposing one's genitalia are not the same thing.***

Indecent exposure under Article 120c required the Government to prove that Appellee exposed his genitalia, anus, *or* buttocks in an indecent manner and that the exposure was intentional. MCM, pt. IV, ¶ 63.b.(6)(a). The Government went beyond that in this case – Appellee pleaded guilty to being *naked* at or near his doorway in view of the public. This was different conduct than what is captured by indecent exposure. It required Appellee to plead to being naked, not to exposing a single prohibited body part.

And it was Appellee's overall nakedness that was at the core of his offense. When standing as close as possible to Appellee's property and looking straight at Appellee's doorway, Appellee would have been approximately 159 feet away from a pedestrian on Station Road. (JA at 93-94). If Appellee was standing facing forward toward Station Road as described in his plea colloquy but *only* exposing his genitalia – say, merely by pulling his penis out of the zipper in his jeans – it is less likely than anyone from the road would have realized what he was doing. (JA at 80, 146). Per the stipulation of fact, LB would have testified that she noticed Appellee when he "quickly" opened his door facing Station Road and stood there "completely naked." (JA at 80). AB would have testified that she noticed Appellant in his doorway at least in part because he "did not have a shirt on." (Id.) Under indecent exposure, the Government could not have charged Appellee for being shirtless in his doorway, even if he did so indecently, because it only criminalizes exposure of a female areola or nipple. MCM, pt. IV, ¶ 63.b.(6)(a). The gravamen of the indecent conduct in this case was that Appellee exposed his naked body to the public in a way that was likely to draw attention to himself in an indecent manner.

This same reasoning also applies to whether the charge of indecent conduct under Article 134 was composed of a residuum of offenses from indecent exposure under Article 120c. The Government did not have to prove that Appellee's exposure was intentional as is required under Article 120c, but it did have to prove that Appellee was *naked* as opposed to only exposing either his genitalia, his anus, or his buttock. When comparing the elements of the offense, indecent conduct for standing naked in view of the public under Article 134 contained a different element than indecent exposure under Article 120c and was not composed of a residuum of the elements of indecent exposure. In this sense, Appellee's case is similar to Avery: This Court found that Article 134, indecent language, is not merely a residuum of Article 120b, lewd acts. This Court reasoned that "there is a class of indecent language communicated to a child that is according to community standards, grossly offensive or shocks the moral sense because of its vulgar, filthy, or disgusting natures, yet that is not sexual – and thus not, without more, a lewd act." 79 M.J. at 368 (internal citations and quotations omitted). Likewise, there is a class of indecent conduct involving nudity that is according to community standards, "grossly vulgar, obscene, and repugnant to common propriety" and "tends to excite sexual desire," but that does not involve, specifically, the exposure of the genitalia, anus, or buttocks, or female areola or nipple. Thus, Article 134, indecent conduct is not composed of a residuum of elements of Article 120c, indecent exposure.

2. ***There is no evidence Congress intended indecent exposure under Article 120c to cover a class of offenses in a complete way.***

Turning to Congressional intent, this case again bears a striking resemblance to the legislative history available in Avery, and this Court should likewise conclude there is insufficient legislative history to find that Congress intended preemption under these circumstances.

In Avery, communicating indecent language to a child under Article 134 was not preempted by sexual abuse of child under Article 120b. 79 M.J. at 367. The Senate Report accompanying the National Defense Authorization Act (NDAA) 2012 described Article 120b "as arising from 'recommend[ations] by the Joint Services Committee on Military Justice (JSC) and the Secretary of Defense to address deficiencies in existing law that have been identified by military courts.'" Id. at 369, citing S. Rep. No. 112-26, at 115 (2011). The Senate Committee on Armed Services recommended that then-Article 120 be separated into three categories: (1) Article 120, rape and sexual assault of any person; (2) Article 120b, sexual offenses against children; and (3) Article 120c, "other non-consensual sexual misconduct." Id. The same "scant" legislative history is at issue here. Id. Nothing in the history of recent amendments to sexual offenses under the UCMJ suggests that indecent exposure was intended to preempt indecent conduct under Article 134.

First, Congress never signaled an intent for preemption when it amended Article 120 in 2007. Indecent acts[14] and indecent exposure were separate offenses in 2007 as Article 120(k) and 120(n) respectively, where they obviously could not preempt each other. MCM, pt. IV, ¶ 45a.(k), (n) (2008 ed.) This was not "the

[14] Indecent Acts with Another became Indecent Acts. MCM, Appendix 23, ¶ 45.f.(4) (2008 ed.)

situation against which the preemption doctrine was intended to guard: namely, *creating* an enumerated offense in order to ease the government's evidentiary burden with respect to a listed offense enacted by Congress." Id. (emphasis in original). Historically, indecent exposure and indecent acts/conduct have coexisted in the UCMJ and MCM and have both been viable charging options. The history of these offenses is "further evidence that Congress did not implicitly intend to preempt the enumerated Article 134, UCMJ, offense." *See* Avery, 79 M.J. 363, 367 n.4.

Second, when Congress again amended Article 120 in 2012, according to 2012 MCM analysis, the new offenses of indecent viewing, visual recording, or broadcasting under Article 120c were derived from indecent acts, formerly Article 120(k). But there was no mention of indecent exposure related to indecent acts. MCM, Appendix 23, ¶ 45c.a. (2012 ed.). This supports that the new indecent exposure offense under Article 120c was not intended to subsume conduct that had formerly been captured by the indecent acts offense.

Third, after issuance of the 2012 MCM, the JSC proposed amendments to the Manual, including an amendment to reintroduce indecent conduct into Article 134. Department of Defense Manual for Courts-Martial; Proposed Amendments, 77 Fed. Reg. 64,865-64,866 (23 Oct 2012). The President listed indecent conduct under Article 134 again in 2016. MCM, pt. IV, ¶ 90 (2016 ed.) JSC's 2012 proposed amendments and the 2016 MCM said child offenses charged under Article 134, indecent conduct[15] might be preempted by Article 120b, but the committee expressed no concerns that indecent exposure might preempt indecent conduct. Id.

As Judge Morgan said in his dissent, "scant legislative history, . . . under these circumstances falls shy of the explicit congressional intent necessary" to find preemption." (JA at 9). It is unlikely Congress intended indecent exposure to preempt charging for standing naked under indecent conduct when (1) in 2007, it shrank the scope of body parts prosecutable under indecent exposure; (2) it was silent when presented with the recommendation that the President reinsert indecent conduct under Article 134; and (3) the JSC specifically listed the other offenses that would likely preempt indecent conduct but omitted indecent exposure.

Historically, the fact that an Article 134 offense requires a lesser mens rea than an enumerated Article offense does not automatically trigger preemption. In United States v. Taylor this Court found malingering under Article 115 did not preempt a charge of intentional injury under Article 134 despite a lower intent element. 38 C.M.R. 393 (C.M.A. 1968). While malingering required a specific intent to avoid work and focused subjectively on "the accused's state of mind,"

[15] "Indecent conduct includes offenses previously prescribed by 'indecent acts with another' except that the presence of another person is no longer required. . . . 'Conduct' and 'act' are synonymous." Id.

intentional injury without that specific intent was permitted under Article 134 because of its "objective orientation . . . calculated to preserve good order and discipline, without necessarily considering the particular mental attitude of the accused." Id. at 395. The Court reasoned that nothing in the language or arrangement of Article 115 suggested that it was intended to eliminate the well-recognized offense of deliberate self-injury that was "to the prejudice of good order." Id.

As relevant to the present case, indecent exposure requires an intentional exposure of the genitalia, but indecent conduct or indecent acts has long been considered a general intent crime. *See* Maj Eugene Milhizer, *Indecent Acts as a Lesser-Included Offense of Rape,* 1992 Army Law. 3, 4 n.15 (1992) (citing United States v. Brundidge, 17 M. J. 586 (A.C.M.R. 1983); United States v. Anderson, 10 M. J. 536 (A.C.M.R. 1980); United States v. Jackson, 31 C.M.R. 738, 741 (A.F.B.R. 1962). Like in Taylor, the military still has an interest in prosecuting indecent nudity that does not necessarily involve the intentional display of the specific body parts listed in Article 120c, and there is nothing to indicate that Congress intended Article 120c to prohibit the military from prosecuting such indecent nudity under Article 134.

Ultimately, neither legislative text nor history "compels the conclusion that Congress intended to wholly subsume into Article 120c the field of" indecently exposing one's naked body to the public. Avery, 79 M.J. at 369. This Court should not find "Congress intended to limit prosecution" for such conduct to only Article 120c, and Appellee's charge under Article 134 was not preempted. Because it was not preempted, the military judge did not abuse his discretion in finding Appellee's plea provident.

B. If there was error, it was not plain or obvious.

If this Court finds that Appellee's offense under Article 134 was preempted by Article 120c, the error was not plain or obvious. Appellee's conviction under Article 134 came from the language he offered in his plea agreement. Neither the trial defense counsel, trial counsel, nor the military judge saw an issue with whether the charge under Article 134 for standing naked in Appellee's doorway in view of the public raised preemption. Plain error review typically addresses unobjected-to Government actions. Here, however, the challenged action belongs entirely to Appellee, who negotiated and offered his guilty plea through exceptions and substitutions. (JA at 74.) No existing case law held that indecent exposure preempted indecent conduct. Similarly, no legislative history indicated that indecent exposure preempts indecent conduct. Public nudity is not obviously identical to exposing a specific, statutorily enumerated body part under Article 120c. Indeed, trial defense counsel never even raised preemption as a potential motion. (JA at 166–167.) Therefore, even if the military judge erred by accepting Appellee's plea, that error was neither plain nor obvious.

C. If there was plain and obvious error, Appellee was not prejudiced because he received exactly what he asked for – a single conviction for indecent conduct under Article 134.

"A finding . . . of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Article 59(a), UCMJ. "Even if a guilty plea is later determined to be improvident, a reviewing court may grant relief only if it finds that the military judge's error in accepting the plea materially prejudice[d] the substantial rights of the accused." Article 45(c), UCMJ." United States v. Moratalla, 82 M.J. 1, 4 (C.A.A.F. 2021) (internal quotation marks omitted).

This Court previously asked "whether appellant's plea of guilty . . . is *improvident* since the *preemption doctrine* applies to this charge which was brought under the assimilative crimes act." Robbins, 52 M.J. at 160 (emphasis added). If Appellee's guilty plea under Article 134 was preempted by Article 120c, then preemption provided a substantial basis in the law to find Appellee's plea improvident. Inabinette, 66 M.J. at 321-322.

While the lead opinion did not address prejudice, the concurrence *dubitante* stated that Appellee suffered material prejudice to his substantial rights in this case because Appellee was "convicted of a supposed violation of Article 134, UCMJ, that was not a chargeable offense . . . and the Article 134 offense avoided the mens rea requirement of Article 120c, UCMJ." (JA at 12). But the concurrence ignores a key fact in this situation – *Appellee* chose the language to which he pleaded guilty for indecent conduct under Article 134. (JA at 74). The Government originally charged Appellee with two specifications of indecent exposure under Article 120c for exposing his penis to the public and one specification of indecent conduct for masturbating in his doorway in view of the public under Article 134. (JA at 71-73). Likely understanding the intended testimony of the witnesses prepared to testify against him (JA at 80) and his own statements from text messages and his interview with local police (JA at 95-106), Appellee sought to limit his criminal exposure by offering to plead guilty to a single offense of indecent conduct under Article 134 for standing naked in view of the public. If accepted, Appellee's plea offer would relieve *him* of the burden of either confessing to or being convicted of intentionally exposing his genitalia or of masturbating in his doorway in view of the neighbors.

The Government was prepared to prove Appellee's intentional exposure beyond a reasonable doubt through multiple eyewitnesses and self-incriminating text messages. Two pedestrians, including a minor, were ready to testify that Appellee stood naked in his doorway posing or holding his genitalia. (JA at 80). Furthermore, in text messages from July and August 2022, Appellee bragged about “flashing” people from his window and repeatedly expressed a desire to engage in public sexual acts because he found it exciting. (JA at 96-106). This witness testimony and digital evidence were sufficient to prove Appellee intentionally exposed himself and masturbated in view of the public beyond a reasonable doubt.

The text messages were close enough in time and specificity that the Government would have admitted them as evidence under Mil. R. Evid. 404(b) to show Appellee’s intent and motive to expose his penis and masturbate in public. The Government had evidence to go forward with the original charges and only refrained from doing so because Appellee offered to plead guilty instead. And in the end, Appellee admitted to intentionally exposing himself. Appellee stated (1) “[t]he potential for someone to see me naked was sexually exciting,” (2) “[k]nowing that someone could see me naked was part of the reason I opened the door,” and (3) “my behavior specifically opening the door to be seen naked . . . sexually excited me.” (JA at 142). Appellee even clarified that he did not accidentally or mistakenly stand naked in the doorway. (JA at 155). Appellee “achieved the specific result for which he successfully bargained,” and did not suffer prejudice even if the offense was preempted. (JA at 22).

In offering to plead guilty, Appellee could only have had one of two possible mindsets: (1) Appellee believed he was guilty of an offense under Article 134 and wished to plead guilty to that offense in exchange for the significant benefit of dismissal with prejudice of the other, more serious, charges and a sentencing cap; or (2) Appellee sought to plead guilty to an offense under Article 134 that he believed to be preempted by Article 120c so he could later attack his guilty plea on appeal, resulting in no conviction at all. If Appellee were of the first mindset, he has not suffered prejudice through his conviction. Appellee was given exactly what he asked for – conviction for a single offense for standing naked in view of the public, dismissal with prejudice of two charges of indecent exposure under Article 120c, and a sentencing cap that shaved 95 days off his maximum confinement at a special court-martial. (JA at 74-75).

If, however, Appellee were of the second mindset, then this Court should not reward Appellee's bait-and-switch maneuver by upholding AFCCA's ruling setting aside his conviction. Contrary to the *dubitante* concurring opinion, in these circumstances Appellee has not suffered prejudice by being convicted according to his own plea offer. (JA at 12). Appellee was not entitled to no conviction whatsoever – he was entitled to a court-martial with all the rights afforded to him by that forum. He was entitled to hold the Government to its burden to prove him guilty beyond a reasonable doubt of each of the referred charges. But he *chose* to offer to plead guilty to a single offense and knowingly waived those rights. Appellee even successfully used his guilty plea and the existence of a federal conviction as evidence in mitigation for his sentence, receiving only 60 days of confinement out of a possible 270. (JA at 67-68, 204). To set aside his conviction now, when Appellee suffered no prejudice, allows Appellee to take advantage of the military justice plea agreement system and "is inconsistent with the fair and efficient administration of justice." Sanchez, 81 M.J. at 504.

Conclusion

In conclusion, even if Appellee preserved this issue, the military judge did not err, plainly or otherwise, by accepting his guilty plea, because the Article 134 offense to which Appellee voluntarily pleaded guilty was not preempted by Article 120c. Even if it were preempted, Appellee suffered no material prejudice to a substantial right. This Court should reverse AFCCA's decision setting aside Appellee's conviction.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court overturn the decision of the Court of Criminal Appeals and remand for the completion of Article 66 review in accordance with this opinion.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and the Appellate Defense Division on 24 July 2026.

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Dated: 24 July 2026