IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
Airman First Class (E-3) **JADA FLORES,** United States Air Force *Appellant*	)	No. ACM S32728 2 August 2022

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for her first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **8 October 2022**. The record of trial was docketed with this Court on 10 June 2022. From the date of docketing to the present date, 53 days have elapsed. On the date requested, 120 days will have elapsed.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

GRANTED
3 AUG 2022

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 2 August 2022.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

3 August 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) JADA FLORES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32728 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 3 August 2022.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 1
Airman First Class (E-3) **JADA FLORES,** United States Air Force *Appellant*	)	No. ACM S32728 30 September 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **7 November 2022**. The record of trial was docketed with this Court on 10 June 2022. From the date of docketing to the present date, 112 days have elapsed. On the date requested, 150 days will have elapsed.

On 20 April 2022, consistent with her pleas,[1] Appellant was convicted by a military judge at a special court-martial convened at MacDill Air Force Base, Florida, of one charge and two specifications of wrongful distribution of marijuana in violation of Article 112a, Uniform Code of Military Justice (UCMJ), one charge and one specification of attempted false pretenses ervices in violation of Article 80, UCMJ, and one charge and one specification of lse official statement in violation of Article 107, UCMJ. R. at 51. The military judge sentenced Appellant to be reduced to the grade of E-1, to forfeit two-thirds pay and

GRANTED
4 Oct 2022

[1] One specification of attempt in violation of Article 80 was withdrawn and dismissed with prejudice pursuant to Appellant's plea agreement. ROT, Vol. 1, Entry of Judgment (EOJ), dated 11 May 2022.

allowances for a period of two months, to be confined for a total of two months,[2] and to be discharged from the service with a bad-conduct discharge. R. at 143. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 5 May 2022.

The record of trial consists of 5 prosecution exhibits, 4 defense exhibits, and 5 appellate exhibits; the transcript is 143 pages. Appellant is not currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and not yet begun her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

[2] Appellant was sentenced to be confined for one month (for Specification 1 of Charge I), to be confined for two months (for Specification 2 of Charge I), and to be confined for two months (for Specification 2 of Charge II), and to be confined for one month (for the Specification of Charge III), with the sentences all running concurrently. R. at 143.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 30 September 2022.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

3 October 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) JADA FLORES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32728 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 3 October 2022.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 1
Airman First Class (E-3) **JADA FLORES,** United States Air Force *Appellant*	)	No. ACM S32728 31 October 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **7 December 2022**. The record of trial was docketed with this Court on 10 June 2022. From the date of docketing to the present date, 143 days have elapsed. On the date requested, 180 days will have elapsed.

On 20 April 2022, consistent with her pleas,[1] Appellant was convicted by a military judge at a special court-martial convened at MacDill Air Force Base, Florida, of one charge and two specifications of wrongful distribution of marijuana in violation of Article 112a, Uniform Code of Military Justice (UCMJ), one charge and one specification of attempted false pretenses to obtain services in violation of Article 80, UCMJ, and one charge and one specification of making a false official statement in violation of Article 107, UCMJ. R. at 51. The military judge sentenced Appellant to be reduced to the grade of E-1, to forfeit two-thirds pay and

GRANTED
3 NOVEMBER 2022

[1] One specification of attempt in violation of Article 80 was withdrawn and dismissed with prejudice pursuant to Appellant's plea agreement. ROT, Vol. 1, Entry of Judgment (EOJ), dated 11 May 2022.

allowances for a period of two months, to be confined for a total of two months,[2] and to be discharged from the service with a bad-conduct discharge. R. at 143. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 5 May 2022.

The record of trial consists of 5 prosecution exhibits, 4 defense exhibits, and 5 appellate exhibits; the transcript is 143 pages. Appellant is not currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and not yet begun her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

[2] Appellant was sentenced to be confined for one month (for Specification 1 of Charge I), to be confined for two months (for Specification 2 of Charge I), and to be confined for two months (for Specification 2 of Charge II), and to be confined for one month (for the Specification of Charge III), with the sentences all running concurrently. R. at 143.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 31 October 2022.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

1 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) JADA FLORES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32728 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

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 1 November 2022.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 1
Airman First Class (E-3) **JADA FLORES,** United States Air Force *Appellant*	)	No. ACM S32728 30 November 2022

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **6 January 2023**. The record of trial was docketed with this Court on 10 June 2022. From the date of docketing to the present date, 173 days have elapsed. On the date requested, 210 days will have elapsed.

On 20 April 2022, consistent with her pleas,[1] Appellant was convicted by a military judge at a special court-martial convened at MacDill Air Force Base, Florida, of one charge and two specifications of wrongful distribution of marijuana in violation of Article 112a, Uniform Code of Military Justice (UCMJ), one charge and one specification of attempted false pretenses to obtain services in violation of Article 80, UCMJ, and one charge and one specification of making a false official statement in violation of Article 107, UCMJ. R. at 51. The military judge sentenced Appellant to be reduced to the grade of E-1, to forfeit two-thirds pay and allowances

GRANTED
5 DECEMBER 2022

[1] One specification of attempt in violation of Article 80 was withdrawn and dismissed with prejudice pursuant to Appellant's plea agreement. ROT, Vol. 1, Entry of Judgment (EOJ), dated 11 May 2022.

for a period of two months, to be confined for a total of two months,[2] and to be discharged from the service with a bad-conduct discharge. R. at 143. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 5 May 2022.

The record of trial consists of 5 prosecution exhibits, 4 defense exhibits, and 5 appellate exhibits; the transcript is 143 pages. Appellant is not currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[3] and has yet to complete her review of Appellant's case. Counsel is currently assigned 22 cases; 10 cases are pending initial AOEs before this Court. This is military counsel's seventh priority case, and fifth priority case before this Court. The following cases have priority[4] over the present case:

1. *United States v. Witt*, ACM 36785 (reh), USCA Dkt No. 22-0090/AF – Counsel will be presenting oral argument before the CAAF on 6 December 2022.

2. *United States v. Knodel*, ACM 40018 – Counsel will be attending a motions hearing 12-13 December 2022 in Miramar, CA as part of Appellant's *DuBay* proceedings. Appellant's *DuBay* hearing has been scheduled for 10-12 January 2023. Two motions have been filed and counsel anticipates another three motions will be filed and litigated during the motions hearing.

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[2] Appellant was sentenced to be confined for one month (for Specification 1 of Charge I), to be confined for two months (for Specification 2 of Charge I), and to be confined for two months (for Specification 2 of Charge II), and to be confined for one month (for the Specification of Charge III), with the sentences all running concurrently. R. at 143.

[3] Since the filing of Appellant's last EOT, counsel filed a supplement to petition for grant of review to the Court of Appeals for the Armed Forces (CAAF) in *United States v. Torello*, ACM S32691 on 7 November 2022, filed a supplement to petition for grant of review in *United States v. Daniels III*, ACM 39407 (rem) on 16 November 2022, filed two motions relating to *Dubay* proceedings in *United States v. Knodel*, ACM 40018 on 16 November 2022, and filed a supplement to petition for grant of review in *United States v. Carlile*, ACM 40053 on 23 November 2022.

[4] Counsel also has a reply brief currently due in *United States v. Kitchen*, ACM 40155, on 6 December 2022. Counsel filed an EOT requesting a 7-day delay for his reply brief. If granted, Appellant's reply brief will be due on 13 December 2022.

3. *United States v. Jones*, ACM 40226 – The record of trial is 10 volumes; the trial transcript is 1070 pages. There are 13 prosecution exhibits, 11 defense exhibits, and 68 appellate exhibits. Counsel has reviewed approximately 650 pages of Appellant's transcript.

4. *United States v McTheny*, ACM S32725 – The record of trial is 2 volumes; the trial transcript is 108 pages. There are 3 prosecution exhibits, 5 defense exhibits, and 4 appellate exhibits. Counsel has completed her review of Appellant's ROT and is consulting with Appellant on issues to raise before this Court.

5. *United States v Robles*, ACM 40280 – The record of trial is 8 volumes; the trial transcript is 399 pages. There are 18 prosecution exhibits, 6 defense exhibits, and 15 appellate exhibits. Counsel has not yet begun her review of Appellant's ROT.

6. *United States v. Arbo*, ACM 40285 - The record of trial is 2 volumes; the trial transcript is 118 pages. There are 6 prosecution exhibits, 2 defense exhibits, and 6 appellate exhibits. Counsel has not yet begun her review of Appellant's ROT.

Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 30 November 2022.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

2 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) JADA FLORES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32728 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

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 2 December 2022.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32728**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jada FLORES	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 3 January 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 6th day of January, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **5 February 2023**.

Any subsequent motions for enlargement of time shall, in addition to the matters required under this court's Rules of Practice and Procedure, include a statement as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was advised of the request for an enlargement of time, and (3) whether Appellant agrees with the request for an enlargement of time.

FOR THE COURT

ANTHONY F. ROCK, Maj, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 1
Airman First Class (E-3) **JADA FLORES,** United States Air Force *Appellant*	)	No. ACM S32728 27 January 2023

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **7 March 2023**. The record of trial was docketed with this Court on 10 June 2022. From the date of docketing to the present date, 231 days have elapsed. On the date requested, 270 days will have elapsed.

On 20 April 2022, consistent with her pleas,[1] Appellant was convicted by a military judge at a special court-martial convened at MacDill Air Force Base, Florida, of one charge and two specifications of wrongful distribution of marijuana in violation of Article 112a, Uniform Code of Military Justice (UCMJ), one charge and one specification of attempted false pretenses to [illegible]s in violation of Article 80, UCMJ, and one charge and one specification of making [illegible]l statement in violation of Article 107, UCMJ. R. at 51. The military judge sentenced Appellant to be reduced to the grade of E-1, to forfeit two-thirds pay and allowances

GRANTED
31 JAN 2023

[1] One specification of attempt in violation of Article 80 was withdrawn and dismissed with prejudice pursuant to Appellant's plea agreement. ROT, Vol. 1, Entry of Judgment (EOJ), dated 11 May 2022.

for a period of two months, to be confined for a total of two months,[2] and to be discharged from the service with a bad-conduct discharge. R. at 143. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 5 May 2022.

The record of trial consists of 5 prosecution exhibits, 4 defense exhibits, and 5 appellate exhibits; the transcript is 143 pages. Appellant is not currently confined, is aware of her appellate rights, and has consented to necessary requests for extensions of time, including this request.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[3] and has yet to complete her review of Appellant's case. Currently, counsel has reviewed three-fourths of Appellant's transcript. Counsel is currently assigned 21 cases; 11 cases are pending initial AOEs before this Court. This is military counsel's fourth priority case. The following cases have priority over the present case:

1. *United States v. Jones*, ACM 40226 – The record of trial is 10 volumes; the trial transcript is 1070 pages. There are 13 prosecution exhibits, 11 defense exhibits, and 68 appellate exhibits. Counsel is currently consulting with Appellant on issues to raise, researching issues, and drafting Appellant's brief which is due to this Court on 21 February 2023.

2. *United States v Robles*, ACM 40280 – The record of trial is 8 volumes; the trial transcript is 399 pages. There are 18 prosecution exhibits, 6 defense exhibits, and 15 appellate exhibits. Counsel has begun reviewing Appellant's ROT.

[2] Appellant was sentenced to be confined for one month (for Specification 1 of Charge I), to be confined for two months (for Specification 2 of Charge I), and to be confined for two months (for Specification 2 of Charge II), and to be confined for one month (for the Specification of Charge III), with the sentences all running concurrently. R. at 143.

[3] Since the filing of Appellant's last EOT, counsel filed a supplement to petition for grant of review in *United States v. Ramirez*, ACM S32538 on 5 January 2023, and represented another client at his *DuBay* hearing (*United States v. Knodel*, ACM 40018), which was conducted from 10-14 January 2023 at Naval Base San Diego.

3. *United States v. Arbo*, ACM 40285 - The record of trial is 2 volumes; the trial transcript is 118 pages. There are 6 prosecution exhibits, 2 defense exhibits, and 6 appellate exhibits. Counsel has not yet begun her review of Appellant's ROT.

Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 27 January 2023.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

30 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) JADA FLORES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32728 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 30 January 2023.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 1
Airman First Class (E-3) **JADA FLORES,** United States Air Force *Appellant*	)	No. ACM S32728 28 February 2023

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **6 April 2023**. The record of trial was docketed with this Court on 10 June 2022. From the date of docketing to the present date, 263 days have elapsed. On the date requested, 300 days will have elapsed.

On 20 April 2022, consistent with her pleas,[1] Appellant was convicted by a military judge at a special court-martial convened at MacDill Air Force Base, Florida, of one charge and two specifications of wrongful distribution of marijuana in violation of Article 112a, Uniform Code of Military Justice (UCMJ), one charge and one specification of attempted false pretenses to obtain services in violation of Article 80, UCMJ, and one charge and one specification of making a false official statement in violation of Article 107, UCMJ. R. at 51. The military judge sentenced Appellant to be reduced to the grade of E-1, to forfeit two-thirds pay and allowances

GRANTED
1 MAR 2023

[1] One specification of attempt in violation of Article 80 was withdrawn and dismissed with prejudice pursuant to Appellant's plea agreement. ROT, Vol. 1, Entry of Judgment (EOJ), dated 11 May 2022.

for a period of two months, to be confined for a total of two months,[2] and to be discharged from the service with a bad-conduct discharge. R. at 143. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 5 May 2022.

The record of trial consists of 5 prosecution exhibits, 4 defense exhibits, and 5 appellate exhibits; the transcript is 143 pages. Appellant is not currently confined, is aware of her appellate rights, and has consented to necessary requests for extensions of time, including this request.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[3] and has yet to finish Appellant's case. Currently, counsel has completed her review of Appellant's case, identified potential issues to raise, and has a call scheduled with Appellant to discuss what issues she would like raised in her brief.

Counsel is currently assigned 23 cases; 12 cases are pending initial AOEs before this Court. This is military counsel's third priority case. The following cases have priority over the present case:

1. *United States v Robles*, ACM 40280 – The record of trial is 8 volumes; the trial transcript is 399 pages. There are 18 prosecution exhibits, 6 defense exhibits, and 15 appellate exhibits. Counsel has begun reviewing Appellant's ROT.

2. *United States v. Arbo*, ACM 40285 - The record of trial is 2 volumes; the trial transcript is 118 pages. There are 6 prosecution exhibits, 2 defense exhibits, and 6 appellate exhibits.

[2] Appellant was sentenced to be confined for one month (for Specification 1 of Charge I), to be confined for two months (for Specification 2 of Charge I), and to be confined for two months (for Specification 2 of Charge II), and to be confined for one month (for the Specification of Charge III), with the sentences all running concurrently. R. at 143.

[3] Since the filing of Appellant's last EOT, counsel filed a lengthy brief in *United States v. Jones*, ACM 40226, on 21 February 2023.

Counsel has reviewed Appellant's transcript, has reviewed ¾ of Appellant's ROT, and submitted a request to view sealed materials.

Accordingly, an enlargement of time is necessary to allow undersigned counsel to advise Appellant regarding potential errors and draft Appellant's Assignments of Error.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 28 February 2023.

Respectfully submitted,

Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

28 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) JADA FLORES, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32728 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 300 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 8 months combined for the United States and this Court to perform their separate statutory responsibilities.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 28 February 2023.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* *v.* Airman First Class (E-3) **JADA FLORES**, United States Air Force, *Appellant*	**BRIEF ON BEHALF OF APPELLANT** Before Panel No. 1 No. ACM S32728 Filed on: 21 March 2023

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

Assignments of Error

I.

WHETHER THE SPECIFICATION OF CHARGE III FAILS TO STATE AN OFFENSE?

II.

WHETHER THE SPECIFICATION OF CHARGE II FOR ATTEMPTED FALSE PRETENSES TO OBTAIN SERVICES IN VIOLATION OF ARTICLE 80, UCMJ, AND THE SPECIFICATION OF CHARGE III FOR MAKING A FALSE OFFICIAL STATEMENT IN VIOLATION OF ARTICLE 107, UCMJ, UNREASONABLY MULTIPLIED THE CHARGES AGAINST A1C FLORES?

III.

WHETHER A1C FLORES'S SENTENCE—WHICH INCLUDES A BAD CONDUCT DISCHARGE—IS INAPPROPRIATELY SEVERE?[1]

[1] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Statement of the Case

Airman First Class (A1C) Jada Flores, Appellant, was tried by a military judge sitting alone at a special court-martial convened at MacDill Air Force Base, Florida, on 20 April 2022. Record (R.) at 1, 3. Consistent with her pleas, A1C Flores was convicted of one charge and two specifications of wrongful distribution of marijuana in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a, *Manual for Courts-Martial*, *United States* (2019 ed.) (2019 *MCM*);[2] one charge and one specification of attempted false pretenses to obtain services in violation of Article 80, UCMJ, 10 U.S.C. § 880; and one charge and one specification of making a false official statement in violation of Article 107, UCMJ, 10 U.S.C. § 907. R. at 51. The military judge sentenced Appellant to reduction to the grade of E-1, forfeiture of two-thirds pay per month for two months[3], confinement for a total of two months,[4] and a bad-conduct discharge. R. at 143. The convening authority took no action on the findings or the sentence. Record of Trial (ROT), Vol. 1, Decision on Action, dated 5 May 2022.

[2] All references to the punitive articles, Rules for Court-Martial, and Military Rules of Evidence are to the 2019 *MCM*, unless otherwise noted.

[3] When reading A1C Flores's sentence on the record, the military judge stated A1C Flores would forfeit "two-thirds of pay and *allowances* for a period of two months." R. at 143 (emphasis added). Based on the jurisdictional maximum at a SPCM, A1C Flores could not forfeit her allowances. Article 19, UCMJ. However, both the Statement of Trial Results (STR) and Entry of Judgment (EOJ) correctly indicate that A1C Flores would forfeit "$1,130.00 pay per month for two months." Corrected STR, dated 5 May 2022; EOJ, dated 11 May 2022. A1C Flores does not assert any prejudice from the military judge's incorrect reading of her sentence.

[4] Appellant was sentenced to be confined for one month (for Specification 1 of Charge I), to be confined for two months (for Specification 2 of Charge I), and to be confined for two months (for Specification 2 of Charge II), and to be confined for one month (for the Specification of Charge III), with the sentences all running concurrently. R. at 143.

Statement of Facts

A1C Flores's Background

A1C Flores is a first-generation Belizean-American. Defense Exhibit (Def. Ex.) A. She was the first in her family to attend college. *Id*. She graduated in five years after becoming embroiled in an emotionally and physically violent relationship during her senior year. *Id*. Wishing to pursue her dream of going to mortuary school and becoming a mortician, A1C Flores joined the Air Force. *Id*. During her two-year career, A1C Flores accomplished the Air Force mission, she volunteered at several community events, and she helped to detain and search an installation gate runner. *Id.*

Charged Offenses

A1C Flores pleaded guilty to wrongful distribution of marijuana to A1C A.K. and A1C J.S. R. at 19, 24. She and A1C A.K. were close friends and A1C Flores explained that A1C A.K. had been dealing with a difficult situation and she offered A1C A.K. marijuana to help her feel better. R. at 19, 126-27. A1C Flores acknowledged that her distribution to A1C A.K. was wrongful and accepted responsibility for her actions. R. at 19, 20, 126.

The situation with A1C J.S., however, was different, as A1C Flores did not initiate the distribution of marijuana to A1C J.S. R. at 24. Working as a confidential informant (CI) for the Air Force Office of Special Investigations (AFOSI), A1C J.S. was asked to contact A1C Flores to set up a drug buy. R. at 100, 101. A1C J.S. began working for AFOSI as a CI after being investigated for his own independent and unrelated drug use. R. at 101. Prior to A1C J.S. contacting A1C Flores as a CI, A1C J.S. and A1C Flores had never spoken about using drugs nor had she ever offered to sell him drugs. R. at 100. Initially, A1C Flores indicated she did not have marijuana to sell. R. at 24. However, she later called him back and told him she could sell him

marijuana for $20. *Id*. They met at a park in Tampa, FL, and she gave him the marijuana in exchange for him electronically wiring her the $20 via CashApp. *Id*. A1C Flores considered A1C J.S. to be her friend, and she explained she thought she was helping a friend when she agreed to sell him marijuana. R. at 127. She acknowledged that distribution of marijuana is illegal and accepted responsibility for her actions. R. at 26, 127.

The same conduct is reflected in the attempt and false official statement specifications. A1C Flores explained that when she was under investigation, she became concerned she would be unable to pay her lease if she was confined or discharged. R. at 28, 35. She was panicking and felt overwhelmed. R. at 127. A co-worker suggested she use Permanent Change of Station (PCS) orders to break her lease without paying the early termination fee of $3,178. R. at 29, 35. This co-worker provided her with fake PCS orders with her name on them. R. at 29, 35. A1C Flores went to the leasing office for her apartment complex, the Cortland Brighton Bay Apartment, and presented the fake orders, along with a notice of intent to vacate, to Ms. Y.C. R. at 29, 35. The complex began processing her paperwork, but it did not end up going through. R. at 29, 35. Despite her attempt, A1C Flores was charged the early termination fee. R. at 29, 35.

At the time she presented the orders to Ms. Y.C., A1C Flores knew the orders were fake as she was not PCS'ing to Turkey. R. at 29, 35. She provided the fake orders to obtain a service, "specifically, [waiver of] the early lease termination fee." R. at 29. She also provided the orders with the intent to deceive her apartment complex so they would waive her early termination fee. R. at 35.

Argument

I.

THE SPECIFICATION OF CHARGE III FAILS TO STATE AN OFFENSE.

Standard of Review

"The question of whether a specification states an offense is a question of law, which this Court reviews de novo." *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). Likewise, whether an objection has been waived is a question of law reviewed de novo. *United States v. Day*, ___M.J. ___, No. 22-0122, 2022 CAAF LEXIS 892, at *6 (C.A.A.F. 13 Dec 2022) (citing *United States v. Gudmundson*, 57 M.J. 493, 495 (C.A.A.F. 2002)).

Additional Facts

During her *Care* Inquiry, the military judge asked A1C Flores whether she made an official statement on 31 January 2022. R. at 35. She responded in the affirmative. *Id*. The military judge asked what her statement pertained to, and A1C Flores explained that she told the leasing office she was "PCSing to Turkey." R. at 36. When asked, "Did your statement [bear] a clear and direct relationship to your official military duties," A1C Flores conferred with her counsel before responding, "Yes, Your honor. Because they relate to my PCS orders." *Id*.

Law

A. Waiver

R.C.M. 907(b)(2) states:

> *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.

R.C.M. 905(e) states:

> *Effect of failure to raise defenses or objections*. (1) Failure by a party to raise defense or objections or to make motions or requests which must be made before pleas are entered under subsection (b) of this rule forfeits the defenses or objections absent an affirmative waiver. . . .
>
> (2) Other motions, requests, defenses, or objections, *except lack of jurisdiction or failure of a charge to allege an offense*, must be raised before the court-martial is adjourned for that case. Failure to raise such other motions, requests, defenses, or objections, shall constitute forfeiture, absent an affirmative waiver (emphasis added).

"Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). Waiver may also occur by operation of law "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." *Day*, 2022 CAAF LEXIS 892, at *6-7 (citation omitted). While appellate courts cannot review waived issues,[5] a forfeited issue is reviewed for plain error, with an appellant bearing the burden of showing: (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. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018).

In *Day*, the Court of Appeals for the Armed Forces (CAAF) stated, "We agree with the Government that an accused may *intentionally relinquish* a waivable objection in a plea agreement by including a clause waiving all waivable motions." *Id*. at *7. Additionally, the Court stated, "We also agree with the Government that a *waiver by operation of law* may result from an unconditional guilty plea." *Id*. at *7-8. However, the CAAF declined to opine on whether failure

[5] *Id*. at *6.

to state an offense is a waivable objection. *Id.* at *8 n.2. The CAAF noted it had previously held that failure to state an offense was not waived pursuant to a guilty plea. *Id*. (citing *United States v. Schweitzer*, 68 M.J. 133, 136 (C.A.A.F. 2009)). However, the CAAF noted that the President had amended R.C.M. 907(b)(2)(E) to include failure to state an offense as a waivable offense. *Id.*

The CAAF appears poised to answer this question. On 7 November 2022, it granted review of the following issue:

> WHETHER A GUILTY PLEA TO AN OFFENSE WAIVES A CHALLENGE THAT THE CONDUCT IS NOT A COGNIZABLE OFFENSE UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

United States v. Byunggu Kim, No. 22-0234 AR, 2022 CAAF LEXIS 795 (C.A.A.F. 7 Nov. 2022).

B. Other jurisdictions have held that failure to state an offense is not waivable.

"[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *United States v. Cotton*, 535 U.S. 625, 630 (2002). In *Cotton*, the indictment identified the amount of a drug as a "detectable amount," which fell below the threshold for the enhanced penalties he ultimately received. *Id*. at 627–28. The Supreme Court held that some omissions from the indictment that render it defective are nonjurisdictional and, thus, waivable. *Id*. at 630-31. But this principle applies to omitted elements of a specification, not a specification that fails to state *any* offense. *See United States v. Humphries*, 71 M.J. 209, 213 (C.A.A.F. 2012) ("Moreover, the Supreme Court overtly reversed itself with respect to the effect on jurisdiction of indictments that are defective because they fail to allege elements." (citing *Cotton*, 535 U.S. at 631-32)).

In *United States v. St. Hubert*, the United States Court of Appeals for the Eleventh Circuit addressed an appellant who challenged his guilty plea to a "non-offense" for the first time on appeal. 909 F. 3d 335, 340 (11th Cir. 2018). The Eleventh Circuit drew a distinction between

defective indictments—like in *Cotton*—and non-offenses. *Id*. at 343 (citing *United States v. Peter*, 310 F.3d 709, 715 (11th Cir. 2002)). The *St. Hubert* Court highlighted its holding in *Peter* that "when an indictment affirmatively alleged a specific course of conduct that is outside the reach of the statute of conviction—or stated another way, alleges only a non-offense—the district court has no jurisdiction to accept the guilty plea." *Id*. at 343 (quoting *Peter*, 310 F.3d. at 715) (internal quotations omitted).[6] As further support for its finding that the failure of an specification to state an offense is jurisdictional and nonwaivable, the Eleventh Circuit noted the Supreme Court's "suggest[ion], albeit in dicta, that a claim that the facts alleged in the indictment and admitted by the defendant do not constitute a crime at all cannot be waived by a defendant's guilty plea because that kind of claim challenges the district court's power to act." *Id.* at 343–44 (citing *Class v. United States*, 138 S. Ct. 798, 804–05 (2018)). Persuasive to the Eleventh Circuit was the fact that in *Class*, the Supreme Court discussed "historical examples of claims not waived by a guilty plea, includ[ing] cases in which the defendant argued that the charging document did not allege conduct that constituted a crime." *Id*. at 344 (citing *Class*, 138 S. Ct. at 804). The First Circuit Court of Appeals reached a similar conclusion when faced with a claim that an appellant had been convicted of a non-offense. *See United States v. Rosa-Ortiz*, 348 F.3d 33, 36 (1st Cir. 2003) (concluding that "a guilty plea does not preclude [an appellant] from arguing on appeal that the statue of conviction does not actually proscribe the conduct charged in the indictment").

C. Failure to State an Offense

"A specification is a plain, concise, and definite statement of the essential facts constituting an offense charged. A specification is sufficient if it alleges every element of the charged offense

[6] This interpretation of *Cotton* has been criticized. *See, e.g., United States v. De Vaugh*, 694 F.3d 1141, 1148 (10th Cir. 2012).

expressly or by necessary implication[.]" R.C.M. 307(c)(3). Failure to state an offense encompasses "whether the specification as drafted allege[s] a criminal offense[.]" *Crafter*, 64 M.J. at 211. In considering the sufficiency of a specification, a specification "may be sustained 'if the necessary facts appear in any form or by fair construction can be found within the terms of the specification.'" *Id.* (quoting *United States v. Mayo,* 12 M.J. 286, 288 (C.M.A. 1982)).

To convict A1C Flores of making a false official statement in violation of Article 107, UCMJ, facts satisfying the following elements needed to be adduced:

> (1) That at or near St. Petersburg, Florida, on or about 31 January 2022, [SrA Flores] with intent to deceive made to Cortland Brighton Bay Apartment an official statement to wit: notice to terminate lease due to permanent change of station or words to that effect;
>
> (2) That such statement was totally false;
>
> (3) That [SrA Flores] knew it to be false at the time [she] made; and
>
> (4) That the false statement was made with the intent to deceive.

R. at 33; 2019 *MCM*, pt. IV, ¶41.b.(1).

To constitute the offense of false official statement, the statement must be "official." 2019 *MCM*, pt. IV, ¶41.c.(1)(b). "Official statements are those that affect military functions, which encompasses matters within the jurisdiction of the military departments and Services." *Id.* The military judge advised A1C Flores:

> A statement is official when the maker is either acting in the line of duty or the statement [bears] a clear and direct relationship to the maker's official military duties or where the receiver is either a military member carrying out a military duty when the statement is made or a civilian necessarily performing a military function when the statement is made.

R. at 33; 2019 *MCM*, pt. IV, ¶41.c.(1)(b)(i)-(iii). To be considered official, "a matter must affect a military function at the time the statement is made." *United States v. Spicer*, 71 M.J. 470, 473 (C.A.A.F. 2013).

Several cases shed light on how an accused's statements may qualify as "official." For example, statements to civilian law enforcement may qualify as "official" statements. In *United States v. Teffeau*, 58 M.J. 62, 63, 64 (C.A.A.F. 2003), a Marine Corps recruiter was charged with *inter alia*, five specifications of making false official statements relating to an underage drinking incident (involving another recruiter and two recruits), which resulted in a fatal car accident and the death of one of the female recruits. The CAAF found, "It is clear, from the inception of the arrangement to meet the two women through and including Appellant's statements to both military and civilian officials, this entire incident and investigation *bore a direct relationship to Appellant's duties and status as a Marine Corps recruiter*." *Id.* at 69 (emphasis added). The CAAF examined "[t]he circumstances leading up to and surrounding the statements" in finding that the appellant's statements had the necessary relationship to his duties as a recruiter, also emphasizing that the circumstances "reflect[ed] a substantial military interest in the investigation." *Id*. Thus, the appellant's statements fit within the ambit of "official" for purposes of "the meaning of Article 107." *Id*.

In contrast, in *Spicer*, the appellant's statements to civilian law enforcement officers regarding the malnourishment and neglect of his two young sons did not qualify as "official." 71 M.J. at 471 n.1, 475. The Court clarified when a statement would constitute a false "official statement."

> The speaker may make a false official statement "in the line of duty," MCM pt. IV, para. 31.c.(1), or to *civilian law enforcement officials* if the statement bears a "clear and direct relationship" to the speaker's official duties. *Teffeau*, 58 M.J. at 69. Alternatively, a statement may be official if the hearer is a military member "carrying out a military duty" at the time the statement is made."
> . . .
>
> Finally, the statements at issue may be official if the hearer is a civilian performing a military function at the time the speaker makes the statement.

Spicer, 71 M.J. at 474-75 (emphasis added). After laying out the above framework, the CAAF concluded that the appellant's statements were false, but not official, stating:

> Appellant did not make the statements in the line of duty. He did not disobey a specific order to provide for his family, and the statements do not bear a clear and direct relationship to his official duties. Furthermore, while Appellant's statements ultimately affected on-base persons performing official military functions, Appellant made the statements to civilian law enforcement officials who were not conducting any military function at the time the statements were made. When Appellant made the statements, the CSPD detectives were not operating a joint investigation with military officials or performing any other military functions.

Id. at 475.

Likewise, the CAAF held that an appellant's statements concerning an alleged larceny were not "official" statements. *United States v. Capel*, 71 M.J. 485, 487 (C.A.A.F. 2013). The Court discussed the framework it had laid out in *Spicer* for determining whether a statement constituted an "official" statement, noting the statement would qualify "if the statement is made 'in the line of duty,' or to *civilian law enforcement officials* if the statement bears a 'clear and direct relationship' to the [accused's] official duties.'" *Id*. (quoting *Spicer*, 71 M.J. at 474) (emphasis added). The CAAF found persuasive that "the record is devoid of any evidence to indicate that Appellant's appearance at the police station and his subsequent statements to Detective Renfroe were pursuant to any specific military duty on Appellant's part." *Id*. Nor was there any evidence that Detective Renfroe was "acting on behalf of military authorities or that he was in any other way performing a military function." *Id*. The CAAF acknowledged that theft among military personnel could impact morale and good order and discipline, but emphasized that "it is the relationship of the statement to a military function at the time it is made -- not the offense of larceny itself -- that determines whether the statement falls within the scope of Article 107, UCMJ, as opposed to 18 U.S.C. § 1001 (2006), or an equivalent state statute." *Id*.

Similarly, the CAAF found that an appellant "was not performing a military duty when writing a personal check for groceries and cash at AAFES."[7] *United States v. Passut*, 73 M.J. 27, 30 (C.A.A.F. 2014). However, the inquiry did not end there. While the appellant was not acting in the line of duty or performing a military duty, the CAAF found that his statement was "official," because the civilian AAFES employee who cashed his check "was performing a military function[.]" *Id.* at 32. In so holding, the Court relied on the fact that "AAFES, through millions of dollars in annual contributions and a continuous presence on bases, installations, and other military sites across the world, plays a significant role in maintaining servicemembers' morale and welfare while also providing essential services." *Id.* at 31.

Analysis

A. The Effect of a Lack of Objection

In *Cotton*, the Supreme Court held that the omission of an element of an offense was nonjurisdictional,[8] however, a specification that states a *non-offense* is distinct from a specification that omits an element of an *actual* offense. Additionally, the omission in *Cotton* related to facts necessary for the enhanced penalties he received (i.e., his sentence),[9] as opposed to relating to his guilt (i.e., findings) for the substantive offense. Under Article 19(a), UCMJ, 10 U.S.C. § 819(a), a special court-martial has jurisdiction to try persons for offenses "made punishable by this chapter[.]" If, as A1C Flores argues, the false official statement specification failed to state an offense, her court-martial did not have jurisdiction to convict her of this non-offense. In effect, she was tried and convicted for an offense that was *not* punishable under Article 107, UCMJ. "Assuming no constraints or limitations grounded in the Constitution are implicated, it is for

[7] AAFES stands for the Army and Air Force Exchange Services.
[8] 535 U.S. at 630-31.
[9] *Id*. at 627-28.

Congress to determine the subject-matter jurisdiction of federal courts." *United States v. Denedo*, 556 U.S. 904, 912 (2009). As such, notwithstanding the President's promulgation of R.C.M. 907, A1C Flores could not waive this issue because it is jurisdictional, and thus, nonwaivable.

Other federal circuit courts of appeal have reached similar conclusions, holding that failure to state an offense is jurisdictional. *See St. Hubert*, 909 F.3d at 343; *Rosa-Ortiz*, 348 F.3d at 36. The CAAF has yet to determine whether failure to state an offense is waived by a guilty plea pursuant to R.C.M. 907(b)(2)(E) (2019 ed.), as amended. *Day*, 2022 CAAF LEXIS 892, at *8 n.2. However, the CAAF heard oral arguments on this issue in *Byunggu Kim* on 7 February 2023.[10] The CAAF's decision in *Byunggu Kim* will determine whether A1C Flores's claim that her Article 107, UCMJ, offense fails to state an offense is waived. If the CAAF finds that failure to state an offense is not waived by a guilty plea, A1C Flores would have forfeited the issue, and this Court would review her claim for plain error. However, if the CAAF holds that failure to state an offense can be waived, pursuant to its authority under Article 66, UCMJ, this Court should pierce A1C Flores's waiver to ensure she "has not been unfairly prejudiced by a legal error[.]" *United States v. Anderson*, No. ACM 39969, 2022 CCA LEXIS 181, at *28 (A.F. Ct. Crim. App. 25 Mar. 2022) (unpub. op.).

B. Failure to State an Offense

The false official statement specification to which A1C Flores pleaded guilty fails to state an offense. While the specification contains "a plain, concise, and definite statement of the essential facts," these facts do not constitute the offense of false official statement in violation of Article 107, UCMJ, as A1C Flores statements, while false, were not "official."

[10] United States Court of Appeals for the Armed Forces, Hearing Calendar, October 2022 Term, February 2023, https://www.armfor.uscourts.gov/calendar/202302.htm#21 (last accessed XX March 2023).

In *Spicer*, the CAAF laid out a framework for determining whether a statement qualifies as a false "official" statement[11] highlighting that whether a statement qualifies as "official" may depend on the standpoint of the speaker of the statement or the standpoint of the hearer of the statement. *Id*. at 473. From the standpoint of the speaker, a statement is considered "official" when the speaker is "in the line of duty[.]" *Id.* at 474. A1C Flores was a member of the 6th Security Forces Squadron. R. at 16. She was not "acting in the line of duty" as she was not performing her job duties when she entered the Cortland Brighton Bay Apartment leasing office, located at or near St. Petersburg, Florida, (R. at 33) and uttered her statements to Ms. Y.C. R. at 35.

Additionally, a statement will qualify as official when made "to *civilian law enforcement officials* if the statement bears a 'clear and direct relationship' to the *speaker's official duties*." *Spicer*, 71 M.J. at 474 (emphasis added) (quoting *Teffeau*, 58 M.J. at 69). Notably, A1C Flores's statements were *not* made to civilian law enforcement, they were made to a civilian apartment leasing agent. R. at 35, 37. Thus, at the outset, her statements do not qualify as "official" under this category of statements. Additionally, her statements did not "bear[] a clear and direct relationship" to her official duties. During her *Care* Inquiry, the military judge asked A1C Flores whether her statements had a "clear and direct relationship to her official military duties." R. at 36. But in so asking, the military judge did not define "official military duties" for her. *Id*. After conferring with her defense counsel, A1C Flores replied, "Yes, Your Honor. Because they relate to my PCS orders." *Id*. While true, this fact is not dispositive as the statements needed to relate to her official duties as a Security Forces' member. In *Teffeau*, the CAAF found a military member's statements—to civilian law enforcement—qualified as "official" because "[t]he

[11] 71 M.J. at 474-75.

circumstances leading up to and surrounding the statements made to the Winfield police bear a clear and direct relationship to Appellant's *duties as a recruiter* and *reflect a substantial military interest in the investigation*." 58 M.J. at 69 (emphasis added). The CAAF's holding in *Teffeau* narrowed "official duties" to the duties a servicemember performs by virtue of their specific military job and job title. Thus, in *Teffeau*, the appellant was a military recruiter (i.e., his miliary job) and his "official duties" were those arising from and encompassed by the recruiter career field.

Here, A1C Flores statements did *not* relate to her official duties as a Security Forces' member, specially, her duties as an Installation Entry Controller. R. at 83. Instead, her statements related to a generalized military duty—shared across the military services—to move when provided military PCS orders. Notably, A1C Flores was not acting pursuant to *any* military duty when she made her statements to Ms. Y.C., as she was not authorized to undergo a military PCS move. Moreover, at the time A1C Flores made her statements to Ms. Y.C., the military was not investigating her relating to this specific issue. Instead, she was being investigated for drug-related offenses entirely independent of any statements she made to Ms. Y.C., the apartment's leasing agent. Significantly, the CAAF made clear that an "official" statement is one which "must affect a military function at the time the statement is made." *Spicer*, 71 M.J. at 474. A1C Flores's statements did not affect a military function at the time they were made. If the privately owned apartment complex had waived A1C Flores's early termination fee, no military function would have been affected by the apartment complex's action. Thus, under this category, A1C Flores's statements, while false, would not qualify as "official."

With regards to the standpoint of the hearer, a statement may be official if "the hearer is a military member 'carrying out a military duty' at the time the statement is made." 71 M.J. 474. Here, A1C Flores's statements do not qualify as "official" under this category as she made her

statements to Ms. Y.C., a civilian employee of Cortland Brighton Bay Apartment Complex. R. at 34, 36. Also from the standpoint of the hearer, a statement may be official "if the hearer is a civilian who is performing a military function at the time the speaker makes the statement." 71 M.J. at 475. In *Passut*, the CAAF found that the phrase "official" "encompasses civilians working for an organization or entity serving a military function." 73 M.J. at 31. As a result, the CAAF found that statements made to civilian employees of AAFES were "official" for purposes of Article 107, UCMJ. *Id*. at 32. In contrast, the CAAF noted that the Armed Forces Bank was "a privately owned bank that caters to members of the military but, unlike AAFES, the Army and Air Force are in no way involved in the management, operations, or setting of policies. . . . Aside from the bank's physical presence on the base, nothing here hinted at a military function." *Id*. As such, the appellant's statements to bank employees were not false "official" statements. *Id*. Here, Ms. Y.C. was acting in her civilian capacity as an employee of a privately owned apartment complex. The Cortland Brighton Bay Apartment Complex is analogous to the Armed Forces Bank in *Passut.* It is apparent that, unlike the civilian employee working for AAFES, Ms. Y.C., a civilian employee of a privately owned apartment complex, was not engaged in the performance of a military function when she heard A1C Flores's statements. Thus, A1C Flores's statements would not qualify as "official" under this category either.

C. A1C Flores's conviction for false official statement amounted to plain error.

In *Crafter*, the CAAF considered "whether the specification as drafted alleged a criminal offense." 64 M.J. at 211. The CAAF found that the sufficiency of a specification "may be sustained 'if the necessary facts appear in any form or by fair construction can be found within the terms of the specification.'" *Id*. The facts alleged by the Government in the Article 107, UCMJ, specification are insufficient to sustain A1C Flores's conviction for making a false official

statement because her statements to Ms. Y.C.—a civilian employee of a privately owned apartment complex—do not qualify as "official." As such, her actions do not constitute the offense of false official statement, and this specification failed to state an offense. Thus, her plea of guilty to a non-offense constitutes error. Moreover, the error is clear and obvious, as Article 107, UCMJ, and the CAAF's case law define when a statement may qualify as "official." It is apparent that A1C Flores's statements do not qualify as "official" under the CAAF's framework established in *Spicer*. This error materially prejudiced A1C Flores's substantial right as she was convicted of making a false official statement, when the specification as drafted did *not* allege the criminal offense of false official statement in violation of Article 107, UCMJ. A1C Flores's should not remain convicted of a non-offense.

WHEREFORE, A1C Flores respectfully requests that this Honorable Court take set aside Charge III and its specification for failure to state an offense.

II.

THE SPECIFICATION OF CHARGE II FOR ATTEMPTED FALSE PRETENSES TO OBTAIN SERVICES IN VIOLATION OF ARTICLE 80, UCMJ, AND THE SPECIFICATION OF CHARGE III FOR MAKING A FALSE OFFICIAL STATEMENT IN VIOLATION OF ARTICLE 107, UCMJ, UNREASONABLY MULTIPLIED THE CHARGES AGAINST A1C FLORES.

Standard of Review

This Court reviews claims of unreasonable multiplication of charges for an abuse of discretion. *United States v. Campbell*, 71 M.J. 19, 22 (C.A.A.F. 2012). A "waive all waivable motions" provision in a plea agreement waives a claim of unreasonable multiplication of charges such that the claim is extinguished and cannot be raised on appeal. *Gladue*, 67 M.J. at 314. However, this Court is "not bound to apply waiver" when exercising its powers under Article 66(d), UCMJ. *United States v. Butcher*, 53 M.J. 711, 714 (A.F. Ct. Crim. App. 2000) (citing

United States v. Evans, 28 M.J. 74, 76 (C.M.A. 1989)). "[F]ailure to raise the issue does not preclude the Court of Military Review in the exercise of its powers from granting relief." *United States v. Britton*, 26 M.J. 24, 27 (C.M.A. 1988). If this Court "in the interest of justice, determines that a certain finding or sentence should not be approved . . . the court need not approve such finding or sentence." *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991).

Additional Facts

After the military judge explained the elements of making a false official statement, she asked A1C Flores to explain why she was guilty of the Specification of Charge III. R. at 34. A1C Flores's defense counsel noted, "Your Honor, the information is *identical* to the information that was provided in the previous Charge and specification."[12] *Id*. (emphasis added). The military judge replied, "And yet we still get to go through this, Counsel." *Id*.

When discussing A1C Flores's plea agreement and the "waive all waivable motions" term, the military judge inquired what motions the Defense would have filed. R. at 43. A1C Flores's defense counsel replied, "We would've filed a motion regarding multiplication of charges, with regards to the fake orders." R. at 44.

Law

"What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4). The CAAF has approved a non-exhaustive list of factors to determine whether charges are unreasonably multiplied:

(1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?;

(2) Is each charge and specification aimed at distinctly separate criminal acts?;

[12] The previous Charge and specification referred to the Specification of Charge II, and Charge II, for attempted false pretenses to obtain services in violation of Article 80, UCMJ. R. at 28-30; ROT, Vol. 1, Charge Sheet.

(3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?;

(4) Does the number of charges and specifications unfairly increase the appellant's punitive exposure?; and

(5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001) (internal quotations and citations omitted).

"On appeal, the issue of unreasonable multiplication of charges involves the duty of the Courts of Criminal Appeals to 'affirm only such findings of guilty, and the sentence . . . as it . . . determines, on the basis of the entire record, should be approved.'" *United States v. Butcher*, 56 M.J. 87, 93 (C.A.A.F. 2001) (citation omitted). This power is "highly discretionary" and includes the ability to determine that an unreasonable multiplication of charges claim "has been waived or forfeited when not raised at trial." *Id.* In *Quiroz*, the Court of Criminal Appeals (CCA) had stated that "if we find the 'piling on' of charges is so extreme or unreasonable as to necessitate the invocation of [its] Article 66(c), UCMJ, authority, we will determine the appropriate remedy on a case-by-case basis"; the CAAF found this well within a CCA's discretion. 55 M.J. at 338–39. This Court has exercised its Article 66, UCMJ, power to overcome waiver in cases where the unreasonable multiplication of charges was "plainly presented." *See*, *e.g.*, *United States v. Jeffers*, No. ACM 38664 (recon), 2016 CCA LEXIS 52, at *10 (A.F. Ct. Crim. App. 28 Jan. 2016) (unpub. op.); *United States v. Chin*, No. ACM 38452 (recon), 2015 CCA LEXIS 241, at *12 (A.F. Ct. Crim. App. 12 Jun. 2015) (unpub. op.), *aff'd*, 75 M.J. 220 (C.A.A.F. 2016). Recently, this Court found that "allowing Appellant to stand convicted of three separate offenses" based upon a singular request was not a just outcome. *United States v. Massey*, No. ACM 40017, 2023 CCA LEXIS 46, at *38-39 (A.F. Ct. Crim. App. 30 Jan. 2023) (unpub. op.). This Court exercised its authority

under Article 66(d), UCMJ, to "consolidate the three specifications into a single specification" which accurately captured the appellant's criminality. *Id*. at *40.

Analysis

A1C Flores was charged with attempted false pretenses to obtain services and making a false official statement for the exact same transaction. R. at 28-30, 34-35. After the military judge asked A1C Flores to explain why she was guilty of making a false statement, her defense counsel informed the military judge that the facts A1C Flores would be providing were "*identical* to the information that was provided in the previous Charge and specification." R. at 34. To treat this transaction as two separate criminal offenses unreasonably multiplied the charges against A1C Flores, and this Court should pierce waiver and dismiss the Specification of Charge III and Charge III.

An examination of the *Quiroz* factors supports this Court's dismissal of A1C Flores's false official statement specification. Because A1C Flores pleaded guilty to both the attempt and making a false official statement, she lodged no objection claiming that her charges had been unreasonably multiplied. R. at 10. Therefore, this factor weighs against her. However, A1C Flores's defense counsel stated that, absent her guilty plea, the Defense "would've filed a motion regarding multiplication of charges, with regards to the fake orders." R. at 44. Therefore, the Defense recognized that A1C Flores was being charged with two offenses for the exact same transaction.

With regards to the second *Quiroz* factor, both charges hinged on A1C Flores's statements to Ms. Y.C. that she was PCS'ing and needed to terminate her lease. R. at 28-30, 34-35. Without A1C Flores's false statements, there would have been no attempted false pretenses to obtain services. Therefore, each charge and specification were aimed at the same criminal act. Because

the identical facts were used to prove both specifications, the number of charges and specifications misrepresents and exaggerates A1C Flores's criminality. Her goal in providing the fake orders was to receive a benefit (i.e., the waiver of her $3,178 early termination fee),[13] and the Government captured her criminality by charging her with attempted false pretenses to obtain services in violation of Article 80, UCMJ. ROT, Vol. 1, Charge Sheet. A1C Flores admitted her misconduct and accepted responsibility for her actions. R. at 34-35. Likewise, the number of charges and specifications unfairly increased A1C Flores's punitive exposure. By charging A1C Flores with two offenses, rather than one, the Government paved the way for A1C Flores to receive the jurisdictional maximum for a Special Court-Martial. R. at 39. However, because A1C Flores agreed to a plea agreement, the Government was able to seek four months confinement for each charge and specification, to be served concurrently. R. at 45. In looking at the fifth *Quiroz* factor, there is no evidence of prosecutorial overreaching or abuse beyond the specifications themselves.

When balancing the factors, the balance weighs in A1C Flores's favor. Just as in *Massey*, it is unjust for A1C Flores to remain convicted of two offenses based on the exact same transaction. *Id*. at *38. In determining the appropriate response, this Court should consider that A1C Flores's criminality was appropriately captured by the attempt charge, and she was sentenced accordingly, receiving two months confinement for her actions. R. at 143. Additionally, this Court should consider A1C Flores's argument that her false official statement specification fails to state an offense as her false statements do not qualify as "official" statements from either the standpoint of the speaker or the standpoint of the hearer. *See* Issue I, *supra*. Charge III unreasonably multiplies A1C Flores's criminality and is itself *not* an offense under the UCMJ. Therefore, the interest of justice weighs in favor of piercing A1C Flores's waiver. A1C Flores should not stand convicted

[13] R. at 32.

of two offenses based on identical facts—i.e., the exact same transaction—when one offense does not capture conduct which is criminalized under the UCMJ. Furthermore, if this Court agrees, A1C Flores will not receive a windfall. If this Court dismisses the Specification of Charge III and Charge III, it will have no impact on her sentence, as she was sentenced to be confined for two months for the Specification of Charge II and to be confined for one month for the Specification of Charge III. R. at 143. Considering the obvious nature of the unreasonable multiplication in this case—which is plainly presented—A1C Flores's requests this Court exercise its power under Article 66(d) to piece her wavier and approve only such findings and sentence as are correct in law and fact.

WHEREFORE, A1C Flores respectfully requests that this Honorable Court set aside her conviction for making a false official statement (the Specification of Charge III and Charge III).

Respectfully submitted

Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division 21 March 2023.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

APPENDIX A

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), A1C Flores, through appellate defense counsel, personally requests that this Court consider the following matters:

III.

A1C FLORES'S SENTENCE—WHICH INCLUDES A BAD CONDUCT DISCHARGE—IS INAPPROPRIATELY SEVERE.[14]

Standard of Review

The standard of review for sentence appropriateness is de novo. *United States v. Lane*, 64 M.J.1, 2 (C.A.A.F. 2006); *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005).

Additional Facts

A1C Flores's Matters in Mitigation, Extenuation, and her Rehabilitative Potential

A1C Flores was born when her mother, A.H., was 21 years old. R. at 122. She came to America from Belize, while A1C Flores's grandparents remained in Belize. R. at 123. A1C Flores spent her summers traveling to Belize, spending time with her grandparents. R. at 123. A1C Flores began working when she turned 14 years old in order to help her mother and family out financially and emotionally. R. at 122. She is the oldest of three, with a younger brother and sister. R. at 123. According to A.H., A1C Flores's younger siblings adore their big sister, and look up to her. R. at 122. Her mother described A1C Flores as being "very selfless," and explained that A1C Flores used her work income to help support the family by paying bills and buying school supplies for her sister. R. at 122.

A.H. indicated that she and A1C Flores's grandparents would provide a strong support system for A1C Flores following her court-martial, and with her bachelor's degree and her

[14] A1C Flores incorporates the facts contained in her Statement of Facts for this Court's assessment of this Assignment of Error.

resiliency, A.H. had no doubt that after falling down, A1C Flores would pick herself back up and move past these mistakes. R. at 123. A.H. noted that A1C Flores was remorseful, embarrassed, and very disappointed in herself for the decisions she made. R. at 124. She described A1C Flores as having "[e]xtremely high" rehabilitative potential. R. at 124. Likewise, A1C Flores's First Sergeant, Senior Master Sergeant J.B., agreed that A1C Flores had rehabilitative potential. R. at 86. The authors of her three characters letters championed her positive outlook, enthusiasm, work ethic, and rehabilitative potential. Def. Ex. B, C, D.

Law

Appellate courts have not only the power but also the independent duty to consider the appropriateness of adjudged sentences. *See United States v. Baker*, 28 M.J. 121, 123 (C.M.A. 1989). Under Article 66(d), UCMJ (*2019 MCM*), this Court may only approve "the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (*2019 MCM*). "Article 66(c)'s sentence appropriateness provision is a sweeping Congressional mandate to ensure a fair and just punishment for every accused."[15] *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (internal quotations and citations omitted). This Court's broad power to ensure a just sentence is distinct from the convening authority's clemency power to grant mercy. *See United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted). Sentence appropriateness is assessed by considering the appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial. *United States v.*

[15] Prior versions of Article 66(c), UCMJ, have included the same or substantially similar language about sentence appropriateness, such that case law interpreting these provisions should be honored, even for cases referred after 1 January 2019. *See* Executive Order 13,825.

Snelling, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim App. 2006), *aff'd* 65 M.J. 35 (2007).

Analysis

A1C Flores, a first generation Belizean-American, had to overcome many obstacles in her life, and overcome them she did. Def. Ex. A. She grew up with a single mother, who struggled to support herself and A1C Flores while A1C Flores's father was absent from her life. *Id*. Later, her mother married her stepfather, and she was gifted with two new siblings. *Id*. A1C Flores helped to raise her brother and sister and took on the added responsibility of working to help support her family when she was just 14 years old. *Id*. Her drive and ability to succeed is evinced by the fact that she was the first person in her family to go to college and graduate with a college degree. *Id*. While pursuing her education, A1C Flores became embroiled in an unhealthy relationship, which turned violent. *Id*. Despite this obstacle and the resulting emotional turmoil, A1C Flores graduated with her Bachelor's degree in five years. *Id*.

Her mom, A.H., testified that A1C Flores was always trying to help her friends. R. at 122. While misguided, A1C Flores explained that she believed she was helping her closest friend, A1C A.K.—who had been struggling with a loss—when she gave her marijuana. R. at 126. She also considered A1C J.S. a friend, and she believed she was helping him when he called her and asked her for marijuana. *Id*. While it does not excuse her actions, it is mitigating that A1C Flores did not initiate the sale of drugs to A1C J.S. R. at 101. Instead, acting at AFOSI's behest, A1C J.S. initiated the conversation with A1C Flores. R. at 101. Prior to this call, A1C Flores had never spoken with A1C J.S. about drugs, nor had they discussed buying or selling drugs prior. R. at 100. With regards to her attempt charge, A1C Flores discussed her panic and how she felt overwhelmed when she realized she would be financially unable to support herself and her family if she was

discharged, confined, or both. R. at 127. This panic led her to make a desperate decision to provide fake orders to her apartment complex to avoid owning a $3,000 early termination fee. R. at 127.

A1C Flores expressed sincere remorse and accepted responsibility for her actions. R. at 126, 127. Her sentencing case demonstrates that she has high rehabilitative potential. A1C Flores presented testimony and character letters from family, friends and coworkers discussing her caring and selfless nature. R. at 122; Def Ex. B-D. Her mother testified to the strong support system that would be available for her and discussed her "extremely high" rehabilitative potential. R. at 124. Her mother discussed her resiliency, and ability to move on (R. at 123), and A1C Flores's discussed her dreams of attending mortuary school and becoming a mortician. R. at 128; Def. Ex. A. During her unsworn, A1C Flores implored the military judge to not adjudge a bad conduct discharge, as this characterization would make her ability to pursue her dreams more difficult. R. at 128. The Government's own witness, A1C Flores's First Sergeant SMSgt J.B., testified to A1C Flores's rehabilitative potential. R. at 86. Moreover, she was described as someone who was hard working and respectful, who endeavored to improve her unit's morale through her positive outlook, and as a "go-to" Airman. Def. Ex. B-D.

In considering the facts and circumstances of the offenses to which A1C Flores pleaded guilty, the matters in mitigation and extenuation offered on the record, and evidence of A1C Flores's rehabilitative potential, her sentence—which includes a bad conduct discharge—is inappropriately severe.

WHEREFORE, A1C Flores requests this Court exercise its authority under Article 66 to modify her sentence and disapprove the bad conduct discharge.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before Panel No. 1
Airman First Class (E-3) **JADA FLORES** United States Air Force *Appellant.*	)	No. ACM S32728
	)	20 April 2023

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

ISSUES PRESENTED

I.

WHETHER THE SPECIFICATION OF CHARGE III FAILS TO STATE AN OFFENSE?

II.

WHETHER THE SPECIFICATION OF CHARGE II FOR ATTEMPTED FALSE PRETENSES TO OBTAIN SERVICES IN VIOLATION OF ARTICLE 80, UCMJ, AND THE SPECIFICATION OF CHARGE III FOR MAKING A FALSE OFFICIAL STATEMENT IN VIOLATION OF ARTICLE 107, UCMJ, UNREASONABLY MULTIPLIED THE CHARGES AGAINST A1C FLORES?

III.[1]

WHETHER A1C FLORES'S SENTENCE—WHICH INCLUDES A BAD CONDUCT DISCHARGE—IS INAPPROPRIATELY SEVERE?

STATEMENT OF CASE

The United States generally agrees with Appellant's statement of the case.

[1] This issue is raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

STATEMENT OF FACTS

Pursuant to a plea agreement, Appellant pleaded guilty to two specifications of wrongful distributions of marijuana, one to A1C AK and one to A1C JS, in violation of Article 112a, UCMJ. (Entry of Judgment, dated 20 April 2022, ROT, Vol 1.) She also pleaded guilty to one specification of attempted false pretenses to obtain services, in violation of Article 80, UCMJ, and one specification of making a false official statement in violation of Article 107, UCMJ. (R. at 10, 19, 24.)

Appellant offered A1C AK marijuana before they went out to a club in Tampa, Florida. (Pros. Ex. 1 at 1.) When they arrived at the club in Appellant's car, Appellant provided A1C AK a marijuana joint to smoke, and A1C AK took three hits from it. (Id.). Appellant acknowledged that her distribution to another Airman was illegal, and she did not have any legal justification for distributing it to A1C AK. (R. at 20, 22.)

Appellant also pleaded guilty to distribution to A1C JS. (R. at 10, 24.) A1C JS worked as a confidential informant (CI) for the Air Force Office of Special Investigations (AFOSI), and he contacted Appellant to set up a drug buy. (R. at 100, 101.) Appellant at first said she did not have marijuana to sell him, but she called him back and said she could sell him some marijuana for $20. (R. at 24.) A1C JS sent $20 via CashApp to Appellant, then they met at a park in Tampa, Florida, and she provided him with five grams of marijuana. (R. at 24; Pros. Ex. 1 at 2.) Appellant acknowledged that her distribution to another Airman was illegal, and she did not have any legal justification for distributing it to A1C JS. (R. at 24, 26.)

AFOSI started investigating Appellant in November 2021. (R. at 28.) While under investigation for wrongful distribution of marijuana to two Airmen, Appellant became concerned she would be unable to pay her lease if she was confined or discharged. (R. at 28, 35.) A co-

worker suggested she use Permanent Change of Station (PCS) orders to break her lease without paying the early termination fee of $3,178. (R. at 29, 35.) This co-worker provided her with fake PCS orders with her name on them. (R. at 29, 35.) Appellant went to the leasing office for the Cortland Brighton Bay Apartment where she resided, and she provided the fake orders and a notice of intent to vacate to YC, a Cortland Brighton Bay Apartment employee. (R. at 29, 35.) Appellant then filled out a notice to vacate on which she noted a "military transfer" as the reason for the early vacation of the residence. (Pros. Ex. 1 at 14.) Appellant told YC she had orders to move to Turkey. (R. at 29.) But Appellant knew she was not actually moving to Turkey, and she knew her statement to YC, the notice to vacate form, and the PCS orders contained false information. (R. at 29.)

Appellant's attempt to terminate the lease failed. (R. at 35.) Appellant was charged the early termination fee. (R. at 29, 35.) Appellant knew the orders were fake when she presented them to YC. She was not PCSing to Turkey. (R. at 29, 35.) She provided the fake orders to obtain a service: "waiver of [Appellant's] early lease termination fee." (R. at 30.) She also made false statements orally to YC and in writing on the notice of intent to vacate with the intent to deceive the apartment complex. (R. at 35.)

In her voluntary plea agreement with the convening authority, Appellant agreed to "[w]aive all motions which may be waived under the Rules for Courts-Martial." (App. Ex. II at 2.) Appellant stated she knowingly and voluntarily signed the plea agreement, she was not forced or coerced to sign it. (R. at 46, 49; App. Ex. II at 3.) Then before entering her pleas, Appellant again waived her right to make any motions to dismiss when the military judge asked:

> MJ: Airman Flores, how do you plead? Before receiving your plea, I advise you that any ***motions to dismiss*** or to ***grant other appropriate relief*** should be made at this time. Your defense counsel will speak for you.

ADC: The defense has ***no motions***.

(R. at 10.) (emphasis added). The military judge discussed the factual basis for any motions that Appellant would have filed but for the plea agreement in the following colloquy:

> MJ: Defense Counsel, what do you believe to be the factual basis of any motions covered by this term of the plea agreement?
>
> ADC: Thank you, Your Honor. We would've filed a motion regarding multiplication of charges, with regards to the fake orders.
>
> MJ: Airman Flores, do you understand that if this motion had been made by your defense counsel and granted by me, then a possible ruling could've been that one of the specifications could have been dismissed in this case?
>
> ACC: Yes, Your Honor.
>
> MJ: Okay. Knowing what your defense counsel and I have told you, ***do you want to give up making this motion*** in order to get the benefit of your plea agreement?
>
> ACC: ***Yes, Your Honor***.

(R. at 44.) (emphasis added).

Appellant understood the maximum punishment for her guilty plea. (R. at 39.) Appellant agreed she had enough time to discuss the guilty plea with her counsel, and she was satisfied with her defense counsel. (R. at 48-49.) Appellant stated that she pleaded guilty voluntarily and of her own free will. (R. at 49.)

ARGUMENT

I.

APPELLANT AFFIRMATIVELY WAIVED ANY MOTION TO DISMISS FOR FAILURE TO STATE AN OFFENSE WITH HER UNCONDITIONAL GUILTY PLEA.

Standard of Review

Waiver

"Whether an appellant has waived an objection is a legal question that this Court reviews *de novo*." United States v. Gudmundson, 57 M.J. 493, 495 (C.A.A.F. 2002).

Failure to State an Offense

Whether a specification fails to state an offense is a question of law that is normally reviewed *de novo*. United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006). Yet an unconditional guilty plea waives all non-jurisdictional claims. United States v. Joseph, 11 M.J. 333, 335 (C.M.A. 1981). *See also* R.C.M. 907(b)(2)(E) (stating that failure to state an offense claim is non-jurisdictional and therefore waivable).

Providence of Guilty Plea

"A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion." United States v. Riley, 72 M.J. 115, 119 (C.A.A.F. 2013) (citing United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008)). "An abuse of discretion occurs when there is 'something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea." Riley, 72 M.J. at 119.

Law

Waiver

"Waiver can occur either by a party's intentional relinquishment or abandonment of a known right or by operation of law." United States v. Jones, 78 M.J. 37, 44 (C.A.A.F. 2018) (internal citations omitted). An accused may intentionally abandon a waivable objection in a plea agreement by including a clause waiving all waivable motions. *See* United States v. Danylo, 73 M.J. 183, 188 (C.A.A.F. 2014) (holding that such a waive all waivable motions clause in a pretrial agreement waived a claim for sentencing credit.). An affirmative statement that an accused at trial has "no objection" generally "constitutes an affirmative waiver of the right or admission at issue." United States v. Swift, 76 M.J. 210, 217 (C.A.A.F. 2017) (citation omitted).

"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, No. 22-0122/AF, slip op. at 5 (C.A.A.F. 13 December 2022) (emphasis added). CAAF has held "[a]n unconditional guilty plea generally 'waives all defects which are neither jurisdictional nor a deprivation of due process of law.'" United States v. Schweitzer, 68 M.J. 133, 136 (C.A.A.F. 2009) (quoting United States v. Rehorn, 9 C.M.A. 487, 488-89, 26 C.M.R. 267, 268-69 (1958)).

Failure to State an Offense

This Court views defective specifications "with maximum liberality" in favor of validity when an accused pleads guilty to the offense and only challenges the specification for the first time on appeal. *See* United States v. Watkins, 21 M.J. 208, 210 (C.M.A. 1986) ("we view standing to challenge a specification on appeal as considerably less where an accused knowingly

and voluntarily pleads guilty to the offense."). Upon such a challenge, Appellant must show substantial prejudice, establishing that the charge was "so obviously defective that by no reasonable construction can it be said to charge the offense for which the convicted was had." Id. (quoting United States v. Thompson, 356 F.2d 216, 226 (2d Cir. 1965), cert denied, 384 U.S. 964 (1966)). If a specification fails to state an offense, the appropriate remedy is dismissal of that specification unless the Government can show that the error was harmless beyond a reasonable doubt. United States v. Humphries, 71 M.J. 209, 213 n.5 (C.A.A.F. 2012).

Providence of Guilty Plea

A military judge may only accept a guilty plea after first ensuring there is a factual basis for that plea. R.C.M. 910(e); United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247, 253 (C.M.A. 1969). "An inquiry into the providence of a guilty plea must establish the factual circumstances admitted by the accused which objectively support his plea." United States v. Shearer, 44 M.J. 330, 334 (C.A.A.F. 1996) (internal citation omitted). "We have stated that in evaluating the providency of a plea, the entire record should be considered." United States v. Negron, 60 M.J. 136, 141 (C.A.A.F. 2004). "[W]hile the standard for acceptance of a guilty plea is high, perfection is not required." United States v. Halsey, 62 M.J. 681, 686 (C.G. Ct. Crim. App. 2006).

Analysis

A. Appellant waived any motion to dismiss for failure to state an offense with her unconditional guilty plea.

An unconditional guilty plea is, by definition, an affirmative waiver of a "failure to state an offense" claim for the pleaded-to offense. United States v. Sanchez, 81 M.J. 501, 504 (A. Ct. Crim. App. 2021). An unconditional guilty plea waives all non-jurisdictional claims. United

States v. Joseph, 11 M.J. 333, 335 (C.M.A. 1981). A failure to state an offense claim is non-jurisdictional and therefore waivable. R.C.M. 907(b)(2)(E).

Before entering her pleas, the military judge advised Appellant, "Before receiving your plea, I advise you that any ***motions to dismiss*** or to grant other appropriate relief should be made at this time." The trial defense counsel responded, "The defense has no motions." (R. at 10.) The military judge specifically identified motions to dismiss in her question, and Appellant explicitly waived the motion when she said she did not have any motions. Appellant then entered her unconditional plea of guilty to the Specification of Charge III. (R. at 10.) Even if the initial statement to the military judge was somehow an error, she waived any waivable motions upon entering her unconditional plea. Sanchez, 81 M.J. at 504.

Then during the plea agreement inquiry, the military judge questioned Appellant about the plea agreement clause in which she waived all waivable motions. (R. at 46; App. Ex. II at 2.) Appellant agreed she understood the term. (R. at 46.) Then the military judge asked, "Defense Counsel, what do you believe to be the factual basis of any motions covered by this term of the plea agreement?" (R. at 43.) And trial defense counsel explained the only motion they would have filed was an unreasonable multiplication of charges motion. Though trial defense counsel was asked directly which motions – plural – they intended to file, trial defense counsel did not mention a motion to dismiss for failure to state an offense. (R. at 44.) Appellant unequivocally waived a motion to dismiss for failure to state an offense orally on *three* different occasions. She also waived any waivable motions in writing in her plea agreement. (App. Ex. II at 2.)

Despite repeatedly being asked if she had any motions at trial, Appellant now argues for the first time on appeal that failure to state an offense is a jurisdictional claim and cannot be waived, so the court-martial lacked jurisdiction over her. (App. Br. at 12.) But Appellant's

argument ignores the plain language of R.C.M. 907. In 2016, the President amended R.C.M. 907(b), making failure to state an offense "waivable." Exec. Order No. 13730, 81 Fed. Reg. 102, 33,336 (26 May 2016).

Appellant argues that, despite the plain language of R.C.M. 907, failure to state an offense is not waivable. (App. Br. at 13.) She argues that if a charge does not state an offense, the court-martial has no jurisdiction over it. (Id.) But as early as 1830, the Supreme Court rejected the suggestion that a federal court is deprived of jurisdiction in "a case in which the indictment charges an offense not punishable criminally according to the law of the land." Ex Parte Watkins, 28 U.S. 193, 203 (1830). The Court has "repeatedly reaffirmed that proposition." Class v. United States, 138 S. Ct. 798, 816 (2018). And the Supreme Court has also explained that "the objection that the indictment does not charge a crime against the United States goes only to the merits of the case" and therefore does not affect jurisdiction. Lamar v. United States, 240 U.S. 60, 64 (1916).

The code does not prohibit the President from making failure to state an offense a non-jurisdictional issue. And Congress has not acted to reverse the President's amendment of R.C.M. 907, though it has been in effect since 2016. The President was within his power to promulgate the change to R.C.M. 907.

Appellant argues "[o]ther federal circuit courts of appeal have reached similar conclusions, holding that failure to state an offense is jurisdictional." (App. Br. at 13.) But the Federal Rules of Criminal Procedure explain a motion to dismiss for failure to state an offense is waived in the federal district courts if not filed pretrial. Fed. R. Crim. Proc. R. 12. The 2016 amendment to R.C.M. 907 brings the rule in closer alignment with the Federal Rules of Criminal Procedure. In accordance with Article 36, UCMJ, the President applied "the principles of law . .

. generally recognized in the trial of criminal cases in the United States district courts" by making a motion to dismiss for failure to state an offense as a waivable motion. 10 U.S.C. § 836.

Furthermore, every CCA that has addressed the President's 2016 amendment to R.C.M. 907(b)(2)(E), has found waiver when an appellant unconditionally pleads guilty pursuant to a plea agreement. *See*, e.g., United States v. Seeto, ACM 39247 (reh), 2021 CCA LEXIS 185, *24 (A.F. Ct. Crim. App. 21 April 2021) (unpub. op.) ("The failure of a specification to state an offense is a non-jurisdictional, waivable basis for a motion to dismiss."); United States v. Macko, 82 M.J. 501, 504 (N-M. Ct. Crim. App. 2021) ("As R.C.M. 907(b)(2)(E) made failure to state an offense a waivable motion at the time of both his plea agreement and his trial, we find that Appellant knowingly and intentionally waived the issue he now asserts as error"); Sanchez, 81 M.J. at 502 ("we hold that an unconditional guilty plea waives a later claim that the pled-to specification fails to state an offense.").

Despite the service courts' alignment on the issue, Appellant argues our superior court has not ruled on whether failure to state an offense is waived by an unconditional guilty plea since the President amended R.C.M. 907 in 2016. (App. Br. at 13.) And Appellant continues that CAAF's decision in United States v. Byunggu Kim, No. 22-0234 AR, 2022 CAAF LEXIS 795 (C.A.A.F. 7 Nov. 2022), will dispose of this issue. (App. Br. at 13.) But CAAF has not published an opinion in Byunggu Kim. Speculative outcomes of our superior court's future decisions are not binding on this Court, but the plain language of the R.C.M. 907 is binding and should be applied in this case.

In this case, Appellant was charged with a violation of Article 107, UCMJ, – an enumerated offense under the UCMJ. If the words in the specification did not articulate a violation of Article 107, then that went to the merits of the case and the providence of the guilty

plea – not the court-martial's ability to try Appellant in the first place. If any error existed, it was not jurisdictional, and the President could provide for its waiver. Because the President had proper authority to make failure to state an offense a waivable ground for dismissal, then Appellant's affirmative actions *and* unconditional guilty plea at trial constitute waiver. Appellant's waiver was valid, and a valid waiver at trial leaves no error to correct on appeal. *See* United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009) (holding that a valid trial waiver extinguishes error). This Court should deny this assignment of error based on Appellant's waiver.

B. The Specification of Charge III expressly states each element of the offense under Article 107, UCMJ, and it gives Appellant notice of the charged misconduct.

Even if this Court pierces Appellant's blatant waiver, Appellant's argument still fails because the Specification of Charge III stated an offense under the UCMJ. "A specification states an offense if it alleges, either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006) (citation omitted).

Article 107, UCMJ, requires these elements be met: (1) Appellant signed a certain official document or made a certain official statement; (2) the document or statement was false in certain particulars; (3) Appellant knew it to be false at the time of signing it or making it; and (4) the false document or statement was made with the intent to deceive. Manual for Courts-Martial, pt. IV, 41.b.(1) (2019 ed.). The Specification of Charge III reads:

> In that [Appellant], United States Air Force, 6th Security Forces Squadron, MacDill Air Force Base, Florida, did at or near St. Petersburg, Florida, on or about 31 January 2022, with intent to deceive, make to Cortland Brighton Bay Apartment, an official statement, to wit: notice to terminate lease due to permanent change of station, or words to that effect, which statement was totally false, and was then known by [Appellant] to be so false.

(*Charge Sheet*, dated 17 February 2022, ROT, Vol. 1.) The Specification of Charge III expressly articulates each element of false official statement under Article 107, UCMJ. The charge specifically states the "notice to terminate lease" was the false official statement. (*Charge Sheet*, ROT, Vol. 1.) The specification explains the who (Appellant), what (notice to terminate lease), where (St. Petersburg, Florida), when (31 January 2022), and how (Appellant's statement was totally false, and Appellant knew it was false) of the offense.

The specification is a "plain, concise, and definite statement of the essential facts constituting the offense charged," and it put Appellant on notice of her illegal conduct and provided "protection against double jeopardy." R.C.M. 307, Crafter, 64 M.J. at 211. Appellant was able to articulate in her own words, why her actions violated Article 107. She said, "I told [YC] that the military was PCSing [me] and thus I had to break my lease. I provided her with my notice of intent to vacate and a copy of a PCS orders with my name on it." (R. at 35.) Her statement shows she as on notice of the offending conduct. Appellant concedes an offense was stated in her brief:

> While the specification contains "a plain, concise, and definite statement of the essential facts," these facts do not constitute the offense of false official statement in violation of Article 107, UCMJ, as A1C Flores statements, while false, were not "official."

(App. Br. 13.) The specification is sufficient because it "alleged every element of the charged offense expressly or by necessary implication." R.C.M. 307. And because the specification articulated what the alleged false official statement was – notice to terminate lease due to permanent change of station – there was no danger that Appellant could be charged for the same conduct again in violation of double jeopardy.

Appellant argues because the statement was not official, the government failed to state an offense. (App. Br. at 13.) But whether the statement was official goes to the merits of the offense and the providence of the inquiry, not to whether the specification put Appellant on notice of the misconduct. Lamar, 240 U.S. at 64.

Even if this Court pierces Appellant's waiver, the Specification of Charge III properly stated an offense under Article 107, UCMJ, and Appellant was properly notified of her offending conduct.

C. Appellant's plea was provident because the military judge established a factual basis for each element of the offense, specifically that the statement was official.

Appellant claims one element of the offense is problematic: whether the statement Appellant made was official. (App. Br. at 13.) Appellant's statement was official. During the Care inquiry with Appellant, the military judge explained each element of false official statement under Article 107, UCMJ. (R. at 33-34.) The military judge defined "official" for Appellant:

> A statement is official when the maker is either acting in the line of duty or the statement bares a clear and direct relationship to the maker's official military duties or where the receiver is either a military member carrying out a military duty when the statement is made or a civilian necessarily performing a military function when the statement is made.

(R. at 33.) "Official statements are those that affect military functions, which encompass matters within the jurisdiction of the military departments and Services." MCM, pt. IV, 41.c (2019 ed.) Military members are ordered to move via permeant change of station orders. A Permanent Change of Station (PCS) is defined as "The assignment, detail, or transfer of an employee, member, or unit to a different PDS (Permanent Duty Station) under a competent travel order that does not specify the duty as temporary, provide for further assignment to a new PDS, or direct return to the old PDS." Wolfing v. United States, 163 Fed. Cl. 135, 151 (citing Joint

Travel Regulation App. A, Part 1 at A1-32). A permanent change of station is an order. Id. Military members are obligated to follow orders under Article 92, UCMJ. The obligation to move bares a clear and direct relationship to a military member's duty to follow orders.

A military judge may only accept a guilty plea after first ensuring there is a factual basis for that plea. R.C.M. 910(e); United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247, 253 (C.M.A. 1969). Appellant admitted her statement bore a clear and direct relationship to her official military duties "because they relate[d] to my PCS orders." (R. at 36.). The official duty was the duty to PCS when ordered to do so.

Appellant's statement to a civilian apartment complex employee bore a direct relationship to Appellant's duties and status as an Air Force member when she used the Service Member's Civil Relief Act (SCRA) to deceive her landlord. 50 U.S.C. § 3955. She invoked her status as a military member and duty to follow orders as a guise to obtain a privilege from the apartment complex. During the guilty plea inquiry, the military judge asked Appellant:

> MJ: Why did you want to deceive this individual by making a false statement?
>
> ACC: [YC] is a civilian. However, she would be obligated to terminate my lease ***if military obligations required me to PCS***.
>
> MJ: All right. And it was the fact that you knew that she would have to do this that you believe related it to your military duties?
>
> ACC: Yes, Your Honor.
>
> MJ: And it was that relation to military duties that made you believe that this was, in fact, an official statement?
>
> ACC: Yes, Your Honor.

(R. at 37.) In United States v. Hagee, the appellant made and signed fake temporary additional duty orders for two friends. M.J. 484, 487 (C.A.A.F. 1993). His friends, then, used the orders to

demonstrate to their civilian landlord that they had been transferred so that they could break their housing leases, and the civilian landlord depended on them. Id. CAAF determined the appellant's actions were a violation of Article 107, because he made and signed false official duty orders for the purpose of using them to deceive a private party who was "entitled to rely" on the orders' integrity. Id. This case is like Hagee, because Appellant purported to be acting at the behest of the United States Air Force when she told YC she was vacating her apartment and when she signed the notice to vacate her apartment. (R. at 37.)

Appellant cites United States v. Spicer to support the claim that Appellant's statement was not official because it was not made while she was in the line of duty, and it did not bear a clear and direct relationship to her official duties. 71 M.J. 470, 472 (C.A.A.F. 2013); (App. Br. at 10.) In Spicer, the appellant's statements to civilian law enforcement related to the details of his son's injuries caused by an alleged kidnapping, and the court determined it did not bear a direct nexus to his official duties. Spicer, 71 M.J. at 472. Meanwhile in this case, Appellant's statement directly invoked her status as a military member and military legal protections under SCRA that required her landlord to terminate Appellant's lease due to military orders. *See* 50 U.S.C. § 3955. Appellant purported to be following military orders, which she could not disobey, when she told YC she was vacating her apartment and she signed the notice to vacate her apartment. (R. at xx.) Thus, Appellant's case is distinguishable from Spicer.

"An inquiry into the providence of a guilty plea must establish the factual circumstances admitted by the accused which objectively support his plea." United States v. Shearer, 44 M.J. 330, 334 (C.A.A.F. 1996) (internal citation omitted). "[W]hile the standard for acceptance of a guilty plea is high, perfection is not required." United States v. Halsey, 62 M.J. 681, 686 (C.G. Ct. Crim. App. 2006). In looking at the record in this case, Appellant stated, "[YC] is a civilian.

However, she would be obligated to terminate my lease if military obligations required me to PCS." (R. at 35-37.) Appellant understood "the nature of the prohibited conduct." United States v. Ballan, 71 M.J. 28, 33 (C.A.A.F. 2012). If Appellant lied to YC that Appellant needed to break her lease due to a military move, then YC would be required to terminate her lease. (R. at 35-37.) The military judge asked, "And it was that relation to military duties that made you believe that this was, in fact, an official statement?" (R. at 37.) To which Appellant replied, "Yes, Your Honor." Appellant understood what she was charged with and why her conduct was prohibited. Then Appellant explained the statement was official because it related to her military duties, specifically her PCS orders. (R. at 37.) The military judge established an adequate factual basis to show that Appellant's statement was official. Thus, her plea was provident. And the military judge did not abuse her discretion in accepting the plea because a substantial basis to overturn the military judge's acceptance of the plea does not exist.

Appellant waived any potential motion to dismiss for failure to state an offense for the Specification of Charge III by affirmatively abandoning her motions and by operation of law before entering her pleas. The Specification of Charge III stated an offense under Article 107, UCMJ, and the military judge did not err in finding Appellant's plea provident. This Court should deny this assignment of error.

II.

APPELLANT AFFIRMATIVELY WAIVED ANY MOTION FOR UNREASONABLE MULTIPLICATION OF CHARGES.

Additional Facts

Appellant unconditionally pleaded guilty to making a false official statement and attempted false pretenses. (R. at 10.) During the plea agreement inquiry, the military judge asked what motions trial defense counsel would have filed. (R. at 44.)

Appellant was convicted of falsifying "an official statement, to wit: notice to terminate lease due to permanent change of station, or words to that effect." (*Entry of Judgment*, ROT, Vol. 1.) The notice of intent to vacate was attached to the stipulation of fact as Attachment 4, and the document reflected the "reason for moving" was a "Military Transfer." (Pros. Ex. 1 at 14.) Appellant made statements to YC that she intended to vacate her apartment. (R. at 29.) The military judge asked Appellant, "All right. On 31 January 2022, did you make an official statement or sign an official document?" Appellant responded, "Yes, Your Honor. On 31 January 2020 [sic], I spoke to Ms. [YC], a representative of Cortland Brighton Bay Apartments. She works in the leasing office." (R. at 35.)

The false pretenses to obtain services conviction was based on Appellant providing the fake orders to her apartment complex to avoid about $3,000 in fees. (R. at 30-31.) The military judge asked Appellant, "And you indicated that you attempted to obtain those services by providing a false set of PCS orders?" She responded, "Yes, Your Honor." (R. at 30.)

Standard of Review

"Whether an appellant has waived an objection is a legal question that this Court reviews *de novo*." United States v. Gudmundson, 57 M.J. 493, 495 (C.A.A.F. 2002). Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." United States v. Davis, 79 M.J. 329, 331 (C.A.A.F. 2020) (citation and internal quotation marks omitted). The standard of review for forfeiture is plain error. United States v. Rich, 79 M.J. 472, 475-76 (C.A.A.F. 2020). "The plain error standard is met when (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights." United States v. Maynard, 66 M.J. 242, 244 (C.A.A.F. 2008).

Law and Analysis

A. Appellant unequivocally waived any motion for unreasonable multiplication of charges with her affirmative statements and unconditional guilty plea.

The same law about waiver from Issue I applies to this assigned error. "Waiver can occur either by a party's intentional relinquishment or abandonment of a known right or by operation of law." Jones, 78 M.J. at 44. Appellant waived her motion for unreasonable multiplication of charges four times on the record. (R. at 10, 44; App. Ex. II at 2.)

Appellant agreed to waive all waivable motion in her plea agreement. (App. Ex. II at 2.) Unreasonable multiplication of charges is a waivable motion. R.C.M. 905(e)(1); R.C.M. 906(b)(12). Appellant intentionally abandoned a waivable objection – a motion for unreasonable multiplication of charges – in her plea agreement by including a clause waiving all waivable motions. (App. Ex. II at 2.) *See* Danylo, 73 M.J. 188 (C.A.A.F. 2014) (holding that such a waive all waivable motions clause in a pretrial agreement waived a claim for sentencing credit.).

The second waiver occurred before entering her pleas. The military judge advised Appellant, "Before receiving your plea, I advise you that any ***motions*** to dismiss or ***to grant other appropriate relief*** should be made at this time." The trial defense counsel responded, "The defense has no motions." (R. at 10.) An affirmative statement that an accused at trial has "no objection" generally "constitutes an affirmative waiver of the right or admission at issue." Swift, 76 M.J. at 217. Trial defense counsel's affirmative statement waived the motion.

The third waiver occurred by operation of law, upon entering her plea of guilty for both the false official statement specification and the attempted false pretenses to obtain services specification. (R. at 10.) "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." Day, No. 22-0122/AF, slip op. at 5. CAAF has held "[a]n

unconditional guilty plea generally 'waives all defects which are neither jurisdictional nor a deprivation of due process of law.'" Schweitzer, 68 M.J. at 136.

The fourth waiver occurred during the plea agreement inquiry, when the military judge discussed the factual basis of any waived motions with Appellant. (R. at 44.) Appellant stated she understood the potential relief she was giving up for unreasonable multiplication of charges by agreeing to the waive all waivable motions term in her plea agreement. (R. at 44.)

Appellant argues that the Court should pierce waiver because the two offenses constitute one transaction. (App. Br. at 20.) The government disagrees. As explained below, the Quiroz factors are not met, and Appellant does not point to any evidence that merits piercing waiver. Appellant unequivocally waived the motion four times, and she received the benefit of her plea agreement and avoided a year in confinement. (R. at 10, 44; App. Ex. II at 2.) She only faced a total of four months confinement with her plea. (Entry of Judgment, ROT, Vol. 1.) Even then, she was only adjudged two months confinement well below the maximum available under the plea, despite tricking and intending to defraud her landlord and giving two Airmen marijuana. (Id.) Appellant should not be allowed to reap the significant benefits of her plea agreement at trial and now get additional relief on appeal. The issue has been sufficiently waived, and Appellant is not entitled to relief.

B. Even if this Court chooses to pierce waiver, the two charges do not constitute unreasonable multiplication of charges.

Rule for Court-Martial 307(c)(4) provides that "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." Unreasonable multiplication of charges concerns "those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." United States v. Quiroz,

55 M.J. 334, 337 (C.A.A.F. 2001). A five-part test determines whether the prosecution has unreasonably multiplied charges:

> (1) Did the Accused object at trial to an unreasonable multiplication of charges or specifications?
>
> (2) Does each charge and specification address distinctly separate criminal acts?
>
> (3) Does the number of charges and specifications misrepresent or exaggerate the Appellant's criminality?
>
> (4) Does the number of charges and specifications unfairly increase the appellant's punitive exposure?
>
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

Id. at 338.

Appellant argues, "[a]n examination of the Quiroz factors supports dismissal of [Appellant's] false official statement specification." (App. Br. at 20.) It does not. Appellant's argument for unreasonable multiplication of charges does not prevail under the Quiroz test.

First, Appellant did not object at trial to the issue. On the contrary, as discussed above, she not only failed to object, but she waived the issue four times. Appellant argues, absent her guilty plea, she would have filed a motion for appropriate relief, and the trial defense counsel claimed Appellant "was being charged with two offenses for the exact same transaction." (App. Br. at 20.) But this argument highlights Appellant's affirmative waiver. Recognition of a potential issue by trial defense counsel does not mean that the military judge would have agreed and ruled in Appellant's favor on the issue at trial. The issue was not litigated because Appellant abandoned it, and we do not know how the military judge would have ruled. Appellant concedes, and the government agrees, that this factor favors the government. (App. Br. 20.)

Second, each charge and specification addressed distinctly separate criminal acts. Appellant argues, "both charges hinged on [Appellant's] statements to Ms. Y.C. that she was PCS'ing and needed to terminate her lease." (App. Br. at 20.) Appellant argues that her false statements created the basis for both criminal acts. (Id.) But Appellant delineated the offenses during her guilty plea inquiry with the military judge. Appellant explained the statement to YC, supplemented by the false statement she endorsed on the notice to vacate, constituted the false official statement. (R. at. 35.) Appellant then stated providing the fake PCS orders to the apartment complex constituted the false pretenses to obtain services. (R. at 30.) Appellant was convicted of two separate acts: making a false statement to YC that she had received PCS orders necessitating that she break her lease in order to deceive YC and providing fake orders to her apartment complex to attempt to gain a service.

Appellant claims identical facts were used to prove both specifications. (App. Br. 21.) However, the court in Quiroz found that "offenses are separate if each offense requires proof of an element not required to prove the other." 55 M.J. at 334 (citing Blockburger v. United States, 284 U.S. 299 (1932)). The offenses are separate in this case as well. False official statement and false pretenses to obtain services differ in two ways and require different facts to prove each: each requires a different intent, and false pretenses requires an expectation of material gain. In this case, the false pretenses to obtain services was charged as an attempt, further attenuating the two specifications and requiring an additional element of specific intent to commit false pretenses to obtain services. MCM, pt. IV, para. 4.b.(2) (2019 ed.) The "mere unity of time and place" does not necessarily make charging "two offenses" unreasonable. United States v. Smith, No. 201600417, 2017 CCA LEXIS 504, at *7 (N-M Ct. Crim. App. July 31, 2017) (citing United

States v. Letang, No. 200000416, 2002 CCA LEXIS 49, at *4, unpub. op. (N-M. Ct. Crim. App. 7 Mar 2002)).

Art. 107 (False Official Statement)	Art. 80 (Attempted False Pretenses to Obtain Services)
(a) That the accused signed a certain official document or made a certain official statement;	(1) That the accused did certain overt acts, that is, with the ***intent to defraud***, did falsely pretend to obtain services and that the ***services were of a certain value***, or of some value.
(b) That the document or statement was false in certain particulars;	(2) That the acts were done with the specific intent to commit the offense of false pretenses to obtain services;
(c) That the accused knew it to be false at the time of signing it or making it; and	(3) That the acts amounted to more than mere preparation, and
(d) That the false document or statement was made with the ***intent to deceive***.	(4) That such acts apparently tended to bring about the commission of the offense of false pretenses to obtain services.

MCM, pt. IV, para. 4.b. (2019 ed.); MCM, pt. IV, para. 41.b(1) (2019 ed.); MCM, pt. IV, para. 66.b. (2019 ed.) (emphasis added).

Making a false official statement requires an intent to deceive: the accused needs to "mislead, cheat, or trick" someone else to gain something. MCM, pt. IV, 70.c.15 (2019 ed.). The purpose of the statement is to gain an advantage, but the gain does not need to be of value. MCM, pt. IV, para. 66.b. (2019 ed.).

False pretenses to obtain services requires an intent to defraud: the accused needs to use misrepresentation to obtain something of value. MCM, pt. IV, 70.c.14 (2019 ed.) The offense requires material gain meaning the service needs to be "of some value." MCM, pt. IV, para. 66.b. (2019 ed.).

Third, the number of charges and specifications do not misrepresent or exaggerate Appellant's criminality as Appellant claims. (App. Br. at 21.) Appellant's criminal exposure

was exactly proportional to the crimes that she committed without exaggeration or misrepresentation. She committed two separate acts, one to deceive YC and then one to attempt to defraud her apartment complex for personal gain under the guise of a military move. Trial counsel, defense counsel, and the military judge all understood the same set of facts that led to the charging of two separate specifications. (R. at 33, 38.) The government therefore prevails on this factor.

Fourth, the number of charges and specifications do not unfairly increase Appellant's punitive exposure. Under her plea, Appellant agreed to a maximum confinement of four months for both Specification 2 of Charge II (attempted false pretenses) and the Specification of Charge III (false official statement), to run concurrently. (App. Ex. II at 2.) The military judge sentenced her to one-month confinement for Specification 2 of Charge II (attempted false pretenses) and two months for the Specification of Charge III (false official statement), and the confinement ran concurrently for these two specifications. (*Entry of Judgment*, ROT, Vol. 1.)

Appellant argues that the charges increased her punitive exposure because "the Government paved the way for [Appellant] to receive the jurisdictional maximum for a Special Court-Martial." (App. Br. at 21.) But each of the four offenses on the charge sheet was punishable by up to a year confinement at a special court-martial. In addition, the attempted false pretenses offense, from which Appellant does not request relief, also carried the jurisdictional maximum sentence. She presents no argument or evidence to show the sentence she received was *per se* unreasonable, or that an increased maximum punishment *actually* increased her punitive exposure unfairly. The conviction for the false official statement did not change the punitive landscape for Appellant. Thus, the fourth Quiroz factor favors the government.

Fifth, Appellant conceded, and the government agrees there is no evidence of prosecutorial overreaching or abuse in the drafting of the charges. (App. Br. at 21.) This factor favors the government.

Appellant unequivocally waived any unreasonable multiplication of charges claim by unconditionally pleading to both offenses and repeatedly abandoning the motion for appropriate relief orally and in writing. Even if this Court pierces waiver, the Quiroz factors favor the government, and the charges were not unreasonably multiplied. This Court should deny this assignment of error.

III.[2]

APPELLANT'S SENTENCE IS NOT INAPPROPRIATELY SEVERE.

In Appellant's plea agreement, she agreed to no more than four months confinement for each specification to which she plead guilty. (App Ex. II at 2.) She reiterated this understanding with the military judge. (R. at 44.) She was facing a maximum of one year confinement. (R. at 38.) All adjudged confinement was to run concurrently. (Id.) Appellant also agreed, "I understand that I still may be sentenced to a Bad Conduct Discharge." (App. Ex. II at 2.)

Standard of Review

This Court reviews sentence appropriateness *de novo*. United States v. Sauk, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (en banc) (per curiam) (citation omitted). The Court may only affirm the sentence if it finds the sentence to be "correct in law and fact and determines, on the basis of the entire record, [it] should be approved." Article 66(d)(1), UCMJ.

[2] This issue is raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

Law and Analysis

Sentence appropriateness is assessed "by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial." United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009). Although this Court has great discretion to determine whether a sentence is appropriate, the Court lacks any authority grant mercy. United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted). Unlike the act of bestowing mercy through clemency, which was delegated to other channels by Congress, CCAs are entrusted with the task of determining sentence appropriateness, thereby ensuring the accused gets the punishment she deserves. United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988).

Appellant's sentence should be affirmed as entered on the Entry of Judgment because Appellant received the punishment she deserved. This Court should find the reasons Appellant advanced as to why her sentence is inappropriate unpersuasive, distinctly and in the aggregate. Appellant advances four reasons why she should receive leniency: (1) though misguided, she distributed marijuana to help her friends; (2) she tried to escape her lease because she was under investigation and was worried she would be unable to pay her rent if she was discharged or confined or both, (3) she expressed sincere remorse, and (4) her sentencing case demonstrated she has high rehabilitative potential. (App. Br., Appx. A at 3-4.)

Appellant argues a bad conduct discharge is too harsh of a punishment (App. Br., Appx. A at 4) despite the fast she expressly stated in her plea agreement, "I understand that I may still be sentenced to a Bad-Conduct Discharge." (App. Ex. II at 2.) "Absent evidence to the contrary, [an] accused's own sentence proposal is a reasonable indication of its probable fairness to him." United States v. Mathis, 2022 CCA LEXIS 90, *21-22 (A.F. Ct. Crim. App. 2022) (citing United

States v. Cron, 73 M.J. 718, 737 n.9 (A.F. Ct. Crim. App. 2014) (quoting United States v. Hendon, 6 M.J. 171, 175 (C.M.A. 1979)) (alteration in the original). "Thus, when considering the appropriateness of a sentence, courts may consider that a pretrial agreement or plea agreement—to which an appellant agreed—placed limits on the sentence that could be imposed." Mathis, 2022 CCA LEXIS 90, *21-22. Appellant agreed a bad conduct discharge was a possible sentence thus indicating its "probable fairness" to her. Id.

Rule for Court-Martial 1003(b)(8)(C) defines a bad conduct discharge as:

> less severe than a dishonorable discharge and is designed as a punishment for bad-conduct rather than as a punishment for serious offenses of either a civilian or military nature. It is also appropriate for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary[.]

Distributing marijuana to two other Airmen, trying to obtain approximately $3,000 in services under false pretenses, and making a false official statement independently and in the aggregate constitute bad conduct worthy of a bad-conduct discharge.

Appellant claims that, although her acts were misguided, she distributed marijuana to help her friends. (App. Br., Appx. A at 3.) But Appellant gave A1C AK marijuana before they went to a party at a club. (R. at 19.) Appellant stated under oath, "I did this because I thought it would make the party more enjoyable for A1C [AK]." (R. at 19.) Appellant then helped A1C JS acquire marijuana by buying him marijuana from a dealer. (R. at 24.) Appellant tried to qualify her actions by explaining A1C JS initiated the purchase. (R. at 101, App. Br., Appx. A at 3.) But such a qualification does not negate the steps she took to obtain the marijuana for another Airman.

Even if giving another Airman drugs somehow helped that individual overcome a struggle (which does not justify a drug distribution under the law), Appellant was "helping" her

friend enjoy a party, and she was "helping" another friend gain access to marijuana by getting it from a dealer for him. If her friends were struggling and required help, Appellant failed to use her military training to actually help her friends. She could have taken them to the first sergeant or a chaplain or helped them to access mental health. She was not helping her friends to do anything but destroy their own careers in the military – a looming aggravating factor in her sentencing.

Appellant claims she felt desperate while under investigation because she would be unable to pay her rent if she was discharged or confined or both. (App. Br., Appx. A at 4.) But this argument is unpersuasive because other resources were available to Appellant that did not require breaking the law. In sentencing Appellant's own mother testified to the strength of Appellant's support system, but Appellant did not turn to them. (R. at 123.) Appellant was married, but she did not turn to her spouse. (Pros. Ex. 2.) Appellant could have turned to military resources such as her first sergeant or supervisor to create a financial plan in case she was confined or discharged. But she did not. AFOSI began investigating Appellant on 19 November 2021, and she tried to get out of her lease on 31 January 2022. (R. at 34, 35.) Between those two events, 73 days passed. She could have asked for help or voiced her financial concerns. Instead, she committed more crimes.

Appellant argues she expressed sincere remorse, and her sentencing case demonstrated she has high rehabilitative potential in society. (App. Br., Appx. A at 4.) The military judge took this into account when she adjudged confinement well below the four-month confinement maximum in the plea agreement. (*Entry of Judgment*, ROT, Vol. 1; App. Ex. 2 at 2.) For Specification 1 of Charge I (distribution of marijuana) and the Specification of Charge III (false official statement), Appellant received only one month of confinement for each offense. (R. at

143; *Entry of Judgment*, ROT Vol. 1.) For Specification 2 of Charge I (distribution of marijuana) and Specification 2 of Charge II (attempted false pretenses), she received only two months confinement for each offense. All the adjudged confinement ran concurrently. (R. at 143; *Entry of Judgment*, ROT Vol. 1.) Appellant only endured two months in confinement when the plea agreement permitted the military judge to adjudge up to four months confinement. (App. Ex. II.) The jurisdictional maximum she faced was 12 months confinement. (R. at 38.)

The military judge considered Appellant's mitigating evidence and demonstrated her discretion as the sentencing authority by adjudging only two months confinement. The military judge also considered the aggravating evidence such as distribution of a controlled substance to *two* Airmen and the attempt to gain an approximately $3,000 windfall from her apartment complex when determining a bad conduct discharge was appropriate. Appellant's sentence was not inappropriately severe, and this Court should deny this assignment of error.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the findings and sentence in this case.

JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

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 20 April 2023.

JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* *v.* Airman First Class (E-3) **JADA FLORES**, United States Air Force, *Appellant*	**REPLY BRIEF ON BEHALF OF APPELLANT** Before Panel No. 1 No. ACM S32728 Filed on: 26 April 2023

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

COMES NOW, Appellant, Airman First Class (A1C) Jada Flores, by and through her undersigned counsel pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, and submits this reply to the Government's Answer, filed on 20 April 2023 (hereinafter Gov. Ans.). Appellant primarily rests on the arguments contained in her Brief on Behalf of Appellant, filed on 21 March 2023 (hereinafter App. Br.), but provides the following additional arguments in reply to the Government's Answer.

Argument

I.

THE SPECIFICATION OF CHARGE III FAILS TO STATE AN OFFENSE.

Analysis

1. The Effect of a Lack of Objection

The Government notes that in 2016, "the President amended R.C.M. 907(b), making failure to state an offense 'waivable.'" Gov. Ans. at 9 (citing Exec. Order No. 13730, 81 Fed. Reg. 102, 33,336 (26 May 2016)). While the President included failure to state an offense as a "waivable" ground, the plain language of R.C.M. 905(e)(2) provides:

> Other motions, requests, defenses, or objections, *except lack of jurisdiction or failure of a charge to allege an offense*, must be raised before the court-martial is adjourned for that case. Failure to raise such *other motions, requests, defenses, or objections*, shall constitute forfeiture, absent an affirmative waiver.

(emphasis added). Thus, the plain language of R.C.M. 905(e)(2) requires *other* motions, defenses, or objections to be raised before a court-martial adjourns, but does *not* impose this same requirement for those motions alleging "lack of jurisdiction" and "failure of a charge to allege an offense." Given that R.C.M. 905(e)(2) treats motions to dismiss for failure to state an offense in the same manner as motions to dismiss for lack of jurisdiction, whether an unconditional guilty plea waives a motion to dismiss for failure to state an offense is much less clear-cut than the Government alleges. *Contra United States v. Seeto*, No. ACM 39247 (reh), 2021 CCA LEXIS 185, *24 (A.F. Ct. Crim. App. 21 Apr. 2021) (unpub. op.).

This lack of clarity was further highlighted by the Court of Appeals for the Armed Forces (CAAF) in *United States v. Day*,[1] and its decision to grant review in *United States v. Byunggu Kim*.[2] The Government next posits that "[s]peculative outcomes of our superior court's future decisions are not binding on this Court, but the plain language of [] R.C.M. 907 is binding and should be applied in this case." Gov. Ans. at 10. Because the CAAF is set to rule on this issue this very term, this Court should wait to issue its decision until the CAAF renders its opinion, which will be binding on this Court.

Moreover, even if "the plain language of [] R.C.M. 907 is binding" on this Court, so is the plain language of R.C.M. 905(e)(2). Notably, R.C.M. 905(e)(2) is entitled "Effect of failure to

[1] 83 M.J. 53, 56 n.2 (C.A.A.F. 2022) (stating "[w]e do not address the question of whether failure to state an offense is a waivable objection").
[2] No. 22-0234 AR, 2022 CAAF LEXIS 795 (C.A.A.F. 7 Nov. 2022). The CAAF granted on two issues, including: "I. WHETHER A GUILTY PLEA TO AN OFFENSE WAIVES A CHALLENGE THAT THE CONDUCT IS NOT A COGNIZABLE OFFENSE UNDER THE UNIFORM CODE OF MILITARY JUSTCE."

raise defenses or objections." Thus, in analyzing A1C Flores's asserted issue, R.C.M. 905(e)(2)'s plain language indicates that she is not barred from raising this issue on appeal, as she was not required to raise "failure of a charge to allege an offense" *prior* to the adjournment of her court-martial. R.C.M. 905(e)(2). As the plain language of R.C.M. 907 and R.C.M. 905(e)(2) are in conflict concerning the impact of the failure to raise a motion for failure to state an offense, it does not appear that this Court can resolve this issue by relying on R.C.M. 907's plain language.

2. Failure to State an Offense

The Government claims that A1C Flores "invoked her status as a military member and duty to follow orders as a guise to obtain a privilege from the apartment complex." Gov. Ans. at 14. In other words, A1C Flores attempted to use false pretenses to obtain a service from her apartment complex. These actions were properly captured by her plea of guilty to Charge II and its specification. The Government then analogizes A1C Flores's actions to the appellant's actions in *United States v. Hagee*, 37 M.J. 484, 487 (C.A.A.F. 1993). Gov. Ans. at 14. However, in *Hagee*, the appellant prepared and signed fake temporary additional duty (TAD) orders for his friends. 37 M.J. at 485. Given that he both created and signed the orders, it is reasonable to infer that his official military duties related to the preparing and signing of these types of orders. As such, under the framework laid out in *Spicer*,[3] his actions in creating and signing the fake orders would "directly relate" to his "official military duties" of creating and signing TAD orders. By contrast, A1C Flores did not create or sign the fake orders, nor did she alter her own prior permanent change of station (PCS) orders. Instead, a fellow co-worker provided her with fake orders. R. at 29, 35. As opposed to the direct relationship observed in *Hagee*, the connection between A1C Flores's actions and the creation of the fake orders is very attenuated. Nor did the

[3] *United States v. Spicer,* 71 M.J. 470, 473 (C.A.A.F. 2013).

creation of these fake orders relate in any manner to A1C Flores's official military duties as a Security Forces' Installation Entry Controller. R. at 83. As argued in her initial brief, when applying the framework set out in *Spicer*, A1C Flores's statements, while false, were not official. App. Br. at 13-17.

WHEREFORE, A1C Flores respectfully requests this Honorable Court set aside Charge III and its specification for failure to state an offense.

II.

THE SPECIFICATION OF CHARGE II FOR ATTEMPTED FALSE PRETENSES TO OBTAIN SERVICES IN VIOLATION OF ARTICLE 80, UCMJ, AND THE SPECIFICATION OF CHARGE III FOR MAKING A FALSE OFFICIAL STATEMENT IN VIOLATION OF ARTICLE 107, UCMJ, UNREASONABLY MULTIPLIED THE CHARGES AGAINST A1C FLORES.

The Government asserts A1C Flores's charges were not unreasonably multiplied and argues that she "does not prevail under the *Quiroz*[4] test." Gov. Ans. at 19. In discussing the second *Quiroz* factor, the Government argues that "each charge and specification addressed distinct criminal acts." *Id*. at 21. According to the Government, "Appellant was convicted of two separate acts: making a false statement to [Y.C.] that she had received PCS orders necessitating that she break her lease in order to deceive [Y.C.] and providing fake orders to her apartment complex to gain a service." *Id.* However, the Government has attempted to parse A1C Flores's words in a manner that is not supported by the record. When A1C Flores described why she believed she had committed the offense of making a false official statement, she stated, "I told [Y.C.] that the military was PCSing [me] and thus I had to break my lease. I provided her with

[4] *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001).

my notice to vacate *and a copy of my PCS orders* with my name on it." R. at 35 (emphasis added).[5] As noted, A1C Flores specially referenced her PCS orders when discussing the false official statement allegation. *Id*.

In fact, the Government's argument for why A1C Flores was guilty of making a false official statement relies on her use of PCS orders to attempt to terminate her lease.[6] Gov. Ans. at 13-14. In its analysis of Issue I, the Government notes, "Military members are ordered to move via [permanent] change of station orders. . . A permanent change of station is an order." *Id*. It is unreasonable to believe the Cortland Brighton Apartment Complex would have allowed A1C Flores to break her lease *without* a copy of her PCS orders, especially given the apartment complex's experience with renting to military members. R. at 75.[7] As such, both charges relied on her use of PCS orders to effectuate each offense.

In discussing the elements of the two offenses, the Government argues that each requires a different intent. Gov. Ans. at 22. According to the Government, A1C Flores "committed two separate acts, one to deceive [Y.C.] and then one to attempt to defraud her apartment complex for personal gain under the guise of a military move." *Id*. at 23. However, the Government fails to appreciate that A1C Flores's intent to deceive is inextricably linked with her intent to defraud. Her purpose in making her statement to Y.C. was to have her apartment complex waive her early termination fee. Thus, while a person may make a false statement that does not include an intent

[5] In explaining why she was guilty of attempted false pretenses to obtain a service, A1C Flores discussed the exact same facts. R. at 29 (emphasis added).

[6] A1C Flores does not concede that she committed the offense of making a false official statement, as she argued in her initial brief and in Issue I, *supra*. Her discussion of the Government's argument is used to demonstrate why Charge II and Charge III fail to address distinct criminal acts.

[7] C.E., a representative from the Cortland Brighton Bay Apartment Complex, testified: "When [Y.C.] received order — or notice and orders, she uploaded them into the system and put a notice to vacate in the system as we do for anyone that provides us paperwork." R. at 74.

to defraud, here, A1C Flores's intent to deceive cannot be decoupled from her intent to defraud as they are part and parcel of the same transaction. R. at 35 ("I made the statement with the intent to deceive Cortland Brighton Bay Apartments *so they would waive my early termination fee*") (emphasis added). Here, the "piling on" of charges was unreasonable, and A1C Flores should not stand convicted of two offenses for the same transaction. *Quiroz*, 55 M.J. at 338-339.

WHEREFORE, A1C Flores respectfully requests this Honorable Court set aside her conviction for Charge III and its specification.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division 26 April 2023.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604