IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Airman Basic (E-1) **Jose A. ASTACIO BURGESS** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)** Before Panel No. 1 No. ACM S32827 3 September 2025

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Airman Basic (AB) Jose A. Astacio Burgess, Appellant, hereby moves for an enlargement of time (EOT) to file Assignments of Error. AB Astacio Burgess requests an enlargement for a period of 60 days, which will end on **13 November 2025**. The record of trial was docketed with this Court on 16 July 2025. From the date of docketing to the present date, 49 days have elapsed. On the date requested, 120 days will have elapsed.

WHEREFORE, AB Astacio Burgess respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 3 September 2025.

[redacted]

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 1
Airman Basic (E-1) **JOSE A. ASTACIO BURGESS,** United States Air Force, *Appellant.*	)	No. ACM S32827
	)	4 September 2025

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.

[redacted]

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 4 September 2025.

VANESSA BAIROS, Maj, USAF
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32827**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jose A. ASTACIO BURGESS	)	
Airman Basic (E-1)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 3 September 2025, counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 days to submit Appellant's assignments of error. The Government opposed the motion.

The court has considered Appellant's motion, the Government's opposition, this court's Rules of Practice and Procedure, and applicable case law.

Accordingly, it is by the court on this 5th day of September, 2025,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error **not later than 13 November 2025**.

Counsel should not rely on any subsequent requests for enlargement of time being granted. Each request will be considered on its merits.

Appellant's counsel is advised that any subsequent motions for enlargement of time shall include, in addition to the matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time.

Counsel may request, and the court may order *sua sponte*, a status conference to facilitate timely processing of this appeal. *See* A. F. Ct. Crim. App. R. 23.4.

FOR THE COURT

[redacted]

JACOB B. HOEFERKAMP, Capt, USAF
Chief Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Airman Basic (E-1) **Jose A. ASTACIO BURGESS** United States Air Force *Appellant*	**MERITS BRIEF** Before Panel No. 1 No. ACM S32827 18 September 2025

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

Submission of Case without Specific Assignments of Error

The undersigned appellate defense counsel attests that she has, on behalf of Airman Basic (AB) Jose A. Astacio Burgess, United States Air Force, carefully examined the record of trial. AB Astacio Burgess does not admit that the findings and sentence are correct in law and fact but submits this case to this Court on its merits with no specific assignments of error.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were electronically delivered to the Court and served on the Air Force Government Trial and Appellate Operations Division on 18 September 2025.

[redacted]
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32827**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jose A. ASTACIO BURGESS	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 13 May 2025, a special court-martial composed of a military judge convicted Appellant, in accordance with his pleas and pursuant to a plea agreement, of one specification of wrongful possession on divers occasions, one specification of wrongful distribution on divers occasions, and two specifications of wrongful introduction onto a military installation, of a controlled substance (psilocybin) in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a.* The military judge sentenced Appellant to reduction to the grade of E-1, forfeiture of $1,546.00 pay per month for six months, a bad-conduct discharge, and a reprimand. The convening authority took no action on the findings or the sentence.

On 18 September 2025, counsel for Appellant submitted the record for review by this court without any specific assignment of error.

A. Date of Enlistment

During our review of the record, we note Appellant's personal data sheet (PDS) (Prosecution Exhibit (PE) 2) and the charge sheet (preferred on 16 December 2024) reflect 4 October 2022 as Appellant's initial active-duty date of service. The stipulation of fact, PE 1, contains facts which predate 4 October 2022 and refers to Appellant's date of enlistment to active duty as 22 June 2022. These facts exist, *inter alia*, in the "Jurisdiction" and "Background and Investigation" sections of the stipulation which pertain to all specifications of Charge II. Nowhere in the stipulation of fact is there a reference to 4 October 2022.

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* These four specifications formed Specifications 1–4 of Charge II. All other charges and specifications were withdrawn and dismissed with prejudice, which will be further discussed *infra*.

Specification 1 (possession) and Specification 2 (distribution) of Charge II allege Appellant committed misconduct "on divers occasions *between on or about 22 June 2022* and on or about 29 February 2024." (Emphasis added).

During the providence inquiry, the military judge asked Appellant the following question:

[Military Judge (MJ)]: When did you join the Air Force?

[Appellant]: October 4, 2022.

At some point during the providence inquiry, the trial counsel stated to the military judge that "[they] heard testimony previously about the 4 October 2022 date, but [their] understanding was that it was 22 June 2022 because of a delayed enlistment." The military judge responded:

> MJ: Okay. I'm just looking back at my notes. I believe I asked [Appellant] when he joined the Air Force, and his answer was October 4th of 2022. Is that when you entered active duty, [Appellant]?
>
> [Appellant]: Yes, Your Honor.
>
> . . . .
>
> MJ: Maybe let me ask this. [Appellant], what's the significance of the 22 June 2022 date?
>
> [Appellant]: I believe that is when I was still signing paperwork with my recruiter during swear-in and things of that nature. But on October 4, 2022, was when I shipped to [basic military training].
>
> MJ: Okay. Did you – do you believe you entered the delayed enlistment program on 22 June 2022?
>
> [Appellant]: Yes, Your Honor.
>
> MJ: Okay. But didn't actually enter active duty until October 4th?
>
> [Appellant]: Yes, Your Honor.

The military judge accepted Appellant's guilty pleas to each specification notwithstanding these facts.

B. Dismissal of Charges I, III and IV and their Specifications

Appellant's plea agreement states he agrees to plead guilty to "Charge II and its Specifications," conditioned, *inter alia*, that the

> Government will withdraw and dismiss, with prejudice, Charge I and its specification, Charge II and its specification, and Charge IV and its specification after such time as the military judge announces a sentence and before the court-martial ad-

> journs. *I understand that prejudice will not attach until the completion of appellate review of the offense to which I have pleaded guilty*.

(Emphasis added.)

Upon the military judge's announcement of sentence, trial counsel announced, "At this time, the [g]overnment would move, pursuant to the plea agreement, to withdraw and dismiss with prejudice, Charge I and its [s]pecification, Charge II and its [s]pecification, and Charge IV and its [s]pecification." The military judge granted this motion as requested. Appellant's entry of judgment and charge sheet reflect each of the dismissed specifications as "dismissed with prejudice" and contain no other qualifying statements.

This court specifies the following issues for briefing in the above-captioned case:

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ACCEPTING APPELLANT'S PLEAS TO EACH SPECIFICATION OF CHARGE II.

II.

ASSUMING THE MILITARY JUDGE DID ABUSE HIS DISCRETION ON ACCEPTING APPELLANT'S PLEA TO ONE OR MORE SPECIFICATIONS, WHAT IS THE APPROPRIATE REMEDY?

III.

ARE CHARGES I, III AND IV AND THEIR SPECIFICATIONS DISMISSED WITH PREJUDICE, VICE DISMISSED WITH PREJUDICE CONDITIONED UPON THE COMPLETION OF APPELLATE REVIEW AS AGREED UPON IN THE PLEA AGREEMENT?

Accordingly, it is by the court on this 24th day of September, 2025,

ORDERED:

Appellant and Appellee shall file briefs on the specified issues with this court. Both briefs are due no later than **24 October 2025**.

No reply briefs will be permitted without leave from the court.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Airman First Class (E-3) **Jose A. ASTACIO BURGESS** United States Air Force *Appellant*	**SPECIFIED ISSUE BRIEF ON BEHALF OF APPELLANT** Before Panel No. 1 No. ACM S32827 22 October 2025

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

SPECIFIED ISSUES

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ACCEPTING APPELLANT'S PLEAS TO EACH SPECIFICATION OF CHARGE II?

II.

ASSUMING THE MILITARY JUDGE DID ABUSE HIS DISCRETION ON ACCEPTING APPELLANT'S PLEA TO ONE OR MORE SPECIFICATIONS, WHAT IS THE APPROPRIATE REMEDY?

III.

ARE CHARGES I, III AND IV AND THEIR SPECIFICATIONS DISMISSED WITH PREJUDICE, VICE DISMISSED WITH PREJUDICE CONDITIONED UPON THE COMPLETION OF APPELLATE REVIEW AS AGREED UPON IN THE PLEA AGREEMENT?

STATEMENT OF THE CASE

A military judge sitting as a special court-martial convicted Airman First Class (A1C) Jose A. Astacio Burgess, United States Air Force, pursuant to his pleas, of one specification of wrongful possession on divers occasions, one specification of wrongful distribution on divers occasions, and two specifications of wrongful introduction onto a military installation, of a

controlled substance (psilocybin) in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a. Entry of Judgment (June 12, 2025) (EOJ); R. at 90. The military judge sentenced him to reduction to the grade of E-1, forfeiture of $1,546.00 pay per month for six months, a bad-conduct discharge, and a reprimand. Statement of Trial Results (May 14, 2025) (STR). The convening authority took no action on the findings or the sentence. Convening Authority Decision on Action (June 2, 2025).

STATEMENT OF FACTS

A. Dates in the Specifications of Charge II

Specifications 1 and 2 of Charge II allege that A1C Astacio Burgess possessed and distributed psilocybin on divers occasions between "on or about 22 June 2022 and on or about 29 February 2024." EOJ; DD Form 458, *Charge Sheet* (Dec. 16, 2024) (Charge Sheet). Specifications 3 and 4 of Charge II do not allege misconduct during a timeframe and instead state a single date from February 2024. *Id*. The military judge found A1C Astacio Burgess guilty of Charge II and all four of its specifications as written. STR; EOJ; R. at 90. A1C Astacio Burgess did not plead guilty by exceptions and substitutions and there were no changes to the specifications before, during, or after the providence inquiry. R. at 21; Charge Sheet.

B. Dates of Admitted Drug Possession and Distribution

During the providence inquiry, A1C Astacio Burgess admitted to possessing psilocybin "[a]t least twice" during the charged timeframe of 22 June 2022 to 29 February 2024 for Specification 1 of Charge II. R. at 35, 36; Charge Sheet. He described two instances of use. R. at 31. The first instance was on or about 4 January 2024. *Id*.; *see* Pros. Ex. 1 ¶ 5b. The second was on or about 2 February 2024. R. at 31; *see* Pros. Ex. 1 ¶ 5c. A1C Astacio Burgess also admitted to distributing psilocybin "[a]t least two times" during the charged timeframe of 22 June 2022 to

29 February 2024 for Specification 2 of Charge II. R. at 45; Charge Sheet. He described two instances of distribution. R. at 40–41. The first instance was on or about 14 February 2024. R. at 40; *see* Pros. Ex. 1 ¶ 6d. The second was on or about 23 February 2024. R. at 41; *see* Pros. Ex. 1 ¶ 6e. All four of these instances were *after* 4 October 2022. R. at 31, 40–41.

The Stipulation of Fact discusses acts that predate 4 October 2022 in only one paragraph. Pros. Ex. 1 ¶ 5a. In September 2022, A1C Astacio Burgess texted with someone about buying psilocybin from them and sent money to her via Cash App. *Id*. But the paragraph does not say he possessed, distributed, or introduced psilocybin in September 2022. *Id*. Seven paragraphs in the "Background and Investigation" section of the Stipulation of Fact discuss acts from January and February 2024. Pros. Ex. 1 ¶ 5b, 5c, 6a–e. This includes the two instances of possession A1C Astacio Burgess described during the providence inquiry, Pros. Ex. 1 ¶ 5b, 5c, and the two instances of distribution he described. Pros. Ex. 1 ¶ 6d, 6e. Paragraph 11a and 11b identify a third occasion of psilocybin distribution on 9 February 2024. Pros. Ex. 1 ¶ 11b.

C. Joining the Air Force through the Delayed Entry Program (DEP)

To join the Air Force, A1C Astacio Burgess entered the Delayed Entry Program (DEP) [1] on 22 June 2022. R. at 37. In doing so, he enlisted as "a Reserve." 10 U.S.C. § 513(a). "A person with no prior military service . . . may . . . be enlisted as a Reserve for service in the . . . Air Force Reserve . . . for a term of not less than six years nor more than eight years." *Id.* A1C Astacio Burgess was then "discharged from the reserve component in which enlisted and immediately [] enlisted in the regular component of an armed force," 10 U.S.C. § 513(b), on 4

[1] This program is also referred to as the Delayed Enlistment Program (DEP) in Air Force Regulations. *See* Department of the Air Force Manual 36-2032, *Military Recruiting and Accessions* (Jan. 16, 2025) (DAFMAN 36-2032) at 289. This brief utilizes the term found in statute. *See* 10 U.S.C. § 513 (section titled "Enlistments: Delayed Entry Program").

October 2022 when he shipped out to Basic Military Training (BMT). R. at 37. But the stipulation of fact instead labeled 22 June 2022 as when "A1C Astacio-Burgess enlisted on active duty." Pros. Ex. 1 ¶ 1.

D. Plea Agreement

A1C Astacio Burgess and the convening authority entered into a plea agreement. App. Ex. X. A1C Astacio Burgess had four charges referred against him and agreed to plead guilty only to Charge II and its Specifications. *Id*. ¶ 1; Charge Sheet. The convening authority agreed that "[t]he Government will withdraw and dismiss, with prejudice, Charge I and its specification, Charge III and its specification, and Charge IV and its specification after such time as the military judge announces a sentence and before the court-martial adjourns." App. Ex. X ¶ 2a. A1C Astacio Burgess then stated, "[I] understand that prejudice will not attach until the completion of appellate review of the offense to which I have pleaded guilty." *Id*.

E. Motion to Withdraw and Dismiss Charges I, III, and IV "With Prejudice"

After the military judge announced the sentence, Trial Counsel "move[d], pursuant to the plea agreement, to withdraw and dismiss, with prejudice, Charge I and its Specification, Charge III and its Specification, and Charge IV and its specification." R. at 100. This language corresponded with paragraph 2a of the Plea Agreement. *Compare* R. at 100, *with* App. Ex. X ¶ 2a (both stating "withdraw and dismiss, with prejudice, Charge I and its specification, Charge III and its specification, and Charge IV and its specification"). The military judge granted the motion as made. R. at 101. Trial Counsel "Z-ed" out Charges I, III, and IV from the Charge Sheet in red ink pen, wrote "withdrawn and dismissed with prejudice 13 May 2025", and initialed. Charge Sheet; *see* Department of the Air Force Instruction 51-201, *Administration of Military Justice* (Mar. 18, 2025), at ¶ 16.2.5.

SUMMARY OF ARGUMENT

The military judge abused his discretion in accepting A1C Astacio Burgess's pleas to Specifications 1 and 2 of Charge II because A1C Astacio Burgess was not subject to the UCMJ for the first three-and-a-half months of the charged timeframe due to being in the DEP. UCMJ jurisdiction is status-based, *Solorio v. United States*, 483 U.S. 435, 438–39 (1987), and the DEP is not a status that confers UCMJ jurisdiction because people in the DEP are reservists and recruits, rather than members of a regular component of an armed force. *See* 10 U.S.C. § 513; Article 2(a), UCMJ, 10 U.S.C. § 802(a); Department of the Air Force Manual 36-2032, *Military Recruiting and Accessions* (Jan. 16, 2025) (DAFMAN 36-2032) at 296.

The remedy for this error is to set aside the portion of the findings of guilty that lack jurisdiction and affirm lesser included offenses with timeframes from when A1C Astacio Burgess was in the regular component of the Air Force. This can be achieved by excepting the words "22 June 2022" and substituting the words "4 October 2022."

Charges I, III, and IV are permanently extinguished because Trial Counsel moved to withdraw and dismiss them with prejudice; he did not move to withdraw and dismiss them with prejudice conditioned upon completion of appellate review. The military judge granted the motion on the record and Trial Counsel "Z-ed" out Charges I, III, and IV from the Charge Sheet.

ARGUMENT

I. The military judge abused his discretion in accepting A1C Astacio Burgess's pleas to Specifications 1 and 2 of Charge II because he was not subject to the UCMJ during the first three-and-a-half months of the charged timeframe.

A. Standard of Review

"The question of jurisdiction is a question of law that [the Court] review[s] de novo." *United States v. Begani*, 81 M.J. 273, 276 (C.A.A.F. 2021) (citation omitted).

The Court "review[s] a military judge's decision to accept an accused's guilty plea for an abuse of discretion." *United States v. Riley*, 72 M.J. 115, 119 (C.A.A.F. 2013) (citation omitted). To constitute an abuse of discretion, the challenged decision must be "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (internal quotation marks and citations omitted). For guilty pleas, "[a]n 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 (quoting *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)). "Once the military judge has accepted a plea as provident and has entered findings based on it, an appellate court will not reverse that finding and reject the plea unless it finds a substantial conflict between the plea and the accused's statements." *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996).

The Court reviews "questions of law arising from a guilty plea de novo." *United States v. Murphy*, 74 M.J. 302, 305 (C.A.A.F. 2015) (citation omitted). This includes de novo review of the military judge's legal conclusion that an appellant's plea was provident. *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005).

B. Law and Analysis

The court-martial lacked jurisdiction over A1C Astacio Burgess during part of the charged timeframe in Specifications 1 and 2 of Charge II, 22 June 2022 to 4 October 2022, because he was not on any UCMJ jurisdiction-conferring status during that time, and UCMJ jurisdiction is status based. *Solorio*, 483 U.S. at 438–39. Specifically, he did not "fall[] within the 'land and naval forces,'" *Id*. at 439 (citation omitted), he was not in a "regular component of the armed forces," Article 2(a)(1), UCMJ, 10 U.S.C. § 802(a)(1), and, as a reservist, he was not performing "inactive-duty training." Article 2(a)(3), UCMJ, 10 U.S.C. § 802(a)(3). Therefore,

the facts in the record and the law for the DEP and UCMJ jurisdiction create a substantial question as to the providence of his pleas to Specifications 1 and 2 of Charge II and the military judge abused his discretion in accepting them. This abuse of discretion does not extend to Specifications 3 and 4 of Charge II because they allege specific dates well after A1C Astacio Burgess began serving in a regular component on 4 October 2022.

The underlying question to this issue is whether Air Force members are subject to the UCMJ while in the DEP. The answer is no; they are not.

A1C Astacio Burgess was in the DEP from 22 June 2022 to 4 October 2022. R. at 37. This was clarified during the providence inquiry and stated on the record, despite the stipulation of fact's misidentification of the date he began active duty. *Id.*; *see* Pros. Ex. 1 ¶ 1. DEP time is a unique status that counts as time in service for some purposes. *See* DAFMAN 36-2032 at 289 (DEP "time is not creditable for longevity pay increases, but it does count against an 8-year [military service obligation]"). Ultimately, though, individuals are "Reserve[s]" and "Recruit[s]" while in the DEP. 10 U.S.C. § 513(a); DAFMAN 36-2032 at 296 (defining "Recruit" as "individuals in the delayed enlistment program or similar programs"); DAFMAN 36-2032 at 289 (defining the DEP as "[a] period of time . . . an applicant may spend in a reserve status that immediately proceeds [sic] entry on active duty in the regular component"). They are not in the regular component of their service yet and are not subject to military orders. 10 U.S.C. § 513; *see also* DAFMAN 36-2032 ¶ 2.4.3.2.2.1 ("Recruiters will not order or otherwise force applicants to report for active duty . . . who . . . [e]nlist in the delayed enlistment program").

For a court-martial to have jurisdiction over an accused, he or she must be "a person who can be regarded as falling within the term 'land and naval Forces.'" *Solorio*, 483 U.S. at 439 (citations omitted)). This stems from Congress's power to "make Rules for the Government and

Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cl. 14. "Pursuant to this governing authority over the land and naval forces, 'Congress has empowered courts-martial to try servicemen for the crimes proscribed by the U.C.M.J.'" *United States v. Begani*, 81 M.J. 273, 276 (C.A.A.F. 2021) (quoting *Solorio*, 483 U.S. at 438–39). UCMJ jurisdiction is based on the "military status of the accused." *Solorio*, 483 U.S. at 438–39. "Members of a regular component of the armed forces . . . and other persons lawfully called or ordered . . . for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it" are "subject" to the UCMJ. Article 2(a)(1), UCMJ, 10 U.S.C. § 802(a)(1). Cadets, reservists on inactive-duty training, guardsmen in federal service, and regular component retirees entitled to pay are also subject to the UCMJ. Article 2(a)(2)–(4), UCMJ, 10 U.S.C. § 802(a)(2)–(4).

While in the DEP, A1C Astacio Burgess did not qualify as an individual within the "land and naval Forces" because he was not subject to military orders, not performing duties with the Air Force, nor receiving pay. *Solorio*, 483 U.S. at 439; *see* DAFMAN 36-2032 ¶ 2.4.3.2.2.1; *see also* Article 2(c), UCMJ, 10 U.S.C. § 802(c) (clarifying that any "person serving with an armed force who . . . received military pay or allowances; and performed military duties; is subject to [the UCMJ]"). He was a mere "Recruit" under Air Force policy, DAFMAN 36-2032 at 296, and was at most a reservist under 10 U.S.C. § 513(a). UCMJ jurisdiction does not extend to recruits and only extends to reservists when they are on active duty orders or performing "inactive-duty training." Article 2(a)(3), UCMJ, 10 U.S.C. § 802(a)(3). Additionally, A1C Astacio Burgess was not a member of a "regular component" while in the DEP from 22 June 2022 to 4 October 2022. Article 2(a)(1), UCMJ, 10 U.S.C. § 802(a)(1). Instead, he first entered the regular component on 4 October 2022 when he was "called or ordered . . . for training in, the armed forces" and shipped out to BMT. *Id.*; R. at 37. 10 U.S.C. § 513(b) makes clear that he and others in the DEP

are first "discharged from the reserve component in which enlisted" and then "immediately [] enlisted in the regular component of an armed force." *Id.*

Given this lack of jurisdiction from 22 June 2022 until 4 October 2022 while in the DEP, there is "a substantial conflict between the plea and the accused's statements" and the military judge abused his discretion in accepting those pleas. *United States v. Saul*, __ M.J. __, No. 24-0098, 2025 CAAF LEXIS 578, at *6 (C.A.A.F. Jul. 25, 2025) (quoting *Garcia*, 44 M.J. at 498). All A1C Astacio Burgess's admitted misconduct occurred well after 4 October 2022. *See* R. at 31, 40-41 (identifying 4 January 2024, 2 February 2024, 14 February 2024, and 23 February 2024 as the specific dates he possessed and distributed psilocybin). But Specifications 1 and 2 of Charge II state on their face that he possessed and distributed psilocybin on divers occasions dating back to on or about 22 June 2022. Charge Sheet. This is a "a substantial conflict between the plea and the accused's statements," *Saul*, 2025 CAAF LEXIS at *6 (quoting *Garcia*, 44 M.J. at 498), because A1C Astacio Burgess *pled* to conduct dating back to 22 June 2022, EOJ, but *stated* he did not start active duty until months later. R. at 37. He cannot plead guilty to certain dates while also not being subject to the UCMJ during part of those dates. The military judge abused his discretion by accepting these pleas despite this substantial conflict and "substantial question regarding the appellant's guilty plea." *Riley*, 72 M.J. at 119 (citation omitted).

II. The appropriate remedy for A1C Astacio Burgess's improvident pleas to Specifications 1 and 2 of Charge II is for this Court to affirm lesser included offenses by excepting the phrase "22 June 2022" and substituting the phrase "4 October 2022".

A. Standard of Review

"Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense." Article 59(b), UCMJ, 10 U.S.C. § 859(b); *see United States v. Simpson*, 77 M.J. 279, 284-85 (C.A.A.F.

2018) (setting aside the military judge's finding of guilty as to the charged offense of larceny and affirming a finding of guilty to the lesser included offense of attempted larceny). "If the Court of Criminal Appeals sets aside the findings, the Court (i) may affirm any lesser included offense." Article 66(f)(1), UCMJ; 10 U.S.C. § 866(f)(1). "The Court may affirm only such findings of guilty as the Court finds correct in law." Article 66(d)(1)(A), UCMJ; 10 U.S.C. § 866(d)(1)(A).

B. Law and Analysis

The most appropriate remedy is affirming lesser included offenses of Specifications 1 and 2 of Charge II by excepting the words "22 June 2022" and substituting the words "4 October 2022." Affirming a narrower date range accurately captures the conduct admitted to by A1C Astacio Burgess and ensures the findings are "correct in law." Article 66(d)(1)(A), UCMJ; 10 U.S.C. § 866(d)(1)(A). "[C]reat[ing] a broader or different offense" is not within this Court's authority, *United States v. English*, 79 M.J. 116, 121 (C.A.A.F. 2019), but affirming findings of guilty for the misconduct admitted at trial by narrowing the dates of the offenses is.

This remedy is appropriate because the specific instances of underlying misconduct for Specifications 1 and 2 of Charge II all occurred after A1C Astacio Burgess enlisted in the regular component of the Air Force on 4 October 2022. *See* R. at 31, 40-41. Therefore, the court-martial had jurisdiction over the actual criminal acts. The issue is only whether the military judge abused his discretion in accepting A1C Astacio Burgess's pleas to Specifications 1 and 2 of Charge II since part of the charged timeframe was when he stated he was in the DEP. That abuse of discretion did occur, and the most judicially efficient and straightforward remedy is to set aside the military judge's findings of guilty as to the charged offenses, but to affirm findings of guilty to the lesser included offenses of possessing and distributing psilocybin on divers occasions between on or about 4 October 2022 and on or about 29 February 2024. Affirming this lesser

included offense can be achieved by excepting the words "22 June 2022" from Specifications 1 and 2 of Charge II and substituting the words "22 October 2022."

Lastly, A1C Astacio Burgess agreed to plead guilty to these charges and his underlying misconduct. App. Ex. X. He specifically requests that there not be a remedy that could create a question as to whether he has complied with his promises from his plea agreement.

III. Charges I, III, and IV and their specifications are withdrawn and dismissed with prejudice; they are not withdrawn and dismissed with prejudice conditioned upon the completion of appellate review.

A. Standard of Review

Interpretation of a plea agreement is a question of law reviewed de novo, done looking to the basic principles of contract law. *United States v. Acevedo*, 50 M.J. 169, 172 (C.A.A.F. 1999). However, "contract principles are outweighed by the Constitution's Due Process Clause protections for an accused." *Id*. Whether the Government has complied with the material terms of a plea agreement is a mixed question of law and fact. *United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006) (citations omitted). "[C]ourts look to all of the facts and circumstances for this determination," and "the accused's understanding of the terms of an agreement as reflected in the record as a whole." *Id.* (citations omitted). If "the relevant facts are undisputed, the materiality determination necessarily reduces to a question of law." *Id.* (citations omitted).

B. Law and Analysis

Charges I, III, and IV and their specifications are withdrawn and dismissed "with prejudice" because that was the "substance" of Trial Counsel's motion and the "particular relief" for which he asked, R. at 100; R.C.M. 905(a), and the military judge granted the motion as made. R. at 101. "A motion is an application to the military judge for particular relief" and "[t]he substance of a motion . . . shall control." R.C.M. 905(a). The charges are not withdrawn and

dismissed "with prejudice conditioned upon the completion of appellate review" because those words were not used in Trial Counsel's motion, nor the military judge's ruling. R. at 100–101.

Additionally, Trial Counsel "Z-ed" out Charges I, III, and IV and their specifications from the Charge Sheet in red ink and wrote that they were "withdrawn and dismissed with prejudice" without any qualifiers. Charge Sheet. This version of the Charge Sheet is in the electronic Record of Trial. Trial Counsel did not wait for the completion of appellate review to physically effectuate these charges' withdrawal and dismissal with prejudice, further showing that withdrawal and dismissal with prejudice is not conditioned upon that event.

There is tension between the two sentences of the plea agreement addressing withdrawal and dismissal of Charges I, III, and IV and their specifications, *see* App. Ex. X. ¶ 2a, but what the Government did on the record is clear. The motion the Government made on the record comported with the more favorable disposition of these offenses—and more favorable reading of this provision in the plea agreement—to A1C Astacio Burgess and resulted in no prejudice to him. Therefore, this Court should not disturb what the Government moved for at trial and effectuated on its Charge Sheet after the military judge granted their motion.

In the plea agreement's paragraph addressing withdrawal and dismissal of Charges I, III, and IV, there is tension between what it is in the first sentence versus the second. *See* App. Ex. X ¶ 2a. In the first sentence, the Convening Authority agreed that the "Government will withdraw and dismiss, with prejudice, Charge I and its specification, Charge II and its specification, and Charge IV and its specification after such time as the military judge announces a sentence and before the court-martial adjourns." *Id*. This sentence does *not* say that the Government will withdraw and dismiss those three charges with prejudice *to attach upon completion of appellate review*, or *conditioned upon the completion of appellate review*. *See id*.

The second sentence of the paragraph then says that A1C Astacio Burgess "understand[s] that prejudice will not attach until the completion of appellate review of the offense to which I have pleaded guilty." *Id.* This second sentence certainly implies some level of understanding between the parties that prejudice would not attach until completion of appellate review. However, that is not actually what the convening authority said the Government "will" do. *See id.* The convening authority agreed the "Government will withdraw and dismiss, with prejudice, [the remaining three charges] after such time as the military judge announces a sentence and before the court-martial adjourns." *Id*. This is then exactly what Trial Counsel did, and the military judge granted Trial Counsel's motion as he made it. R. at 100-101. The phrase "pursuant to the plea agreement" that Trial Counsel used in his motion, R. at 100, does not convert his motion into a motion to withdraw and dismiss with prejudice upon the completion of appellate review because (a) the words "upon the completion of appellate review" were not included in the "substance" of the motion itself nor the "particular relief" sought, R.C.M. 905(a), and (b) that is *not* what the Government agreed to do "pursuant to the plea agreement." R. at 100.

Lastly, A1C Astacio Burgess has no power to action the understanding he professed to have in the second sentence of this paragraph. This sentence shows he was willing to accept a disposition of Charges I, III, and IV that is less favorable to him in order to receive the benefit of the deal, but the paragraph taken as a whole does not unequivocally state that the less favorable disposition is what the Government "will" do. App. Ex. X ¶ 2a. The Government failed to move for this disposition and made a motion to withdraw and dismiss with prejudice that matched the wording of the first sentence of this paragraph. *Compare* App. Ex. X ¶ 2a, *with* R. at 100. The Government's motion—whether made in violation of their own purported benefit in the plea agreement or not—did not prejudice A1C Astacio Burgess. Therefore, this Court should not

disturb the motion that was made and granted on the record and should rule that Charges I, III, and IV and their specifications are withdrawn and dismissed with prejudice.

CONCLUSION

The military judge abused his discretion in finding A1C Astacio Burgess's pleas to Specifications 1 and 2 of Charge II provident because the court-martial lacked jurisdiction over him for a portion of the charged timeframe. From 22 June 2022 until 4 October 2022, A1C Astacio Burgess was a reserve and recruit in the DEP rather than a member of a regular component, so he was not subject to the UCMJ. The appropriate remedy for this abuse of discretion is to affirm the findings of guilty only as to lesser included offenses of Specifications 1 and 2 of Charge II by excepting the words "22 June 2022" and substituting the words "4 October 2022". Lastly, Charges I, III, and IV are withdrawn and dismissed with prejudice at trial because that is the motion that was made and granted on the record.

WHEREFORE, A1C Astacio Burgess asks this Court to set aside the findings of guilty in Specifications 1 and 2 of Charge II and affirm findings of guilty for lesser included offenses of Specifications 1 and 2 of Charge II by excepting the words "22 June 2022" and substituting the words "4 October 2022" from both specifications. A1C Astacio Burgess asks this Court to rule that Charges I, III, and IV and their specifications are withdrawn and dismissed with prejudice.

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were electronically delivered to the Court and served on the Air Force Government Trial and Appellate Operations Division on 22 October 2025.

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24 October 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' BRIEF REGARDING SPECIFIED ISSUES**
v.	)	Before Panel No. 1
Airman First Class (E-3) **JOSE A. ASTACIO-BURGESS,** USAF, *Appellant.*	)	No. ACM S32827

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

SPECIFIED ISSUES

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ACCEPTING APPELLANT'S PLEAS TO EACH SPECIFICATION OF CHARGE II[?]

II.

ASSUMING THE MILITARY JUDGE DID ABUSE HIS DISCRETION ON ACCEPTING APPELLANT'S PLEA TO ONE OR MORE SPECIFICATIONS, WHAT IS THE APPROPRIATE REMEDY?

III.

ARE CHARGES I, III AND IV AND THEIR SPECIFICATIONS DISMISSED WITH PREJUDICE, VICE DISMISSED WITH PREJUDICE CONDITIONED UPON THE COMPLETION OF APPELLATE REVIEW AS AGREED UPON IN THE PLEA AGREEMENT?

STATEMENT OF CASE

On 13 May 2025, pursuant to a plea agreement, Appellant pled guilty before a military judge sitting at a special court-martial to Charge II and its four Specifications for possession of psilocybin mushrooms; distribution of psilocybin mushrooms; introduction of psilocybin mushrooms onto Beale Air Force Base, California, with intent to distribute on or about 9

February 2024; and introduction of psilocybin mushrooms onto Beale Air Force Base, California, with intent to distribute on or about14 February 2024. (R. at 21.) As part of and pursuant to the plea agreement, the government withdrew and dismissed Charges I, III, and IV. (ROT at 100; App. Ex. X.)

After finding Appellant guilty pursuant to his plea, the military judge sentenced Appellant to a bad conduct discharge; forfeiture of two-thirds of basic pay, or $1,546, per month for six months; reduction to the grade of E-1, and a reprimand, with no confinement. (R. at 62, 100.)

On 18 September 2025, Appellant submitted a merits brief to this Court.

On 24 September 2025, this Court directed the parties to provide supplemental briefing on three specified issues no later than 24 October 2025.

STATEMENT OF FACTS

- *Appellant's Plea Agreement*

On 4 April 2025, Appellant offered to plead guilty to Charge II and its specifications. (App. Ex. X.) Part of that plea agreement stated:

> The Government will withdraw and dismiss, with prejudice, Charge I and its specification, Charge III and its specification, and Charge IV and its specification after such time as the military judge announces a sentence and before the court-martial adjourns. ***I understand that prejudice will not attach until the completion of appellate review of the offense to which I have pleaded guilty.***

(Id. at 1.) (emphasis added.) The Government also agreed that it would not pursue additional charges or specifications from the evidence within the Government's control or that is related to the misconduct that either the Staff Judge Advocate or military law enforcement was aware of at the time the plea agreement was signed by the Convening Authority.

Appellant also agreed that the military judge "must" enter the following sentence: (1) a bad conduct discharge; (2) reduction to Airman Basic; (3) a reprimand; and (4) two-thirds

forfeiture of pay. (Id. at 2.) The agreement stated that the military judge "shall not adjudge any confinement, fine, restrictions, or hard labor without confinement."

In his agreement, Appellant stated, "I understand that this offer, when accepted by the Convening Authority, constitutes a binding agreement." (Id.) The agreement also states that the "agreement will also be canceled and of no effect, if any of the following occurs: (a) Refusal of the court to accept my plea of guilty, as set forth above, or modification of the plea by anyone during the trial to not guilty or to a lesser degree of guilt." (Id. at 3.) The agreement further states that Appellant understood that "if this agreement is canceled for any reason stated above . . . the limitations upon disposition of my case set forth in this agreement will have no effect." (Id.)

- *Appellant's Guilty Plea Inquiry*

During his plea inquiry, Appellant stated that he joined the Air Force on 4 October 2022. (R. at 28.) Appellant stated that he believed he was "still signing paperwork with my recruiter during swear-in and things of that nature" on 22 June 2022, but that he "shipped to BMT" on 4 October 2022." (R. at 37.)

Appellant pled guilty to the four specifications within Charge II. Specification 1 alleged that on divers occasions at a location worldwide, between on or about 22 June 2022 and on or about 29 February 2024, Appellant possessed psilocybin.

When asked about this specification, Appellant stated that on or about *4 January 2024*, he ordered psilocybin from someone he knew. (R. at 31.) He said he knew the drug that arrived was psilocybin because he looked at it and recognized it. Appellant said he possessed this psilocybin on or about 2 February 2024 in his dorm room at Beale Air Force Base and that he had the drug shipped directly to Beale Air Force Base. (R. at 31-32.) Appellant said he ordered

psilocybin again from the same person at that time – *February 2024* - and that the drug arrived in the same packaging. (R. at 31.) Appellant said he possessed this order of psilocybin at a house he rented in Plumas Lake, California and that had the drug shipped directly to that house. (R. at 32-33.) Appellant said each possession lasted a few weeks and that each possession involved 20 grams of the drug. (R. at 33-34.)

Specification 2 alleged that on divers occasions at a location worldwide, between on or about 22 June 2022 and on or about 29 February 2024, Appellant distributed psilocybin. When asked about this specification, Appellant stated that on or about *February 14, 2024*, he delivered approximately 2 grams of psilocybin to another airman. (R. at 40.) Appellant said the airman knew Appellant had psilocybin, asked him for it, and that Appellant delivered it to an address in California. (R. at 40-41.) Appellant said the airman paid him for the drug.

Appellant distributed psilocybin again on or about *23 February 2024* to a second airman at the house located in Plumas Lake, California. (R. at 41.) Appellant did not receive any money for this distribution.

Specification 3 alleged that on or about 9 February 2024, at or near Beale Air Force Base, Appellant introduced psilocybin onto Beale Air Force Base. Appellant admitted that this offense took place on or about *9 February 2024*. (R. at 49.)

Specification 4 alleged that on or about 14 February 2024, Appellant introduced psilocybin onto Altus Air Force Base. Appellant admitted that on or about *14 February 2024*, he went to the post office and sent an airman psilocybin through the mail to an address located at Altus Air Force Base. (R. at 56.)

When discussing his plea agreement, the military judge read Appellant the paragraph of the plea agreement that stated, "I understand that prejudice will not attach until the completion of

appellate review of the offenses to which I have pled guilty." (R. at 67, *referencing* App. Ex. X.) When asked if he had any questions about this paragraph, Appellant responded, "No, Your Honor." (Id.)

- *Appellant's Stipulation of Fact*

This Court's Order noted that the Stipulation of Fact "contains facts which predate 4 October 2022 and refers to Appellant's date of enlistment to active duty as 22 June 2022," adding that "These facts exist, *inter alia*, in the 'Jurisdiction' and 'Background and Investigation' sections of the stipulation which pertain to all specifications of Charge II." (AFCCA Order.)

The *Jurisdiction* section of the Stipulation contains Paragraph 1 and 2. These paragraphs refer to Appellant's date of enlistment as 22 June 2022. (*See* Pros. Ex. 1 at 1.)

The *Background and Investigation* section of the Stipulation, contains Paragraphs 3 through 6. Paragraph 3 makes no mention of dates. Paragraphs 4 and 5 read as follows:

> 4. Between on or 30 August 2022 and on or about 4 February 2024, A1C Astacio-Burgess had several conversations with Ms. Jodie Marie Ly and other individuals regarding the use, sale, and distribution of psilocybin and other controlled substances.
>
> 5. On multiple occasions between on or about 10 September 2022 and on or about 3 February 2024, A1C Astacio-Burgess purchased controlled substances from Ms. Ly to further distribute them.
>
> a. On 21 September 2022, A1C Astacio-Burgess texted Ms. Ly and planned to buy 20 bars of psilocybin mushrooms. On or about 14 September 2022 and on or about 30 September 2022, payments of $160.00 and $62.00, respectively, were sent from A1C Astacio-Burgess' Cash App account to Ms. Ly.
>
> b. On 4 January 2024, A1C Astacio-Burgess bought psilocybin for $198.00 from Ms. Ly and paid via Apple Pay. The mushrooms were mailed to his residence on Beale AFB, CA.
>
> c. On 2 February 2024, at 2034 hours and 2036 hours, A1C Astacio-Burgess sent $100.00 and $10.00, respectively, to Ms. Ly for the purchase and shipping of psilocybin mushrooms.

(Id. at 1-2.) As shown, Paragraph 5 and its subparagraphs discuss the purchase of psilocybin. Paragraph 6 and its five subparagraphs discuss facts related to distributing psilocybin and

introducing psilocybin onto Beale Air Force Base and Altus Air Force Base. No date earlier than 11 September 2023 is mentioned within Paragraph 6 or its subparagraphs.

- *Close of Proceedings*

At the close of the proceedings, following the military judge announcing Appellant's sentence, the trial counsel stated, "At this time, the government would move, ***pursuant to the plea agreement***, to withdraw and dismiss, with prejudice, Charge I and its Specification, Charge III and its Specification, and Charge IV and its Specification." (R. at 100.) (emphasis added.)

Additional facts necessary to the disposition of this case are discussed in the specific issues below.

ARGUMENT

I.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN ACCEPTINGS APPELLANT'S GUILTY PLEAS TO EACH SPECIFICATION OF CHARGE II.

Standard of Review and Law

This court reviews a military judge's decision to accept a guilty plea for an abuse of discretion. United States v. Finch, 73 M.J. 144, 148 (C.A.A.F. 2014). The appellant bears the burden of establishing that the military judge abused that discretion. United States v. Phillips, 74 M.J. 20, 21 (C.A.A.F. 2015).

The test for determining the providency of a guilty plea is whether there is a substantial conflict raised in the record between Appellant's plea of guilty and some inconsistent statement. United States v. James, 55 M.J. 297 (C.A.A.F. 2001); United States v. Shearer, 44 M.J. 330, 335 (C.A.A.F. 1996). Once a military judge has accepted a plea and entered findings, an appellate court will not disturb the findings and plea "unless it finds a substantial conflict between the plea

and the accused's statements or other evidence of record." United States v. Peterson, 47 M.J. 231, 233 (C.A.A.F. 1997) (*citing* United States v. Garcia, 44 M.J. 497, 498 (C.A.A.F. 1996)). "The appellant bears the burden of establishing that the military judge abused that discretion, i.e., that the record shows a substantial basis in law or fact to question the plea." United States v. Phillips, 74 M.J. 20, 21-22 (C.A.A.F. 2015) (*citing* United States v. Finch, 73 M.J. 144, 148 (C.A.A.F. 2014).

However, jurisdiction is a legal question which Court's review de novo. United States v. Harmon, 63 M.J. 98, 101 (C.A.A.F. 2006); United States v. Kuemmerle, 67 M.J. 141, 143 (C.A.A.F. 2009). When challenged, the Government must prove jurisdiction by a preponderance of evidence. United States v. Morita, 74 M.J. 116, 121 (C.A.A.F. 2015) (*citing* United States v. Oliver, 57 M.J. 170, 172 (C.A.A.F. 2002).

Law

Generally, there are three prerequisites that must be met for courts-martial jurisdiction to vest: (1) jurisdiction over the offense, (2) jurisdiction over the accused, and (3) a properly convened and composed court-martial. *See* Rule for Courts–Martial (R.C.M.) 201(b); Harmon, 63 M.J. at 101. Based on this Court's specified issues, the second requirement is the only concern in this case.

Article 2, UCMJ, delimits those persons subject to court-martial jurisdiction, permitting jurisdiction over, inter alia, "[m]embers of a regular component of the armed forces . . ." Article 2(a)(1), UCMJ, 10 U.S.C. § 802(a)(1). The Supreme Court has further delimited court-martial jurisdiction based on the time of offense. Thus, courts-martial may only exercise jurisdiction over a servicemember "who was a member of the Armed Services at the time of the offense charged." Solorio v. United States, 483 U.S. 435, 451 (1987).

"An inquiry into court-martial jurisdiction focuses on … whether the person is subject to the UCMJ at the time of the offense." United States v. Hale, 78 M.J. 268, 271 (C.A.A.F. 2019) (*quoting* United States v. Ali, 71 M.J. 256, 261 (C.A.A.F. 2012)); *see also* United States v. Kuemmerle, 67 M.J. 141, 143 (C.A.A.F. 2009).

This Court's Morita opinion, in conjunction with our superior Court's opinion in the same case, is pivotal. *See* United States v. Morita, 73 M.J. 548 (A.F. Ct. Crim. App. 2014); Morita, 74 M.J. at 116. In that case, which was litigated, the appellant – a reservist – was charged with numerous fraud and forgery specifications. Many of those specifications involved timeframes that encompassed multiple years. Morita, 73 M.J. at 569-71. For example, Specification 1 in that case encompassed 1 August 2006 until 1 October 2008, Specification 2 encompassed 1 November 2006 until 1 March 2008, Specification 3 encompassed 1 November 2005 through 1 July 2007, and Specification 5 encompassed 1 November 2005 until 1 March 2008. Id. Each specification also had numerous line items detailing specific fraudulent acts and the exact dates those specific acts took place.

However, the record showed the appellant was only on approved active-duty orders during a portion of those charged timeframes. Specifically, the appellant was on three approved 120-day tours: (1) 14 November 2005 through 14 March 2006; (2) 1 December 2006 through 30 March 2007; and (3) 1 October 2007 through 28 January 2008. Id. at 558. The record also showed the appellant forged active-duty orders for other various timeframes from 2005 to 2008.

This Court held that jurisdiction existed only to misconduct that occurred while the appellant was on the three approved, 120-day sets of active-duty orders and also during the timeframe of the forged active-duty orders. Id. at 557-58, 560. This Court held that jurisdiction did not exist for the remainder of the time.

This Court dismissed two of the seven specifications against the appellant because none of the misconduct charged in those specifications occurred while the appellant was on orders. However, for the remaining five specifications, instead of setting aside the specifications outright or amending the up to three-year charging windows, this Court instead amended the specifications by affirming only the line items that occurred during the timeframes that the appellant was on orders. The line items that were outside the timeframe when the appellant was on orders were not affirmed.

Our superior Court both agreed and disagreed with this Court. Our superior Court agreed that jurisdiction existed over the misconduct that occurred within the dates of the three lawfully approved 120-day tours. Morita, 74 M.J. at 124. However, CAAF disagreed with this Court by finding that jurisdiction did not exist for those periods related to the forged active-duty orders. Id.

In the end, the appellant in Morita stood convicted of specifications that contained an overall three-year timeframe even those he was not on active-duty orders for that entire timeframe, but only of the misconduct he committed while he was actually on active-duty orders during those multi-year timeframes. However, neither this Court nor our superior Court set aside any specifications simply because the charging windows in those specifications contained timeframes when the appellant was not subject to UCMJ jurisdiction. Neither did either Court alter or amend those charging windows in any specification to match the timeframes when the appellant was actually on active-duty orders.

Analysis

This Court's specified issue stems from apparent concern that Specifications 1 and 2 of Charge II alleged Appellant committed misconduct between on or about 22 June 2022 and on or

about 29 February 2024. (*See* AFCCA Order at 2.) As this Court's Order noted, Appellant confirmed at trial that he did not enter active duty until 4 October 2022, a little over three months into the charging timeframes for both Specifications 1 and 2.

However, as our superior Court has held in Hale, Morita, Ali, and Kuemmerle, the focus on jurisdiction inquiries is whether an appellant was subject to UCMJ jurisdiction *at the time of the offense*. Thus, rather than focusing on the entire charged timeframe for Specifications 1 and 2, our superior Court's holdings show the true focus should be on exactly when the offenses took place and whether Appellant was subject to UCMJ jurisdiction at that time.

The facts in this case clearly show that he was. For Specification 1, Appellant admitted during his providency inquiry that he ordered psilocybin on or about 4 January 2024 and then again in February 2024. Both of those dates occurred well after Appellant entered active duty in October 2022. The same holds true for Specification 2, where Appellant admitted during his providency inquiry that he distributed psilocybin on or about 14 February 2024, and then again on or about 23 February 2024. Again, both of these dates occurred well after Appellant entered active duty.

To be sure, if Appellant had admitted to the military judge that he had only bought or distributed psilocybin prior to October 2022 and have never done it after entering active duty, there could be a jurisdictional issue in this case. However, that did not occur. Instead, Appellant, charged with violating on divers occasions in both Specifications 1 and 2, admitted to two instances for each specification – all instances of which occurred well after Appellant was on active duty and, thus, subject to UCMJ jurisdiction.

This case coincides with Morita in that both cases had overarching charging timeframes that encompassed times when both appellant were subject to UCMJ jurisdiction and times when

both appellant were not subject to UCMJ jurisdiction. In Morita, however, this Court did not set aside a guilty finding or even alter the overarching charging windows to match the timeframes when that appellant was subject to the UCMJ.

The same should hold true here. The facts, as admitted by Appellant himself, show the whole of Appellant's admitted misconduct occurred in January and February 2024, well after Appellant was subject to the UCMJ. Thus, this Court, following its and our superior Court's holdings in Morita, should be convinced by a preponderance of the evidence that jurisdiction existed over Appellant at the time of his offenses and affirm Appellant's convictions and sentence without altering the current specifications. Though the holdings in Morita prove it to be unnecessary, this Court could also, in the alternative, amend the charging windows of Specifications 1 and 2 to begin on 4 October 2022. This amendment would remove any concern regarding jurisdiction.

As to Specifications 3 and 4, neither of these specifications involve a charging timeframe that included any pre-UCMJ jurisdiction period. Specification 3 alleges an offense that occurred on or about 9 February 2024, and Specification 4 alleges an offense that occurred on or about 14 February 2024. (R. at 49, 56.) Thus, there are no jurisdictional concerns regarding these two specifications.

The Government does acknowledge that the Stipulation of Fact in this refers to Appellant's date of enlistment as 22 June 2022 and includes portions discussing timeframes prior to 4 October 2022. (*See* Pros. Ex. 1.) The first, within paragraph 4, states that between on or about 30 August 2022 and on or about 4 February 2024, Appellant had several conversations with individuals about the use, sale and distribution of psilocybin and other controlled substance. (Id. at 1.) This statement, however, does not allege any criminal misconduct. Furthermore, our

superior Court has held that actions taken by an appellant during periods when the appellant was not subject to the UCMJ can be considered to establish intent. *See* Hale, 78 M.J. at 273 ("we believe that Appellant's other actions taken during periods he was not subject to the UCMJ could have been considered by the members to establish Appellant's intent . . . This is similar to how members are permitted to consider evidence of other acts admitted under Military Rule of Evidence 404(b) to prove the requisite intent for an offense.")

Here, the fact that Appellant had discussed the use, sale, and distribution of psilocybin for years prior to his admitted misconduct in January and February of 2024 established that Appellant had both the intent to use, sale and distribute psilocybin. It also showed Appellant had knowledge that the drug he actually received, distributed and introduced in January and February 2024 was actually psilocybin. There is no error in the inclusion of this statement in the Stipulation.

Next, the Stipulation states that on 21 September 2022, Appellant texted a female and "*planned* to buy 20 bars of psilocybin mushrooms." (Id. at 2.) (emphasis added.) The Stipulation further states in Paragraph 4a, "On or about 14 September 2022 and on or about 30 September 2022, payments of $160.00 and $62.00, respectively, were sent to from" Appellant's Cash App account to this female. (Id. at 2.) Importantly, however, these statements never specifically state that Appellant bought psilocybin mushrooms in September 2022 or, as charged in Specification 1, that he actually possessed psilocybin mushrooms in September 2022.[1] Moreover, these statements are in contrast to the statements made in Paragraphs 4b and 4c that specifically state on 4 January 2024 and 2 February 2024, Appellant bought psilocybin from the

[1] Appellant was not charged with buying psilocybin, but instead with possessing it, distributing it, and introducing it onto two military installations.

female. Notably, these two dates in 2024 are the two, and only two, dates Appellant admitted within his providence inquiry.

What the statements in Paragraph 4a do show, however, is that Appellant knew the same female in September 2022 that he would eventually admit to buying psilocybin from in January and February 2024. As noted above, Hale tells us that these facts, even if outside the time within Appellant was within UCMJ jurisdiction, are valid facts to consider in establishing Appellant's intent to committed the misconduct that occurred in January and February 2024.

Though not noted in this Court's Order, the Stipulation mentions the year 2022 at various points within the *Elements of the Charge and its Specification* section. Paragraph 9a, 9b, 9c, which relate to Specification 1, states as follows:

> 9. The following information establishes that A1C Astacio-Burgess committed this offense:
>
> a. On multiple occasions from 2022 to 2024, A1C Astacio-Burgess purchased psilocybin from Ms. Ly. Ms. Ly sent A1C Astacio-Burgess text messages containing photographs of the packages and tracking information. The shipping address on the package was listed at A1C Astacio-Burgess' home address at Beale AFB. A1C Astacio-Burgess subsequently received these packages and took possession of the psilocybin.
>
> b. Text messages between A1C Astacio-Burgess and Ms. Ly show that A1C Astacio-Burgess requested to purchase psilocybin. He sent Ms. Ly payments for psilocybin and other controlled substances via CashApp on multiple occasions. He intentionally requested, paid for, and provided his mailing information to Ms. Ly in exchange for receiving psilocybin. Based on his multiple requests and transactions for controlled substance spanning over two years, A1C Astacio-Burgess knew he actually possessed psilocybin.
>
> c. Ms. Ly specifically told A1C Astacio-Burgess that the specific type of psilocybin was "exotic shatki" and told him how much "a zip" would cost. A "zip" is slang for an ounce, or approximately 28 grams. On another occasion, Ms. Ly stated "I have new mushroom pills $12 each is 1 gram of mush."

While Paragraph 9a does mention "multiple occasions from 2022 to 2024," the paragraph also states that when Appellant purchased the psilocybin from the female, the drugs were sent to his home address at Beale, Air Force Base – a clear indication all of the encompassed

misconduct referenced in this paragraph occurred while Appellant was on active duty and living on an Air Force installation.

While Paragraph 9b states that "Based on his multiple requests and transactions for controlled substance spanning over two years, [Appellant] knew he actually possessed psilocybin," this statement is again permissible under Hale to prove Appellant's knowledge that what he bought from the female in January and February 2024 was actually psilocybin.

Finally, Paragraph 9C mentions no dates at all. However, no matter the dates in which the referenced text messages were sent, they again, consistent with Hale, would be valid facts to consider to evidence Appellant's intent and knowledge of psilocybin.

The only other time the year 2022 is mentioned within the *Elements of the Charge and its Specification* section, other than when the Stipulation states verbatim the language from Specifications 1 and 2, is in Paragraph 11a, which relates to Specification 2. (*See* Pros. Ex. 1 at 4.) That paragraph states as follows:

> a. On at least three separate occasions between on or about 22 June 2022 and on or about 29 February 2024, A1C Astacio-Burgess distributed psilocybin to Amn Samuel, A1C Kai Dayle, and A1C Canchola-Enriquez.

However, the three specific dates that are then mentioned in Paragraph 11b are 11 January 2024, 8 February 2024, and 9 February 2024, all of which occurred well after Appellant's entry onto active duty and are within the very timeframes admitted by Appellant to the military judge during his providency inquiry. (Id.)

No other portion of the Stipulation discusses any dates prior to Appellant's entry onto active duty, including the sections specifically discussing Specifications 3 and 4. (*See* Pro. Ex. 1 at 4-6.)

As shown, the Stipulation does not explicitly state or admit that Appellant either possessed, distributed or introduced drugs at any point prior to his entry onto active duty. More importantly, Appellant's actual plea inquiry to the military judge does not mention any pre-October 2022 events at all. In fact, Appellant's plea inquiry only discusses events that occurred on or after January 2024 – over 14 months after Appellant's entry onto active duty. Here, a review of the transcript and the explicit details provided by Appellant during his plea inquiry make it clear that the charged misconduct for which Appellant pled guilty and now stands convicted of committing occurred well after 4 October 2002, when Appellant was on active duty and subject to UCMJ jurisdiction.

In all, under a jurisdictional lens, the Government has shown by a preponderance of the evidence that Appellant was subject to UCMJ jurisdiction with respect to each specification to which he pled guilty. As Appellant's own admissions to the military judge show, the whole of the misconduct to which Appellant has been convicted occurred in January and February 2024, over 14 months after Appellant became subject the UCMJ jurisdiction. Since Appellant was subject to the UCMJ at the time of his offenses, there are no jurisdictional issues relating to these specifications and this Court should affirm.

The same holds true if this issue was reviewed under an abuse of discretion standard. Notably, Appellant bears the burden of establishing that the military judge in this case abused his discretion in accepting Appellant's pleas. Appellant has failed in that burden because, though he has not yet responded to this Court's specified issues, Appellant filed a merits brief with this Court previously raising no issues with this Court. Because Appellant did not even raise a providency issue challenging his guilty pleas, he certainly has not met his burden in showing the military judge abused his discretion in this case.

Yet, even if he had, the record shows the military judge did not abuse his discretion in accepting Appellant's pleas. Here, the military judge properly determined exactly when Appellant came on active duty and then heard from Appellant's own admissions that *all* of the misconduct in this case occurred well after his entry into the Air Force. Simply put, the providence inquiry showed Appellant committed the charged misconduct while he was subject to military jurisdiction. As shown, the record contains a sufficient factual basis to support Appellant voluntary guilty plea and there are no substantial conflicts in the record between Appellant's plea and any other evidence, especially regarding exactly *when* Appellant committed his misconduct and the fact that Appellant was on active duty and under UCMJ jurisdiction when that misconduct took place. Accordingly, the military judge did not abuse his discretion in accepting Appellant's guilty pleas to each specification.

II.

ASSUMING THE MILITARY JUDGE DID ABUSE HIS DISCRETION ON ACCEPTING APPELLANT'S PLEA TO ONE OR MORE SPECIFICATIONS, THE APPROPRIATE REMEDY IS TO REMAND THE CASE FOR A REHEARING.

Standard of Review, Law, and Analysis

As noted above, there are no jurisdictional issues with Appellant's convictions to all four of the specifications under Charge II and the military judge did not abuse his discretion in accepting Appellant's plea. Therefore, this Court can affirm Appellant's findings and sentence without altering the current specifications.

However, assuming, *arguendo*, the military judge did abuse his discretion, the most appropriate remedy, as noted above, is to amend the charging timeframes of Specifications 1 and 2 to begin on 4 October 2022, as this cures any jurisdictional concerns. However, should this Court determine amending the charging window of these two specifications does not cure any

abuse of discretion on the part of the military judge, then remanding the case for a rehearing is the next most appropriate remedy. "The remedy for finding a plea improvident is to set aside the finding based on the improvident plea and authorize a rehearing." United States v. Riley, 72 M.J. 115, 122 (C.A.A.F. 2013).

That said, should this Court find any of Appellant's pleas improvident, the Government believes such a ruling by this Court would invalidate Appellant's entire plea agreement. The plea agreement requires Appellant to plead guilty to all specifications of Charge II and, that the agreement "will . . . be canceled and of no effect" if there is a "[r]efusal of the court to accept my plea of guilty." (App. Ex. X at 3.) Further, the plain language of R.C.M. 705(f)(4)(B) states that a convening authority may withdraw from a plea agreement "if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review."

Thus, if this Court refuses to accept any of Appellant's guilty pleas, he will have failed to comply with the requirements of the plea agreement, rendering the plea agreement null and void. Indeed, if this Court refuses to accept any of Appellant's guilty pleas, the plea agreement must be canceled and of no effect as the Government has now lost its benefit of the bargain – namely guilty pleas to all specifications of Charge II.

The practical effect of Appellant's plea agreement being rendered cancelled reverses the benefits received by Appellant due to the plea agreement, namely (1) the withdrawal and dismissal of Charge I, which involves fraudulent enlistment; (2) the withdrawal and dismissal of Charge III, which involves attempted distribution of psilocybin at Altus Air Force Base, (3) the withdrawal and dismissal of Charge IV, which involves obstruction of justice;[2] (4) the convening

[2] As detailed in Issue III below, prejudice has not yet attached to any withdrawal or dismissal of Charges I, III, and IV.

authority's agreement not to prefer any additional charges or specifications against Appellant that were known to the legal office, law enforcement agencies, or the convening authority at the time the plea agreement was signed; and (5) the convening authority's agreement that Appellant's sentence in this case would involve no sentence to confinement. For, as the plea agreement states, "if this agreement is canceled for any reason stated above . . . the limitations upon disposition of my case set forth in this agreement will have no effect." (*See* App. Ex. X.)

Thus, if this Court refuses to accept any of Appellant's guilty pleas, this Court should set aside the entirety of the findings and sentence in this case (since all were based on Appellant's plea agreement that would be rendered cancelled) to allow the convening authority to withdraw from the now cancelled original plea agreement and either (1) elect to proceed under a new agreement, or (2) proceed to trial on all four charges, as well as any other charges or specifications for misconduct known by the legal office, law enforcement agencies, or the convening authority at the time the plea agreement was signed.

III.

CHARGES I, III, AND IV WERE DISMISSED WITH PREJUDICE *PURSUANT TO THE PLEA AGREEMENT* AT APPELLANT'S TRIAL AND THUS, *PURSUANT TO THE PLEA AGREEMENT*, PREJUDICE WILL NOT RIPEN ON THOSE WITHDRAWN AND DISMISSED CHARGES UNTIL THE COMPLETION OF APPELLATE REVIEW.

Standard of Review and Law

Interpretation of a plea agreement is a question of law reviewed de novo. United States v. Lundy 63 M.J. 299, 301 (C.A.A.F. 2006). This Court looks at the terms of the plea agreement as well as Appellant's "understanding of the terms of [the] agreement as reflected in the record as a whole." Id.

Analysis

As noted above, Appellant's plea agreement stated as follows:

> The Government will withdraw and dismiss, with prejudice, Charge I and its specification, Charge III and its specification, and Charge IV and its specification after such time as the military judge announces a sentence and before the court-martial adjourns. ***I understand that prejudice will not attach until the completion of appellate review of the offense to which I have pleaded guilty.***

(App. Ex. X.) When the military judge specifically read this portion of the plea agreement and asked Appellant if he understood this provision, Appellant answered, "Yes, Your Honor." (R. at 67.) When asked if he had any questions about it, Appellant answered, "No, Your Honor." (Id.)

Then, at the close of the proceedings, the trial counsel stated, "At this time, the government would move, ***pursuant to the plea agreement***, to withdraw and dismiss, with prejudice, Charge I and its Specification, Charge III and its Specification, and Charge IV and its Specification." (R. at 100.) (emphasis added.)

Here, all parties knew exactly what the trial counsel was saying and seeking to accomplish – especially considering the trial counsel prefaced the statement by saying "pursuant to the plea agreement." Referencing the plea agreement, the trial counsel followed through on the convening authority's agreement with Appellant that *after* the military judge announced the sentence but *before* the court-martial adjourned, the Government would withdraw and dismiss with prejudice the three remaining charges. *However*, in referencing the plea agreement, the trial counsel – as well as the military judge, Appellant, and Appellant's counsel – recognized that prejudice *would not* attach until the completion of appellate review.

This is undoubtedly why neither the military judge, Appellant's counsel, or Appellant, attempted to correct or question the trial counsel prior to the military judge granting the motion – they knew exactly what the trial counsel meant and knew it was "pursuant" to the plain language

of the plea agreement. It is also why neither Appellant nor his appellate counsel raised any issue related to the withdrawal and dismissal before this Court, but instead submitted only a merits brief.

Indeed, considering the silence of Appellant and his trial and appellate counsel on this matter, it would be suspect for Appellant to now argue that he *ever* believed that prejudice attached to those charges or that he believed the trial counsel's action was anything other than following the plain language of the plea agreement. In short, *all* parties knew that prejudice on these withdrawn and dismissed charges *would not* ripen until the close of appellate review.

This Court's Order notes that neither the charge sheet or the Entry of Judgment (EoJ) in this case contain "qualifying statements" regarding prejudice. Here, however, the "qualifying statement" is the statement made by the trial counsel on the record when he stated that the charges were being withdrawn and dismissed with prejudice "pursuant to the plea agreement," which provided indication that everyone, including Appellant, understood that prejudice would "will not attach until the completion of appellate review." (*See* App. Ex. X.)

Moreover, a prior opinion from the Court indicates that if the EoJ in this case had included a "qualifying statement," versus stating that the charges had been dismissed with prejudice, then the EoJ would need to be corrected. *See* United States v. John, ACM S32682, 2021 CCA LEXIS 464, at fn 13 (Sep. 15, 2021) which states:

> Although not raised by Appellant, the entry of judgment (EoJ) fails to indicate that Charge II, Specification 3 was withdrawn and dismissed *with prejudice*. Instead, the EoJ states this specification was "withdrawn and dismissed per PA [(plea agreement)]." However, we note this specification was withdrawn and dismissed with prejudice. *See* R.C.M. 1111(b)(1). Appellant has not claimed any prejudice as a result of this error; however, we direct the Chief Trial Judge, Air Force Trial Judiciary, to have a detailed military judge correct the EoJ accordingly, prior to completion of the final

> order under R.C.M. 1209(b) and Air Force Instruction 51-201, *Administration of Military Justice*, Section 14J (18 Jan. 2019).

Language of the EoJ aside, the specific, qualifying language used by the trial counsel in the motion to withdraw and dismiss these charges made it perfectly clear the action was being done "pursuant to the plea agreement." All parties understood what the trial counsel's motion entailed and why it was originated, and the military judge, understanding that context, granted the motion with that purpose in mind.

Yet, even if the trial counsel had not used any qualifying language that referenced the plea agreement, the result would still be the same because the trial counsel had no power – on his own accord – to unilaterally withdraw and dismiss charges with prejudice. R.C.M. 604(a) states that the "convening authority or a superior competent authority" can withdraw charges after referral. The Discussion explains further that "[c]harges that have been properly referred to a court-martial may be withdrawn *only by the direction* of the convening authority," and that a trial counsel may only withdraw charges or specifications when "*directed to do so* by the convening authority." *See* R.C.M. 604(a) Discussion. (emphasis added.)

In other words, the only way the trial counsel here could move to withdraw and dismiss the charges with prejudice was based on the direction of the convening authority – and that direction came from the plea agreement itself. Thus, the trial counsel in this case only had authority from the convening authority to withdraw and dismiss the charges pursuant to the plea agreement, which, again, prefaced any talk of prejudice to only attaching once appellate review was complete. The trial counsel certainly had *no* authority from the convening authority to withdraw and dismiss the charges in this case with prejudice outright or in a way that prejudice would ripen immediately.

Thus, if this Court should determine the trial counsel did move to withdraw and dismiss the charges in this case with prejudice but *without* the caveat that prejudice would not attach until appellate review was complete, this Court should *further* find (1) that the trial counsel exceeded the authority and direction provided to him by the convening authority and, therein, violated R.C.M. 604 when he moved to withdraw and dismiss the charges; and (2) determine that Charges I, III, and IV have not yet been properly withdrawn or dismissed pursuant to the direction of the convening authority. Depending on what this Court finds on the other two issues, the fate of Charges I, III, and IV would then come down to these options:

- If the Court finds all of Appellant's guilty pleas were provident, this Court can then remedy the issue by way of specific performance and dismiss Charges I, III, and IV with prejudice;[3]

- If the Court finds any of Appellant's guilty pleas were not provident, this Court should do nothing regarding Charge I, III, and IV, and, instead, return the case to The Judge Advocate General to allow the convening authority to withdraw from the now cancelled original plea agreement and either (1) elect to proceed under a new agreement, or (2) proceed to trial on all four charges, as well as any other charges or specifications for misconduct known by the legal office, law enforcement agencies, or the convening authority at the time the plea agreement was signed.

However, these contingencies are unnecessary because this Court should find the trial counsel moved to withdraw and dismiss Charges I, III, and IV pursuant to the plea agreement and that prejudice on these withdrawn and dismissed charges *will not* ripen until the close of appellate review.

[3] *See* United States v. Wolcott, ACM 39639, 2020 CCA LEXIS 234 (A.F. Ct. Crim. App. 15 Jul. 2020); United States v. Ramsdell, ACM 39533, 2019 CCA LEXIS 145 (A.F. Ct. Crim. App. 2 Apr. 2019); United States v. Malacara, 71 M.J. 380 (C.A.A.F. 2012)

CONCLUSION

WHEREFORE, this Court should deny affirm Appellant's provident guilty pleas and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 24 October 2025 via electronic filing.

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