IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) **HANNES MARSCHALEK** United States Air Force *Appellant.*	))))))))	UNITED STATES' MOTION FOR RECONSIDERATION Before Special Panel No. ACM S32776 17 February 2026

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 31.2 of this Court's Rules of Practice and Procedure, the United States respectfully moves this Honorable Court to reconsider its 16 January 2026 opinion dismissing the charge to which Appellant plead guilty and (1) clarify that Appellant's plea was improvident and (2) authorize an "other trial" under R.C.M. 810. United States v. Marschalek, 2026 CCA LEXIS 6 (A.F. Ct. Crim. App. Jan. 16, 2026) (unpub. op.).

The United States disagrees with the majority and concurring opinions with respect to whether preemption can be waived and whether the Article 134 offense here was preempted and agrees with the dissent written by Judge Morgan. The United States wishes to preserve the preemption issues in case of further appeal, but the focus of the United States' motion for reconsideration is whether this Court should have authorized an "other trial" in the above captioned case.

Reconsideration is appropriate because "[a] material legal or factual matter was overlooked or misapplied in the decision." A.F. CT. CRIM. APP. R. 31.2(b)(1). Specifically, this Court:

1. Overlooked that a plea is improvident if it fails to state an offense, that the basis for the preemption doctrine is that a preempted charge fails to state an offense, and that a plea is improvident if the offense is later found to be preempted.

2. Overlooked its authority under Article 66 to authorize a rehearing after dismissing a specification.

3. Overlooked R.C.M. 810(e) and the discussion section of R.C.M. 810(a), which says an "other trial" may be ordered if the "original proceedings are declared invalid because of a . . . failure of a charge to state an offense," which is the basis for preemption.

4. Overlooked R.C.M. 705(e)(4)(B) and United States v. Von Bergen, 67 M.J. 290 (C.A.A.F. 2009), which allow a convening authority to withdraw from a plea agreement if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.

At issue is whether a preempted guilty plea is improvident and whether, because it was improvident, this Court should exercise its discretion to authorize a rehearing under Article 66(f)(1)(A)(ii). This Court overlooked its ability to set aside Appellant's guilty plea as improvident and authorize a rehearing under Article 66, which would have allowed the Government to pursue the original, enumerated charge and specifications for indecent exposure under Article 120c, UCMJ, against Appellant that were dismissed in accordance to the terms of his plea agreement. Authorizing a rehearing under these circumstances is appropriate and is consistent with the fair administration of justice to prevent Appellant and future accuseds from securing favorable plea agreements that include dismissal with prejudice of some of their charges and then gaining a windfall through dismissal on appeal instead of a rehearing. United States v. Kennedy, 2021 CCA LEXIS 575, *8 (A.F. Ct. Crim. App. 2021) (unpub. op.).

This Court overlooked that an "other trial" may be held under R.C.M. 810 when the original proceeding was declared invalid because the charge failed to state an offense, and the basis for preemption is that the charge fails to state an offense. R.C.M. 810(a), Discussion. This Court further overlooked its ability to specifically find that the guilty plea was improvident,

which would allow the convening authority to exercise its authority under R.C.M. 705(e)(4)(B) or Von Bergen to withdraw from the guilty plea. Finding that Appellant's guilty plea was improvident based on preemption and that an "other trial" is authorized under Article 66(f)(1)(A)(ii) would allow the Government to revive the original charges dismissed in accordance with Appellant's guilty plea and allow for Appellant to be tried on the merits for the original charged offenses under Article 120c and Article 134.

This Court overlooked its ability to "place the parties in their pretrial status quo ante," Von Bergen, 67 M.J. at 293, by both finding Appellant's guilty plea improvident, which would allow the convening authority to withdraw from the plea agreement under R.C.M. 705(e)(4)(B), and by authorizing a rehearing. Failing to return the parties to the status quo and preventing the Government from proceeding on the original charges allows gamesmanship by Appellant in this case, who offered to plead guilty by exceptions and substitutions to a specification under Article 134 that *Appellant* then contested on appeal as preempted *after* Appellant reaped the other benefits of the plea agreement (dismissal with prejudice of the other charges and a sentencing cap). Left as is, this Court's decision is contrary to the effective administration of justice because it allowed Appellant to offer to plead guilty to a charge under Article 134, attack that same charge as preempted on appeal, and then escape accountability without giving the convening authority the opportunity to bring Appellant to a court-martial for the original, enumerated offenses under Article 120c and Article 134.

For these reasons, this Court should reconsider its decision.

ISSUE FOR RECONSIDERATION

WHETHER THIS COURT SHOULD CLARIFY THAT APPELLANT'S PLEA IS IMPROVIDENT AND AUTHORIZE AN OTHER TRIAL UNDER R.C.M. 810.

JURISDICTION

In accordance with Rules 15 and 31(b)-(c), this Court has jurisdiction to consider this motion because neither the Court of Appeals for the Armed Forces nor any other court has acquired jurisdiction over this case.

STATEMENT OF THE CASE

The government initially charged Appellant with one charge (Charge I) and two specifications of indecent exposure in violation of Article 120c, UCMJ, for standing outside his residence and exposing his penis in view of the public on two different occasions. (*Charge Sheet*, dated 3 April 2023, ROT, Vol. 1.) The government also initially charged Appellant with one charge (Charge II) and one specification of indecent conduct under Article 134, UCMJ, for masturbating outside in view of the public, which conduct was of a nature to bring discredit upon the armed forces. (Id.)

Appellant offered to plead guilty to Charge II and its specification by exceptions and substitutions. (App. Ex. I, ROT, Vol 2) Specifically, he would plead guilty to "standing naked" at or near his doorway in view of the public instead of "masturbating" "outside" in view of the public. (*Id.*) Per the plea agreement, Appellant would plead not guilty to Charge I and to the excepted language of Charge II. (*Id.*)

In return for his guilty plea, Charge I and its two specifications would be withdrawn and dismissed with prejudice and the maximum confinement would be 270 days. (App. Ex. I at 2.) The plea agreement did not specifically address the effect of appellate review with respect to the charges dismissed with prejudice. (Id.) Appellant's plea agreement did include the term that the plea agreement would be "canceled and of no effect," by "[r]efusal of the court to accept my plea of guilty." (Id.)

A military judge, sitting alone at a special court-martial, found Appellant's guilty plea to Charge II to be provident. (R. at 72, 74.) At that time, the Government moved to withdraw Charge I and its two specifications with the condition that dismissal with prejudice was "predicated on announcement of sentence." (App. Ex. I at 2; R. at 73.) The military judge granted this motion. (R. at 73.)

The military judge sentenced Appellant to a reduction in grade to E-1, two months confinement, and a bad conduct discharge. (C*orrected Entry of Judgment*, dated 7 February 2024, ROT, Vol. 1.) At announcement of the sentence, the military judge asked if the Government had "a motion with respect to Charge I and its specifications," and the Government moved "to dispose of the previously withdrawn specifications." (R. at 197). The military judge granted the motion. (R. at 197).

On appeal, Appellant raised four assignments of error before this Court. (*See* App. Br.) On 16 January 2026, this Court found in favor of Appellant on his first assignment of error, concluding that his conviction for standing naked in his doorway in view of the public under Article 134 was preempted by indecent exposure under Article 120c. Marschalek, 2026 CCA LEXIS 6. This Court set aside the finding of guilty, dismissed Charge II and its specification, and ordered that "[a]ll rights, privileges, and property, of which Appellant has been deprived by virtue of the findings and sentence set aside by this decision, [be] restored." Id. at *16. This Court did not address whether the preemption doctrine made Appellant's guilty plea improvident or authorize a rehearing or "other trial." Id.

The United States received the Court's opinion on 16 January 2026 and timely filed a motion for reconsideration within 30 days.

STATEMENT OF FACTS[1]

After exercising in his off-base residence in a local neighborhood of the United Kingdom, Appellant stripped himself naked and opened both external doors to his house while completely naked. (R. at 29, 34.) Appellant knew that his doorway was visible to the public from the road that ran along the back of his house. (R. at 30, 35; Pros. Ex. 1 at 1.) He stated, "I understand and believed that I was in the view of the public when I stood at or near the door of my residence naked on one [sic] more than one occasion between 9 August and or about 4 October 2022." (R. at 30.) When he exposed his genitals to the neighborhood, he stood in the doorway for approximately 10 to 20 seconds. (R. at 34.) Appellant made no effort to cover his body or genitals. (R. at 30, 34; Pros. Ex. 1 at 3.) Appellant repeated this process on more than one occasion. (R. at 29.)

The possibility that someone might see him naked, "sexually excited" Appellant, and he hoped he would be seen when he opened the door. (R. at 30, 40, 41, 44.) Appellant explained, "I believe that people passing my house on Station Road could have perceived by behavior as vulgar, obscene because I was naked[,] and they could see me." (R at 42.) He admitted, "I also believed that my behavior could have been -- could have tended to excite sexual desire or deprave the morals of people passing by on Station Road." (R. at 31.) Two women did see Appellant naked in his doorway while walking past his house. (R. at 31; Pros. Ex. 1.)

Appellant admitted that his conduct was of a nature to bring discredit on the armed forces, and British nationals who saw him naked would think less of the United States' military because of his conduct. (R. 31-32; Pros. Ex. 1 at 3.)

[1] The United States adopts the statement of facts from its original Answer to Assignments of Error; however, for this Court's convenience, the most pertinent facts are recited again here.

ARGUMENT

THIS COURT SHOULD CLARIFY THAT APPELLANT'S PLEA WAS IMPROVIDENT BASED ON THE PREEMPTION DOCTRINE AND AUTHORIZE A REHEARING OR "OTHER TRIAL" UNDER ARTICLE 66(f)(1)(A)(ii).

Law & Analysis

This Court should reconsider its opinion and specifically find that Appellant's plea was improvident based on the preemption doctrine for three reasons: (1) preemption is a question of law, based on a failure to state an offense; (2) this Court could authorize a rehearing under Article 66(f)(1)(A)(ii), which would be an "other trial" under R.C.M. 810 because the charge failed to state an offense; and (3) finding the guilty plea improvident will allow the convening authority to withdraw from the plea agreement under R.C.M. 705 and bring the original, enumerated charges against Appellant in an authorized rehearing/other trial.

A. A guilty plea to an offense under Article 134 that is preempted by an enumerated offense is improvident.

Preemption provides a substantial basis in the law to find a guilty plea improvident. To determine whether a plea was improvident, this Court asks "[d]oes the record as a whole show a *substantial basis in law* and fact for questioning the guilty plea?" United States v. Inabinette, 66 M.J. 320, 321-322 (C.A.A.F. 2008) (emphasis added). "Whether an offense is preempted depends on statutory interpretation, which is a *question of law* we review de novo." Marschalek, 2026 CCA LEXIS 6, at *6 (citing United States v. Wheeler, 77 M.J. 289, 291 (C.A.A.F. 2018)) (emphasis added). If preemption is a question of law, then it inherently provides a substantial basis in law to find a guilty plea improvident, if the Article 134 offense was preempted by an enumerated offense. Therefore, preemption is a basis for a plea to be improvident.

This Court's own opinion in United States v. Robbins referred to whether a "guilty plea was improvident as a result of the preemption doctrine." 48 M.J. 745, 748 (A.F. Ct. Crim. App. 1998). CAAF likewise referred to preemption as a question of providence; in United States v. Robbins, the granted issue was "whether appellant's plea of guilty . . . is *improvident* since the *preemption doctrine* applies to this charge which was brought under the assimilative crimes act." 52 M.J. 159, 160 (C.A.A.F. 1999) (emphasis added).

CAAF "addressed the relationship between the military preemption doctrine under Article 134 and the providency of [a]ppellant's plea" again in United States v. Erickson 61 M.J. 230, 232 (C.A.A.F. 2005). In Erickson, Appellant argued his plea under Article 134 for inhaling nitrous oxide was improvident for (1) lacking a sufficient factual basis to support his guilt and (2) as preempted by Article 112a. Id. at 232-233. At the beginning of the opinion, CAAF found "[f]or the reasons set forth below," which included the analysis of both the factual basis and preemption, "the guilty plea was provident." Id. at 231. Finally, the Coast Guard Court of Criminal Appeals has also taken up whether a guilty plea is "improvident" based on the preemption doctrine. United States v. Kowalski, 69 M.J. 705, 706 (C.G. Ct. Crim. App. 2010).

This Court should further consider a plea to a preempted offense "improvident" because a preempted offense fails to state an offense, and this Court found that failure to state an offense rendered a plea improvident. United States v. Enriquez, 1996 CCA LEXIS 296, at *5 (A.F. Ct. Crim. App. Oct. 4, 1996). As the majority opinion in Enriquez states, the "basis for the preemption doctrine is the principle that, if Congress has occupied the field for a given type of misconduct, then an allegation under Article 134, UCMJ, fails to state an offense." Id. at *7, (citing United States v. Robbins, 52 M.J. 159, 160-61 (C.A.A.F. 1999)). This Court has consistently adhered to the concept that the basis for the preemption doctrine is that the charge

fails to state an offense. *See* United States v. Costianes, 2016 CCA LEXIS 391, at *4 (A.F. Ct. Crim. App. June 30, 2016); United States v. Hill, 2016 CCA LEXIS 291, at *4 (A.F. Ct. Crim. App. May 9, 2016).

In Enriquez, this Court addressed a guilty plea for an assimilated offense for federal money laundering under Clause 3 of Article 134. 1996 CCA LEXIS 296, at *5. Because the conduct Appellant pled guilty to was not an "unlawful activity" covered by the applicable federal statute, this Court found that the guilty plea "was improvident because it failed to state an offense." Id. In United States v. Day, this Court addressed an appellant's argument that a guilty plea to two specifications for attempted conspiracy were "improvident as the specifications failed to state an offense." 2022 CCA LEXIS 5, at *16 (A.F. Ct. Crim. App. Jan. 5, 2022). These cases demonstrate that failure to state an offense is treated as a question of providence.

Based on the above, this Court should take these two principles together: Preempted offenses are improvident because 1) a preempted offense fails to state an offense; and 2) a guilty plea is improvident if the charge failed to state an offense. Therefore, because this Court found Appellant's guilty plea to Charge II, indecent conduct under Article 134 was preempted, this Court should have specifically found that there was a "substantial basis in the law" to find Appellant's guilty plea improvident. Because this Court did not do so, it should reconsider its opinion. Marschalek, 2026 CCA LEXIS 6, at *15; Inabinette, 66 M.J. at 321-322.

This Court should specifically clarify that Appellant's guilty plea was improvident, which explained in greater detail below, would allow the convening authority to withdraw from the plea agreement.

B. Because the basis for preemption is failure to state an offense, this Court should authorize a rehearing under Article 66(f)(1)(A)(ii) so the convening authority may bring Appellant to an other trial under R.C.M. 810.

This Court overlooked its ability to authorize a rehearing under Article 66(f)(1)(A)(ii) when a rehearing in this case could have been authorized as an "other trial" under R.C.M. 810, and this Court should reconsider its decision as contrary to the fair and efficient administration of justice. Kennedy, 2021 CCA LEXIS 575, at *8. The statutory term "rehearing" under Article 66(f)(1)(A)(ii) encompasses a "rehearing," "new trial," and "other trial" under R.C.M. 810. Richard v. United States, 2026 CCA LEXIS 2, at *9 (C.G. Ct. Crim. App. Jan. 7, 2026).

If this Court were to authorize a rehearing in this case, the circumstances would "place any such rehearing within the definition of 'other trial' in R.C.M. 810(e)." Id. An "other trial" is "another trial of a case in which the original proceedings were declared invalid because of lack of jurisdiction or failure of a charge to state a defense." R.C.M. 810(e).

And, as explained above, the basis for a preempted offense is that it fails to state an offense. Costianes, 2016 CCA LEXIS 391, at *4; Hill, 2016 CCA LEXIS 291, at *4. Appellant should be subject to an "other trial" because to dismiss the case against him grants Appellant an unjust windfall. He bargained for a maximum confinement term and dismissal of Charge I through his plea agreement in exchange for a guilty plea (App. Ex. I), but now he has no criminal conviction for repeatedly exposing his genitals to the public to sexually excite himself and others. (R. at 31, 42).

The Government cannot bring Appellant to a rehearing absent authorization from this Court, because the convening authority's jurisdiction following an appellate mandate is limited to "the explicit purpose of the mandate." United States v. Carter, 2016 CCA LEXIS 432, at *36 (A.F. Ct. Crim. App. July 21, 2016). In Carter, this Court relied on United States v. Riley, which

found that "[o]n a remand from this Court, a Court of Criminal Appeals can only take action that conforms to the limitations and conditions prescribed by the remand." 55 M.J. 185, 188 (C.A.A.F. 2001). CAAF affirmed this Court's opinion in Carter, holding that under the language in then-Article 66(d), authorizing a rehearing is discretionary; a CCA "*may* order a rehearing and, if it does not order a rehearing, it *shall* dismiss the charges." United States v. Carter, 76 M.J. 293, 294 (C.A.A.F. 2017) (emphasis in original). Absent an authorization from this Court, the Government cannot bring Appellant to another trial on the charges in this case. Id. at 295.

This Court *should* use its discretionary authority to authorize a rehearing and permit the Government to bring charges against Appellant again. Not authorizing a rehearing allows Appellant to enjoy the benefits of his plea agreement without the guilty plea he offered in exchange. If Appellant "can successfully attack the providence of his guilty pleas, escape the conviction based on those pleas, yet bar the convening authority from resurrecting the withdrawn charges, the convening authority has, in a sense, not received the expected benefit of his bargain." United States v. Cook, 12 M.J. 448, 455 (C.M.A. 1982). Such is the situation here. This Court's current decision allows Appellant to escape all accountability for indecently exposing himself to a local, off-base community instead of returning the parties to the "status quo" to proceed to trial as originally planned. Von Bergen, 67 M.J. 290, 293 (C.A.A.F. 2009). This Court overlook or misapplied its authority to grant a rehearing in this case and should reconsider its decision to avoid granting Appellant this unearned boon.

C. This Court should find Appellant's guilty plea improvident to confirm that the convening authority can withdraw from the plea agreement in accordance with R.C.M. 705(e)(4)(B) or consider it cancelled by the terms of the plea agreement itself.

By failing to identify Appellant's plea as improvident, this Court overlooked a convening authority's ability to withdraw from a plea agreement in the event that the "findings are set aside

because a plea of guilty entered pursuant to the agreement is held improvident on appellate review." R.C.M. 705(e)(4)(B). Without an express statement that Appellant's plea was improvident, the United States could experience problems bringing the original charge and specifications for indecent exposure under Article 120c against Appellant in an authorized rehearing under R.C.M. 810.

The plea agreement in this case stated that Charge I and its two specifications would be dismissed with prejudice. (App. Ex. I at 2). In accordance with that agreement, trial counsel first moved to withdraw Charge I after the military judge accepted Appellant's guilty plea to Charge II and later moved to dismiss the charges after announcement of the sentence. (R. at 73, 197.) The military judge granted both motions. (Id.)

While the plea agreement itself did not contain an express term regarding withdraw from the plea agreement or revival of the dismissed charges pending appellate review, R.C.M. 705(e)(4)(B) established a two-part test for the convening authority to withdraw from the plea agreement: the appellate court must "(1) set aside [the] findings; and (2) do so because the plea was improvident." United States v. Smead, 68 M.J. 44, 64 (C.A.A.F. 2009). An express plea term permitting the convening authority to withdraw from the plea agreement if an appellate court found the guilty plea improvident is not required. As the Army Court of Criminal Appeals noted in United States v. Stout, such a plea term is "simply a restatement of the CA's authority set forth in R.C.M. 705(d)(4)(B) to withdraw from an agreement upon an appellate decision finding appellant's plea improvident." United States v. Stout, 2018 CCA LEXIS 174 at *8-9 (Army Ct. Crim. App. 9 Apr. 2018) (mem. op.), *aff'd on other grounds*, 79 M.J. 168 (C.A.A.F. 2019). However, Smead suggests that an appellate court must make "an express holding on

providence" in order for the convening authority to withdraw from a plea agreement under R.C.M. 705(e)(4)(B).

Further, Appellant's plea agreement in this case *did* include the term that the plea agreement would be "canceled and of no effect" from "[r]efusal of the court to accept my plea of guilty" as a possibility. (App. Ex. I). This Court's finding that the plea was improvident would result in "cancellation" of the plea agreement through that term, because "the military judge could not have accepted an improvident plea." Von Bergen, 67 M.J. at 294. "[T]his Court's decision" finding the plea improvident "had the same effect as if the military judge had not accepted Appellant's plea, which was an express basis for cancellation." Id.

This Court overlooked the importance of finding the plea improvident because, under either R.C.M. 705 or Von Bergen, the plea agreement should no longer exist, and the parties should be returned to the status quo that existed prior to trial. In this case, this Court only met the first part of the R.C.M. 705 test, in that this Court *did* set aside the findings. Marschalek, 2026 CCA LEXIS 6, at *15. For the second part, this Court did not "express[ly]" rule on the providence of Appellant's plea. Smead, 68 M.J. at 64. Without an "express holding on providence," CAAF has stated that the United States cannot rely on R.C.M. 705(e)(4)(B) to have a convening authority withdraw from the plea agreement. Id. at 64-65. Without a more explicit finding on providence or even a discussion of improvidence at all in its opinion, this Court left open whether the convening authority can treat the dismissed charges as revived for purposes of a rehearing (should one be authorized). In sum, this Court overlooked improvidence with respect to the preemption doctrine and should reconsider and clarify that a preempted plea is improvident.

D. This Court should authorize a rehearing based on Appellant's improvident plea.

After clarifying that Appellant's guilty plea was improvident, this Court should authorize a rehearing. Unlike in Smead, this case does not present an issue of failure by the Government to comply with the terms of a plea agreement or Government gamesmanship. While Smead dealt with an overturned guilty plea unrelated to issues of providence, the opinion still highlighted the government and convening authority's failure to comply with the terms in the plea agreement related to the appellant's reduction in rank and confinement location to complete a sex offender treatment program. Id. at 46. The government compounded its failure by failing to follow the CCA's order to take corrective action. Id.

Here, the Government *honored* the plea agreement in full by accepting Appellant's offer to plead guilty to an offense of indecent conduct under Article 134, sentencing him to confinement for 60 days, and dismissing Charge I and its specifications for indecent exposure under Article 120c. As highlighted in the concurring opinion, the language used to describe Appellant's indecent conduct under Article 134 as standing "naked" "at or near the door" in view of the public was "*Appellant's suggestion*." (App. Ex. I); Marschalek, 2026 CCA LEXIS 6, at *19 (A.F. Ct. Crim. App. Jan. 16, 2026) (Johnson, J., concurring) (emphasis added). There is nothing in the record to suggest that the Government sought a specification under Article 134 that would be easier to prove or spare the Government from having to prove up a difficult vital element. Even if it was error for the Government to agree to Appellant's proposed terms based on the preemption doctrine, this Court should not grant Appellant a windfall by preventing the Government from proceeding with the original Charge I and its specifications for indecent exposure. This would allow Appellant to "[secure] a favorable pretrial agreement via a guilty plea, and then on appeal attack[] the facial legality of one of the specifications," and that "is

inconsistent with the fair and efficient administration of justice." United States v. Kennedy, 2021 CCA LEXIS 575, *8 (A.F. Ct. Crim. App. 2021) (unpub. op.).

Instead, this Court should reconsider its decision and specifically find that Appellant's guilty plea was improvident, allowing the convening authority to withdraw from the plea agreement and "revive" the dismissed specifications. Smead, 68 M.J. at 65. This is consistent with the fair administration of justice, because it will allow the Government prosecute Appellant for the originally charged offenses that the Government did not pursue under the plea agreement. Appellant can then decide whether to plead guilty to the original charges or to contest his guilt at a fully litigated trial. This course of action will discourage Appellant or any future accuseds from engaging in gamesmanship to escape all accountability for their conduct by securing a favorable plea agreement and then attacking it on appeal based on the preemption doctrine. Kennedy, 2021 CCA LEXIS 575, at *8. If an offense that the accused himself requested to plead guilty to is found to be preempted on appeal, the plea should be found improvident, and the case should be returned to the convening authority for a rehearing.

The United States respectfully requests that this Court grant reconsideration and issue specific decisions addressing whether the Court has authority to and will (1) designate Appellant's plea as improvident; and (2) authorize a rehearing/other trial. Specific rulings by this Court on these points will enable the United States to decide whether to appeal this Court's ruling, and if so, which issues to appeal.

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court to reconsider its 16 January 2026 decision.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 17 February 2026.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S REPLY TO UNITED STATES' MOTION FOR RECONSIDERATION**
v.	)	
	)	Before Special Panel
Staff Sergeant (E-5) **HANNES MARSCHALEK,** United States Air Force, *Appellant.*	)	No. ACM S32776
	)	23 February 2026

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 31(c) of this Court's Rules of Practice and Procedure, Staff Sergeant Hannes Marschalek, Appellant, replies to the United States' 17 February 2026 motion for reconsideration of this Court's 16 January 2026 opinion in this case. This Court should deny the Government's motion to reconsider its decision because the Government's basis for requesting reconsideration is not an appropriate ground for reconsideration.

While the Government accuses this Court of overlooking material legal or factual matters as its basis for requesting reconsideration, the motion instead asks this Court to decide an issue that was not presented, to issue relief the Government did not ask for before the opinion, and to endorse prospective Government action at a potential new trial. These are not proper grounds for reconsideration, and this Court should deny the Government's motion.

A. Asking this Court to decide an issue that was not presented is not a ground for reconsideration.

In its motion, the Government incorrectly states, "[a]t issue is whether a preempted guilty plea is improvident." Gov. Mot. at 2. That was not the issue before this Court in this case. The issue decided in this case was "whether Appellant's conviction under Article 134, UCMJ, was *barred* by the preemption doctrine because the misconduct is covered by Article 120c, UCMJ,

10 U.S.C. § 920c." *United States v. Marschalek*, 2026 CCA LEXIS 6, at *3 (A.F. Ct. Crim. App. Jan. 16, 2026) (emphasis added). The Government's motion does not identify any material fact or law this Court overlooked in resolving that issue; instead, it asks the Court to decide a different issue that was never presented. While Appellant challenged the providence of his plea based on separate grounds not based on the preemption issue, this Court did not reach that challenge because it agreed with Appellant that his conviction under Article 134, UCMJ, was *barred* by the preemption doctrine. *Id.* at *16.

Yet the Government's motion is now asking this Court to decide an issue that was never before this Court and conclude that Appellant's guilty plea was improvident because of the preemption doctrine.[1] Whether Appellant's plea was provident and whether his conviction was barred by the preemption doctrine are two separate issues. This Court set aside Appellant's finding of guilty based on the latter issue. Asking the Court to dispose of this case on an issue that was not presented is not a valid basis for reconsideration. *See* A.F. CT. Crim. App. R. 31(2)(b). Reconsideration is not a vehicle for the Government to reframe the case around an unbriefed issue after this Court decides against it on the issue presented. Therefore, this Court should deny the Government's motion.

B. Asking this Court to grant alternate, discretionary relief that the Government did not request before the opinion is not a ground for reconsideration.

[1] Notably, prior to this Court's decision, the Government argued that the preemption doctrine did not apply to Appellant's conviction and that Appellant's plea was provident. *See United States v. Marschalek*, ACM No. S32776, Answer to Assignments of Error, 30 May 2025, at 13-19. Furthermore, the Government attempts to maintain its argument that the preemption doctrine *does not* apply in this case while simultaneously arguing this Court should find Appellant's plea improvident because it *was* preempted, with no reconciliation between these contradictory positions. Gov. Mot. at 1, 7.

The Government's argument that this Court overlooked material legal matters by not authorizing a rehearing or a new trial on the original charges is unjustified. Gov. Mot. at 2. By the Government's own admission, whether to authorize a rehearing is discretionary. *Id.* at 11. The Court's decision to dismiss the charge and specification is not only within its authority, but also consistent with how the Court of Appeals for the Armed Forces and this Court have disposed of convictions that were barred by the preemption doctrine. *See e.g. United States v. Grijalva*, 84 M.J. 433, 439 (C.A.A.F. 2024) ("Specification 2 of Charge III is dismissed"); *United States v. Costianes*, 2016 CCA LEXIS 391, at *20 (A.F. Ct. Crim. App. Jun. 30 2016) ("Charge II and its specification are set aside and dismissed"); *United States v. Long*, 2014 CCA LEXIS 386, at 13 (A.F. Ct. Crim. App. Jul. 20 2014) (affirming the military judge's decision to dismiss specifications that were barred by the preemption doctrine with prejudice). There is nothing for this Court to *correct* on reconsideration when it exercised a proper use of its discretion under Article 66, UCMJ.

Moreover, before this Court's opinion, the Government never requested this Court to order a rehearing. *See generally United States v. Marschalek*, ACM No. S32776, Answer to Assignments of Error, 30 May 2025. Even under the second issue, where Appellant specifically challenged the providence of his plea, the Government did not argue for a rehearing. *Id.* at 19-27.

This Court should not allow the Government to submit new requests for relief under the guise of a motion for reconsideration. This Court did not overlook its authority to authorize a rehearing. The Government never asked for a rehearing, and this Court granted relief consistent with its finding that Appellant's conviction was barred by the preemption doctrine and provided the standard remedy for such an error. The Government's attempt at recasting its preferred remedy after the fact does not satisfy Rule 31's requirement to identify a material legal or factual matter

this Court misapplied or failed to consider. *See* A.F. CT. Crim. App. R. 31. Therefore, this Court should deny the Government's motion.

C. Requesting this Court's endorsement of a prospective trial is neither a request for reconsideration nor a ground for reconsideration.

The Government is not requesting reconsideration because it believes this Court made an error in the facts or law of this case. Instead, the Government plainly states it is making the request to this Court "so the convening authority may bring Appellant to another trial under R.C.M. 810." Gov. Mot. at 10. This is neither a valid nor an appropriate basis to request reconsideration. That is a request for advisory guidance about potential future proceedings, not a request to correct any error in this Court's decision.

The Government does not believe it can bring Appellant to a trial on Charge I and its Specifications because the Government moved to dismiss the Charge with prejudice after the findings and sentence were announced. *Id.*; *see also* Entry of Judgment. While this may be true, this is not a valid basis for this Court to grant reconsideration. *See* A.F. CT. Crim. App. R. 31(2)(b). Charge I and its Specifications were never at issue before this Court. Whether the Government may pursue Charge I and its Specifications at a new trial is not at issue before this Court. Because neither Charge I nor its Specifications were before this Court, the Government cannot supply this as a basis for requesting reconsideration of this Court's ruling.

Despite this, the Government is asking this Court to change its opinion and grant relief that allows the convening authority to bring Charge I and its Specifications to a new trial. That is not a motion for reconsideration, but rather a request for this Court to sanction potential action the convening authority may or may not take. This is not an appropriate basis for reconsideration. *See* A.F. CT. Crim. App. R. 31(2)(b). The Government's dissatisfaction with the downstream consequences of its own charging and plea decisions does not transform those consequences into

an error by this Court warranting reconsideration. This Court should deny the Government's request.

D. This Court should deny the Government's motion for reconsideration.

The Government has not identified any material legal or factual matter that this Court overlooked or misapplied in its opinion. As such, there is no basis for reconsideration. The record demonstrates that this Court correctly found that Appellant's conviction under Article 134, UCMJ, was barred by the preemption doctrine. This Court should not entertain requests to alter its opinion in a way that (1) changes the nature of the issue presented, (2) grants relief which the Government did not request prior to the opinion, or (3) sanctions potential action the Convening Authority may or may not pursue. The Government's request is not a proper basis for reconsideration under Rule 31.2(b)(1). This Court should deny the Government's motion for reconsideration.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 23 February 2026.

[redacted]

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32776**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Hannes MARSCHALEK	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 17 February 2026, Appellee moved this court to reconsider its decision in *United States v. Marschalek*, No. ACM S32776, 2026 CCA LEXIS 6 (A.F. Ct. Crim. App. 16 Jan. 2026) (unpub. op.). Appellant opposed the motion.

The panel consisting of Chief Judge Johnson, Senior Judge Gruen, and Judge Morgan voted 2–1 to grant the motion for reconsideration.

Accordingly, it is by the court on this 18th day of March, 2026,

ORDERED:

The Appellee's Motion for Reconsideration dated 17 February 2026 is hereby **GRANTED**.

No further briefs will be accepted without leave from the court. The court will issue its opinion in due course.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court