

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

No. ACM 40758

UNITED STATES

Appellee

v.

Francisco J. TORRES

Major (O-4), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 5 October 2026

Military Judge: Vicki L. Marcus (arraignment); Joshua D. Rosen.

Sentence: Sentence adjudged 16 July 2024 by GCM convened at Joint Base McGuire-Dix-Lakenhurst, New Jersey. Sentence entered by military judge on 20 August 2024: Dismissal, confinement for 30 days, and a reprimand.

For Appellant: Major Jordan L. Grande, USAF; Captain Paige F. Markey Denton, USAF.

For Appellee: Major Vanessa Bairos, USAF; Major Allison R. Gish, USAF; Major Regina Henenlotter, USAF; Major Kate E. Lee, USAF; Major Brittany M. Speirs, USAF; Major Jocelyn Q. Wright, USAF; Mary Ellen Payne, Esquire.

Before MORGAN, GRUEN, and KINDNESS, *Appellate Military Judges*.

Senior Judge GRUEN delivered the opinion of the court, in which Judge Kindness joined. Chief Judge Morgan filed a separate opinion concurring in part and in the result.

**This is an unpublished opinion and, as such, does not serve as
precedent under AFCCA Rule of Practice and Procedure 30.3.**

GRUEN, Senior Judge:

Appellant was found guilty by a military judge, consistent with his pleas, of one specification of attempting to wrongfully induce a person not his spouse, to engage in a sexual act with him in exchange for money, and that such conduct was of a nature to bring discredit upon the armed forces, in violation of Article 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880; one specification for wrongfully broadcasting a profile on the internet using pictures of his then-wife ST, including a picture of her bare breasts, without her knowledge or consent, to create the appearance that ST was seeking sexual partners for Appellant, and that said conduct was unbecoming an officer; one specification for providing false information to KH as part of his efforts to engage in sexual conduct with her, and that said conduct was unbecoming an officer; and one specification for offering a room for a person to use in exchange for sexual conduct, and that said conduct was unbecoming an officer, all in violation of Article 133, UCMJ, 10 U.S.C. § 933.¹ The military judge sentenced Appellant to a dismissal, confinement for 30 days, and a reprimand. Appellant requested the convening authority commute his sentence to confinement, or in the alternative, reduce his confinement by ten days. The convening authority denied both requests. Appellant did not request waiver of automatic forfeitures; however, the convening authority waived all automatic forfeitures for a period of one month, or release from confinement, or expiration of term of service, whichever was sooner, with the waiver commencing on 16 July 2024. The total pay and allowances were directed to be paid to ST, for the benefit of Appellant's dependents. The convening authority took no other action on the findings or the sentence.

Appellant raises four issues on appeal, which we have reworded: (1) whether Appellant's guilty plea to the first specification under Article 133, UCMJ (Charge IV, Specification 1), was improvident because it was preempted and thus barred by Article 117a, UCMJ, 10 U.S.C. § 917a; (2) whether Appellant's guilty plea to the same specification under Article 133, UCMJ (Charge IV, Specification 1), was improvident because the military judge abused his discretion by not resolving an issue of fact as to whether ST had a reasonable expectation of privacy, neglected to consider whether Appellant's conduct involved a liberty interest, and failed to establish how Appellant's conduct amounted to conduct unbecoming an officer; (3) whether Appellant's guilty plea to the second specification under Article 133, UCMJ (Charge IV, Specification

¹ Unless otherwise specified, references to the UCMJ and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

2), was improvident because the military judge abused his discretion by neglecting to consider whether Appellant’s conduct involved a liberty interest and failed to establish how such conduct amounted to conduct unbecoming an officer; and (4) whether Appellant’s guilty plea to the third specification under Article 133, UCMJ (Charge IV, Specification 3), was improvident because the military judge abused his discretion by neglecting to consider whether Appellant’s conduct involved a liberty interest and failed to establish how it amounted to conduct unbecoming an officer.

I. BACKGROUND

Appellant married ST in 2009. In April 2022, after ST asked Appellant for a divorce but while still married to ST, Appellant made posts in an online community forum seeking sex with women not his wife. Specifically, Appellant posted in online sub-forums, where members discussed adulterous sexual acts and sought out others to have sex with their spouses. Appellant opened an online account, pretending to be ST, in a forum using the name “cu[*]k[****]life” for his profile name and posted a picture of ST’s bare breasts as the profile picture for the account.² ST could not be identified from the picture since only her stomach, breasts, chest, neck, and chin were depicted in the picture and there were no other identifying features on the profile to connect the account or picture to ST. Underneath the picture of ST, the profile stated, “Happy wife living the cu[*]k life,” followed by a kissing face emoji. Appellant apparently had consent to possess the picture, but he did not have ST’s consent to post the picture on any online website or forum.³ This picture was posted to this online forum for more than three months.

During his *Care* inquiry,⁴ Appellant admitted that he “used a picture of [ST’s] exposed breasts for the profile picture on the account” and that he “specifically pretended to be [ST], making statements about Appellant’s sexual prowess, sexual acts, and soliciting sex with other women for [Appellant].” Appellant admitted that while posing as his wife on this online forum, he sought sexual partners by posting to various message boards to include “[**]Cu[*]kqueanComm[****]y,” “[**]cu[*]kqueencomm[****]y,” and

² During ST’s unsworn statement, she described the picture as one taken for “medical purpose[s].” In a memorandum attached to the Stipulation of Fact (Prosecution Exhibit 1), the picture is further described as having been “taken as a before picture of augmentation surgery.”

³ While there was no evidence to prove Appellant did not have consent to possess the picture, ST told Appellant’s First Sergeant that she had never sent the picture to Appellant and she was not sure how it came into his possession.

⁴ *United States v. Care*, 18 C.M.A. 535 (C.M.A. 1969).

“[**]cu[*]kque[*]n.” These online forums “contained messages, pictures, and videos of women seeking to have sex with spouses of others or for others to have sex with their spouses, with their knowledge.” Appellant’s posts returned more than 106 “arrows up” posts indicating an online user’s approval, and 17 comments by other users and replies by Appellant.

Appellant, posing as ST, received a response to his online solicitations from a woman named KH. Appellant moved his communications with KH from the online forums to a different, more personal online chatting medium. While communicating with KH, Appellant provided KH two phone numbers claiming one was his contact number and one was ST’s contact number—however, both phone numbers went to phones belonging to Appellant. Appellant admitted that he “revealed personal information about himself, [his wife ST], and their family, including pictures of both of them [(he and ST)] and their children to convince [KH] that [his wife ST] knew about and consented to the proposed sexual relationship” Appellant sought with KH. Posing as ST, Appellant proposed a location for he and KH to meet to have sex. Further, he requested KH send videos of the sexual acts between him and KH to the person who KH believed was Appellant’s wife, ST. Appellant and KH engaged in a sexual relationship for approximately three months. While having in-person sexual relations with KH for three months, Appellant continued to pose as ST when messaging KH online.

In November of 2022, Appellant told KH that he needed her comfort because he was mourning the loss of his wife and children, who he falsely claimed had perished in a car accident. Appellant asked KH to move in with him because he found “the on demand sex appealing.” After Appellant made the move-in request, KH and her roommates searched online for information about Appellant and discovered a social media post by Appellant’s wife, ST, demonstrating that she was alive. Upon discovering ST was alive, KH contacted her and learned that she had not created, nor participated in the online “cu[*]k[****]life” account. Additionally, ST did not know Appellant had been pretending to be both himself and ST online. Finally, ST did not know Appellant was having sex with KH. ST was “shak[en]” to find out Appellant had posted a picture of her breasts as his profile picture for the online forum site. After the conversation with ST, KH contacted Appellant’s First Sergeant to report his misconduct—soon thereafter, the investigation into Appellant’s conduct began.

Appellant also had an online account where he posted that he had a room available for rent in his house—the room being offered in exchange for sex rather than money. While Appellant was stationed at Joint Base McGuire-Dix-Lakehurst in New Jersey, the post included a photograph of his house in Maryland with the address visible. Appellant used three different online forums to

offer a room for rent in exchange for sex. An anonymous tip to the Air Force Office of Special Investigations (OSI) disclosed Appellant's posts soliciting sex in exchange for rent. The tip included hyperlinks to Appellant's social media page and details about his purchase of the Maryland home pictured in the solicitation.

In November 2023, Appellant traveled from New Jersey to Phoenix, Arizona, to visit his children who lived with ST. While in Phoenix, Appellant solicited sex for money online. In this effort, Appellant responded to an online advertisement and contacted a person he believed was a prostitute. Unbeknownst to Appellant, he was actually communicating with an undercover detective engaged in a human trafficking sting operation run by the local police department. In the communications between the detective and Appellant, Appellant offered to pay \$75.00 for "FS," which indicated full service sexual services for a price of \$75.00. He then arranged to meet the detective in an agreed-upon hotel room. When he showed up to meet the detective, whom he believed to be a prostitute, he was arrested.

II. DISCUSSION

A. Law

1. Preemption Doctrine and Article 133, UCMJ

The preemption doctrine "prohibits application of Article 134[, UCMJ, 10 U.S.C. § 934,] to conduct covered by Articles 80 through 132." *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. IV, ¶ 91.c.(5)(a). "Whether an offense is preempted depends on statutory interpretation, which is a question of law we review de novo." *United States v. Wheeler*, 77 M.J. 289, 291 (C.A.A.F. 2018) (citation omitted). An appellant's "guilty plea neither forfeits nor waives the issue of preemption." *United States v. Dominguez-Sandoval*, No. ACM 40084, 2022 CCA LEXIS 203, at *15 (A.F. Ct. Crim. App. 31 Mar. 2022) (unpub. op.) (citing *United States v. Robbins*, 52 M.J. 159, 160 (C.A.A.F. 1999)); see also *United States v. Bailey*, No. ACM 39052, 2017 CCA LEXIS 639, at *6–7 (A.F. Ct. Crim. App. 26 Sep. 2017) (unpub. op.) (finding "*stare decisis* and our own precedent in *Jones*⁵ interpreting *Robbins* to stand for the general principle that waiver of preemption is not valid" and holding "preemption was not waived"); *United States v. Costianes*, No. ACM 38868, 2016 CCA LEXIS 391, at *3 (A.F. Ct. Crim. App. 30 Jun. 2016) (unpub. op.) (citation omitted) ("[The [a]ppellant's guilty plea neither forfeits nor waives the issue of preemption.>").

⁵ *United States v. Jones*, 66 M.J. 704, 706 (A.F. Ct. Crim. App. 2008).

The basis for the preemption doctrine is the principle that if Congress has occupied the field for a given type of misconduct, then an allegation under Article 134, UCMJ, fails to state an offense. *See Robbins*, 52 M.J. at 160–61. A claim of preemption, therefore, presents “a question of subject-matter jurisdiction of the trial court and thus cannot be waived by either a plea or failure to object.” *United States v. Jones*, 66 M.J. 704, 706 (A.F. Ct. Crim. App. 2008) (citing *Robbins*, 52 M.J. at 160). Notwithstanding an appellant’s plea agreement containing a provision such as “waiving all motions that may be waived,” R.C.M. 705(c)(1)(B) states “[a] term or condition in a plea agreement shall not be enforced if it deprives the accused of . . . the right to challenge the jurisdiction of the court-martial”

“Article 133, UCMJ is not subject to preemption by other punitive articles.” *United States v. Taylor*, 23 M.J. 314, 318 (C.M.A. 1987); *see also United States v. Conliffe*, 67 M.J. 127, 133 n.2 (C.A.A.F. 2009) (citation omitted) (explaining that “whereas the military ‘preemption doctrine’ bars the [G]overnment from charging an accused under Article 134(1), UCMJ, and Article 134(2), UCMJ, for conduct that is appropriately charged under an enumerated article, this same doctrine does not apply to Article 133, UCMJ”). The text of this statute states, “Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer shall be punished as a court-martial may direct.” 10 U.S.C. § 933. The elements are: “(1) [t]hat, the accused did or omitted to do certain acts; [and] (2) [t]hat under the circumstances, the act or omission constituted conduct unbecoming an officer and a gentleman. *MCM*, pt. IV, ¶ 90.b.

The *MCM* explains that “conduct violative of this article is action or behavior . . . in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person’s standing as an officer.” *Id.* at ¶ 90.c.(2). It further explains that “[t]his article prohibits conduct by a commissioned officer . . . which, taking all the circumstances into consideration, is thus compromising.” *Id.* Moreover, “[t]his article includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and a gentleman. Thus, a commissioned officer who steals property violates both this article and Article 121 [UCMJ, for example].” *Id.*

We look to the most current version of the *MCM* (*i.e.*, *Manual for Courts-Martial, United States* (2024 ed.) (2024 *MCM*)) for additional guidance on conduct that violates Article 133, UCMJ.⁶ The explanation for Article 133, UCMJ,

⁶ We recognize the provisions in the following sentences of this paragraph come from the 2024 *MCM*, pt. IV, ¶ 90.c.(2). While we are aware the 2019 *MCM* contains the

under this more current version, provides “[t]his article includes misconduct that approximates, but may not meet every element of, another enumerated offense.” 2024 *MCM*, pt. IV, ¶ 90.c.(2). Moreover, “[a]n officer’s conduct need not violate other provisions of the UCMJ or be otherwise criminal to violate Article 133.” *Id.* “The gravamen of the offense is that the officer’s conduct disgraces the officer personally” *Id.* Further, “[t]he absence of a ‘custom of the service,’ statute, regulation, or order expressly prohibiting certain conduct is not dispositive of whether the officer was on sufficient notice that such conduct was unbecoming.” *Id.*

2. Guilty Plea Inquiry

This court reviews “questions of law arising from the guilty plea de novo.” *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). However, “[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) (quoting *Inabinette*, 66 M.J. at 322). In determining whether a military judge abused his discretion in accepting a guilty plea as provident, “an appellate court will not reverse that finding and reject the plea unless it finds a substantial conflict between the plea and the [appellant’s] statements.” *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996). The appellant bears the burden of establishing that the military judge abused his discretion—that the record shows “a substantial basis in law or fact for questioning the plea.” *United States v. Finch*, 73 M.J. 144, 148 (C.A.A.F. 2014) (quoting *United States v. Negron*, 60 M.J. 136, 141 (C.A.A.F. 2004)).

3. Liberty Interest

We review de novo whether an appellant was convicted for conduct in which he had a constitutionally protected liberty interest. *See United States v. Marcum*, 60 M.J. 198, 202 (C.A.A.F. 2004) (citation omitted); *United States v. McDaniel*, 80 M.J. 555, 557–58 (A.F. Ct. Crim. App. 2020).

The First Amendment to the Constitution states that “Congress shall make no law . . . abridging the freedom of speech” U.S. CONST. amend. I. “[M]ilitary authorities may curtail a servicemember’s communication and association with other individuals -- and thus burden the servicemember’s freedom of speech and association -- provided the authorities act with a valid military purpose and issue a clear, specific, narrowly drawn mandate.” *United States v. Moore*, 58 M.J. 466, 468 (C.A.A.F. 2003) (citing *United States v. Jeffers*, 57 M.J. 13, 15–16 (C.A.A.F. 2002) (additional citations omitted)).

applicable statute and elements for Appellant’s offenses, we find the 2024 *MCM* language expounding upon the operation of Article 133, UCMJ, applicable and persuasive to Appellant’s case.

Though servicemembers are not excluded from all First Amendment protection,

the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

Parker v. Levy, 417 U.S. 733, 758 (1974).

If criminal and constitutionally protected conduct overlap, the military judge should conduct a heightened plea inquiry, specifically “an appropriate discussion and acknowledgment on the part of the [appellant] of the critical distinction between permissible and prohibited behavior.” *United States v. Hartman*, 69 M.J. 467, 468 (C.A.A.F. 2011) (citations omitted). However, if no constitutional issue exists, then no substantial basis in law or fact exists to overturn the plea solely because a military judge does not conduct a heightened plea inquiry. *United States v. Phillips*, 74 M.J. 20, 22 (C.A.A.F. 2015). “A plea is provident so long as [an a]ppellant was convinced of, and [was] able to describe, all of the facts necessary to establish [his] guilt.” *United States v. Murphy*, 74 M.J. 302, 308 (C.A.A.F. 2015) (second and third alterations in original) (internal quotation marks and citation omitted). If an appellant’s admissions make clear his conduct is not constitutionally protected, then no *Hartman* inquiry is required. *United States v. Timsuren*, 72 M.J. 823, 827 (A.F. Ct. Crim. App. 2013).

B. Analysis

1. Preemption

With respect to issue (1), Appellant contends that his guilty plea to Specification 1 of Charge IV under Article 133, UCMJ, was improvident because it was preempted and thus barred by Article 117a, UCMJ. He bases this contention on the premise that the preemption doctrine applies to Article 133, UCMJ, the same way it does to Article 134, UCMJ. In support of this contention, Appellant cites *United States v. Grijalva*, 84 M.J. 433 (C.A.A.F. 2024). In that case, the United States Court of Appeals for the Armed Forces (CAAF) made a one-time introductory reference to Article 133, UCMJ, stating: “The ‘preemption doctrine’ generally prohibits using Articles 133 and 134, [UCMJ,] to charge conduct covered by Articles 80 through 132, [UCMJ].” *Grijalva*, 84 M.J. at 434. Article 133, UCMJ, was never again mentioned in the *Grijalva* opinion, which dealt with the operation of the preemption doctrine involving a specification alleging a violation of Article 134, UCMJ.

We find Congress did not intend to limit prosecution for Appellant’s conduct to Article 117a, UCMJ, and that charging under Article 133, UCMJ, was appropriate. “The primary question in applying the preemption doctrine is ‘whether Congress intended to limit prosecution for wrongful conduct within a particular area or field to offenses defined in specific articles of the Code.’” *Grijalva*, 84 M.J. at 439 (quoting *United States v. Wright*, 5 M.J. 106, 110–11 (C.M.A. 1978)). We find support for this in the *MCM* and in *Taylor*, wherein the court found that “Article 133, UCMJ is not subject to preemption by other punitive articles.” 23 M.J. at 318. Further, the *MCM* is persuasive on this matter, dictating that “[c]onduct violative of this article is action or behavior in an official capacity . . . or in an unofficial or private capacity that, in dishonoring or disgracing the officer personally, seriously compromises the person’s standing as an officer.” ¶ 90.c.(2). The 2024 *MCM* further explains that “[a]n officer’s conduct need not violate other provisions of the UCMJ or be otherwise criminal to violate Article 133.” pt. IV, ¶ 90.c.(2). Appellant seeks to persuade this court to find his conduct “closely tracks the wording of Article 117a, UCMJ,” *Grijalva*, 84 M.J. at 436, and therefore must have been charged under Article 117a, UCMJ. We do not agree.

The Government was not limited to charging this offense under Article 117a, UCMJ, even if the conduct underlying the offense closely tracked that Article. Given that the 2024 *MCM* explanation to Article 133, UCMJ makes clear that “[t]he gravamen of the offense is that the officer’s conduct disgraces the officer personally . . .,” and that “[a]n officer’s conduct need not violate other provisions of the UCMJ or be otherwise criminal to violate Article 133,” pt. IV, ¶ 90.c.(2), we find it was wholly appropriate for the Government to charge Appellant under this statute, even if it might have also been able to charge the conduct under Article 117a, UCMJ. Thus, Appellant’s guilty plea to Specification 1 of Charge IV was not improvident because it was not preempted nor barred by Article 117a, UCMJ.

The gravamen of an Article 117a, UCMJ, offense is the wrongful broadcasting of an intimate visual image of another person or a visual image of sexually explicit conduct involving another person in cases where the appellant knew or should have known that the broadcast was “likely (A) to cause harm, harassment, intimidation, emotional distress, or financial loss for the person depicted in the intimate visual image . . . or (B) to harm substantially the depicted person with respect to that person’s health, safety, business” *MCM*, App. 2, at A2-40. In the case at bar, Specification 1 of Charge IV was not simply about the broadcasting of an image of ST’s breasts. Appellant created and broadcasted an online profile pretending to be another person, he displayed the sexual image of ST’s breasts to reinforce the plausibility of this scheme, and he enticed others to engage in sexual activity with him under the false pretense that ST was seeking sexual partners for him. These factors form the criminal

underpinnings of the charged Article 133, UCMJ, offense. Appellant's statements during his plea inquiry demonstrate that his focus was not to harm, harass, intimidate, distress, or cause financial loss to ST through the disclosure of this image, but to surreptitiously satisfy his own sexual desires through an online ruse relying on ST's persona. As a military officer, this is conduct unbecoming an officer and is a different offense altogether from Article 117a, UCMJ.

2. Guilty Plea Inquiry

If not preempted, Appellant next contends that his guilty plea to Specification 1 of Charge IV was improvident because the military judge abused his discretion by not resolving an issue of fact as to whether ST had a "reasonable expectation of privacy," neglected to consider whether Appellant's conduct involved a constitutionally protected liberty interest, and failed to establish how Appellant's conduct amounted to conduct unbecoming an officer. He further contends that his guilty pleas to Specifications 2 and 3 of Charge IV were improvident because the military judge abused his discretion by neglecting to consider whether Appellant's conduct involved a constitutionally protected liberty interest and failed to establish how such conduct amounted to conduct unbecoming an officer. We disagree with each contention and address the reasonable expectation of privacy, liberty interest, and conduct unbecoming collectively.

Specification 1 of Charge IV alleges Appellant wrongfully broadcasted a profile picture of ST's bare breasts without her knowledge or consent to create the appearance that ST was seeking sexual partners for Appellant. Specification 2 of Charge IV alleges Appellant wrongfully provided false information to KH as part of his efforts to engage in sexual conduct with her. Specification 3 of Charge IV alleges Appellant wrongfully offered a room in his home for rent in exchange for sex rather than money. All three specifications allege that such conduct was conduct unbecoming an officer.

With respect to Specification 1, Appellant now contends that ST did not have a reasonable expectation of privacy in the photo of her breasts that he posted without her knowledge or consent in his online forum profile seeking sex because, Appellant suggests, "it is possible the picture was posted on a publicly available website related to breast augmentation." This contention has no merit. Even if ST had taken pictures of her breasts contemplating breast augmentation, taking a position that she had no privacy rights outside of the medical forum violates the very essence of one's autonomy over her body and medical procedures and the right to control the sanctity of her bodily privacy. ST has said that she had no idea how Appellant came into possession of the photo of her breasts that he posted online. Not only did she not know Appellant was in possession of the picture and had posted it online, she did not

consent to such public display. Second, Appellant and the military judge addressed ST's reasonable expectation of privacy in the *Care* colloquy when the military judge asked Appellant if his "broadcasting of the profile which included a picture of [ST's] bare breasts [was] accidental or intentional." In response to this question, the following colloquy occurred:

[Appellant]: Intentional, sir.

[Military Judge (MJ)]: So I'm going to read you [a] definition here. Reasonable expectation of privacy means circumstances in which a reasonable person would believe she could disrobe in privacy without being concerned that an image of a private area of that person was being captured or circumstances in which a reasonable person would believe that a private area of that person would not be visible to the public. At the time you broad—so any questions for me about that definition?

[Appellant]: No, sir.

MJ: At the time you broadcasted the profile, did [ST] have a reasonable expectation of privacy in that picture of her bare breasts that was included with the profile?

[Appellant]: Yes, sir.

MJ: And why do you think that she had a reasonable expectation of privacy?

[Appellant]: Because the picture itself had been taken at that point years before with solely for the purposes of private use.

The military judge did not abuse his discretion in finding ST had a reasonable expectation of privacy in the image Appellant used to deceptively impersonate her. Indeed, for this offense under Article 133, UCMJ, it was not even necessary for the military judge to inquire into and resolve this issue. The gravamen of the offense was Appellant seriously compromised his standing as an officer by deceptively impersonating ST online to obtain sex for himself. Where the military judge nevertheless determined ST maintained a reasonable expectation of privacy in the image, he did not abuse his discretion.

With respect to Appellant's contentions regarding Specifications 1–3 of Charge IV, that his pleas were improvident because the military judge abused his discretion by neglecting to consider whether Appellant's conduct involved a liberty interest and failed to establish how such conduct amounted to conduct unbecoming an officer, we similarly find the contentions meritless. Appellant bears the burden of defining a liberty interest that would show a substantial basis to question his guilty plea, and he has failed to do so. *See Finch*, 73 M.J.

148. Appellant contends the military judge erred by not conducting a heightened inquiry required when constitutionally protected conduct such as a bona fide liberty interest is implicated by the facts of the case. However, Appellant's public speech and online broadcasting of another person's breasts without that person's consent do not equate to a liberty interest such as protected speech. *Timsuren*, 72 M.J. at 827. Moreover, Appellant's own admissions during his *Care* inquiry make clear that his conduct was not constitutionally protected.

With respect to Specification 2 of Charge IV, during his *Care* colloquy with the military judge, in response to the military judge asking Appellant to tell him in his own words why he is guilty of this offense, Appellant responded,

[Appellant]: In late 2022 I maintained a sexual relationship with a woman named [KH] stemming from the [online] accounts I had also maintained. As far as that relationship, I told [KH] that my then spouse [ST] had approved of the relationship, although that was not true. I knew it was not true and I knew my then spouse did not approve of the relationship.

MJ: Did you wrongfully provide false information to [KH] as part of our efforts to engage in sexual conduct with her?

[Appellant]: Yes, sir.

MJ: And what did you do? What did you do to provide her false information? How did you do that?

[Appellant]: By posing as my then spouse through the profile and engaging in conversation with her such that she believed she was having a conversation with both myself and my spouse.

MJ: And who is [KH]?

[Appellant]: A person that I met through [the online forum].

MJ: And when did this or [sic] occur? Not when did you meet her, but when did the actual actions of you lying to her, providing that false information, when did that occur?

[Appellant]: On multiple occasions between the time that we first interacted at the end of September/beginning of October 2022, until we last interacted in January of 2023.

....

MJ: Was your intent in providing—what was your intent with providing [KH] false information?

[Appellant]: Ultimately to maintain the sexual relationship.

With respect to Specification 3 of Charge IV, in his *Care* colloquy with the military judge, in response to the military judge asking Appellant to tell him in his own words why he is guilty of this offense, Appellant responded,

[Appellant]: In late 2022, I maintained [online forum accounts] accounts that I used to seek sexual accounts with other women. And as part of those proposed encounters, I offered my room in exchange for that.

MJ: Did you wrongfully offer a room for a person to use in exchange for sexual conduct?

[Appellant]: Yes, sir.

MJ: All right, So what did you do?

[Appellant]: I created a post on [the online forum] doing exactly that, just offering a room to somebody in exchange for sexual favors.

MJ: Was it a person in particular?

[Appellant]: No, sir.

MJ: And how was it known that you were offering a room in exchange for sexual conduct?

. . . .

[Appellant]: I just created a post that was cross-posted to a number of sub-[forums online] and a room—just offered—or started a post to offer a room in exchange for

. . . .

MJ: My real question to you is how [are] you offering a room, how did you know it was in exchange for sexual conduct. . . .

[Appellant]: The nature of the sub-[forums online] in combination with the post itself, essentially the euphemism, it's pretty evident, Your Honor.

Any argument that Appellant had a liberty interest or the military judge abused his discretion by not conducting a heightened *Hartman* inquiry is defeated by the fact that Appellant had no liberty interest in the illicit content he posted, the false statements he made to KH in order to lure her into a sexual relationship without her consent as to the nature of the reality of such relationship, and his publicly seeking to rent a room in exchange for sexual favors. *See Timsuren*, 72 M.J. at 827 (holding that because the “appellant’s own admissions demonstrate[d] that his conduct . . . was not private and consensual,” a *Hartman* inquiry was not required); *see also United States v. Whitaker*, 72

M.J. 292, 293 (C.A.A.F. 2013) (refusing to extend *Hartman* to a guilty plea for nonconsensual sodomy because the nonconsensual nature “does not implicate constitutional protections or even arguably constitute permissible behavior”). In each specification, Appellant admitted his actions were wrongful, brought dishonor and/or disgrace upon himself personally, and seriously compromised his standing as a commissioned officer. He further admitted that his conduct was immoral, reflected indecency or indecorum that was morally unfitting and unworthy of being an officer and that his actions constituted serious misbehavior as opposed to merely inappropriate behavior or just made in poor taste. With respect to Appellant’s contention that the military judge failed to establish how such conduct amounted to conduct unbecoming an officer, the record is replete with testimony from the plea inquiry that satisfies this element.

III. CONCLUSION

The findings as entered are correct in law. Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2024 *MCM*). In addition, the sentence as entered is correct in law and fact, and no error prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.

MORGAN, Chief Judge (concurring in part and in the result)

While I agree with the majority’s decision to affirm the findings and sentence, I write separately because I would uphold Appellant’s conviction for “broadcasting of the profile which included a picture of [ST’s] bare breasts,” in violation of Article 133, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 933 (Charge IV, Specification 1), on the basis that Appellant explicitly waived the preemption issue through his unconditional guilty plea and his colloquy with the military judge. Alternatively, I would find his guilty plea survives a plain error analysis given the absence of substantial prejudice. I further would overrule this court’s decision in *United States v. Jones*, 66 M.J. 704, 706 (A.F. Ct. Crim. App. 2008).

I. BACKGROUND

The military judge thoroughly questioned Appellant to ensure he understood his plea agreement. Regarding the “waive all waivable motions” provision, Appellant confirmed this term originated with the Defense and he understood it meant he was giving up “the right to make any motion which by law is given up when you plead guilty.” When asked if he understood this term “may

preclude this court or any appellate court from having the opportunity to determine if you are entitled to relief based upon such motions,” Appellant responded in the affirmative.

The military judge then engaged in the following exchange addressing specific motions waived by Appellant:

MJ: Are there any motions out there that you thought there was a factual basis that might be covered?

. . . .

[Defense Counsel (DC)]: Your Honor, we had contemplated a filing of a preclusion-type issue related to Spec[ification] 1 of Charge IV. That motion was never filed ultimately. We elected to pursue the plea agreement for strategic reasons. So we welcome the court’s inquiry, but there was a preclusion issue we had explored but nothing was ever formally filed.

MJ: Okay. And I’m not looking for a lot of details or going into some kind of advice that you provided, attorney/client privilege, but what do you believe to be the factual basis of that motion or any other motions that might be covered by this term of the plea agreement?

DC: The factual basis, Your Honor, would be just that Spec[ification] 1 of Charge IV itself — more of a legal issue more than anything that requires facts, but the legal theory that we had looked into was whether or not Spec[ification] 1 was precluded by a separate UCMJ provision.

MJ: Okay. Understood. Major Torres, do you understand that if such a motion was made and granted by me then a possible ruling could have been that the specification or specifications that are the subject of that motion may have been dismissed?

[Appellant]: Yes, sir.

MJ: And 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?

[Appellant]: Yes, sir.

MJ: Do you have any questions for me about this provision of your plea agreement?

[Appellant]: No, sir.

II. DISCUSSION

A. Law

An appellant’s failure to preserve an issue at trial raises the question whether the appellant has forfeited or waived the issue on appeal. *See United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017). “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)) (additional citation omitted).¹ Appellate courts review forfeited issues for plain error; a valid waiver leaves no error “to correct on appeal.” *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (citation omitted).

An accused may intentionally relinquish a waivable objection in a plea agreement by including a provision waiving all waivable motions. *United States v. Day*, 83 M.J. 53, 56 (C.A.A.F. 2022). Additionally, a waiver by operation of law may result from an unconditional guilty plea. The United States Court of Appeals for the Armed Forces (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 (C.M.A. 1958)).

In my view, the concept that a preemption claim constitutes an unwaivable question of subject-matter jurisdiction no longer prevails. Specifically, in *United States v. Cotton*, the United States Supreme Court held a defective indictment does not deprive a court of jurisdiction. 535 U.S. 625, 630–31 (2002). The Supreme Court rejected an “elastic concept of jurisdiction” in favor of one defined by “a court’s power to hear a case” and explained that “the objection that [an] indictment does not charge a crime against the United States goes only to the merits of the case.” *Id.* at 630–31 (quoting *Lamar v. United States*, 240 U.S. 60, 65 (1916)). Noting it was “[f]reed from the view that indictment omissions deprive a court of jurisdiction, [the Court] proceed[ed] to apply the plain-error test . . . to respondents’ forfeited claim.” *Id.* at 631 (citations omitted).

In *Lewis v. United States*, 523 U.S. 155, 158–59 (1998), defendants were convicted of first-degree murder under Louisiana law as assimilated through the Assimilative Crimes Act (ACA).² The Supreme Court found the ACA did

¹ Waiver may also occur by operation of law. *United States v. Jones*, 78 M.J. 37, 44 (C.A.A.F. 2018) (citation omitted).

² 18 U.S.C. § 13(a).

not properly assimilate the Louisiana statute and remanded the case for re-sentencing. *Id.* at 172–73. The Court’s silence on the jurisdictional argument has been cited by numerous federal circuit appellate courts as demonstrating the non-jurisdictional nature of the defendants’ assimilation appeal.³

Three years prior to *Cotton*, our superior court addressed the preemption doctrine in relation to the ACA in *United States v. Robbins*, 52 M.J. 159, 160 (C.A.A.F. 1999). There, the appellant argued the offense of involuntary manslaughter by terminating the pregnancy of his wife was not cognizable under the UCMJ because it could not be assimilated under Article 134, UCMJ. *Id.* The United States Court of Appeals for the Armed Forces (CAAF) explained “if the offense was improperly assimilated, it was not cognizable by a court-martial,” and held “that the preemption issue was not waived by the guilty plea or appellant’s failure to raise it at trial.” *Id.*

However, following *Cotton*, the CAAF observed that with respect to whether an issue was “jurisdictional,” the Supreme Court had since “tried in recent cases to bring some discipline to the use of [the] term.” *United States v. Humphries*, 71 M.J. 209, 213 (C.A.A.F. 2012) (quoting *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)). The CAAF held that where defects in a specification are raised for the first time on appeal, dismissal of the affected charges or specifications will depend on whether there is plain error -- which, in most cases, will turn on the question of prejudice.” *Id.* at 213–14 (citing *Cotton*, 523 U.S. at 631–32) (applying plain error review)) (additional citations omitted).

Following *Humphries*, the CAAF decided several cases involving the issue of waiver pertinent to the discussion here. In *United States v. Warner*, the CAAF held that “when not objected to at trial, defects in an indictment are reviewed for plain error.” 73 M.J. 1, 3 (C.A.A.F. 2013) (citing *Cotton*, 535 U.S. at 631). Under a plain error analysis, “[an] appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused.” *Id.* (citation omitted).

In *United States v. Gleason*, 78 M.J. 473, 474 (C.A.A.F. 2019), the CAAF held a “novel” Article 134, UCMJ, “charge of interfering with an emergency

³ See, e.g., *United States v. Twitty*, 859 F. App’x. 310, 313 (10th Cir. 2021) (reasoning that jurisdictionally, whether an offense is charged “under the ACA or another provision of federal law did not matter”); *United States v. Key*, 599 F.3d 469, 476–77 (5th Cir. 2010) (reviewing an assimilation claim for plain error because the error was not raised below and was a nonjurisdictional issue); *United States v. Hall*, 979 F.2d 320, 323 (3d Cir. 1992) (analogizing improper assimilation to an incorrect statutory citation in an indictment).

call fail[ed] to state an offense because the offense is already listed inside Article 134's framework"⁴ "Because [the appellant did not challenge the specification at trial, [the CAAF] review[ed] his challenge to the 'novel' specification for plain error." *Id.* at 475 (citing *United States v. Tunstall*, 72 M.J. 191, 196 (C.A.A.F. 2013)). The issue was not framed as a "jurisdictional" one.

In *Gladue*, the CAAF held the appellant's express waiver of any waivable motions in his pretrial agreement waived claims of multiplicity and unreasonable multiplication of charges and barred the appellant from asserting them on appeal. 67 M.J. at 314. The CAAF reasoned, "A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution." *Id.* at 314 (citing *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995)). "That includes double jeopardy, the basis of the multiplicity objection." *Id.* (first citing *Mezzanatto*, 513 U.S. at 201; then citing *Ricketts v. Adamson*, 483 U.S. 1, 10 (1987) (holding "double jeopardy defense waivable by pretrial agreement")). The Supreme Court has applied this "general rule" that presumes waiver in finding that appellants waived a broad array of constitutional claims. *New York v. Hill*, 528 U.S. 110, 114 (2000).⁵

B. Analysis

In this case, Appellant negotiated a plea agreement wherein he originated a provision to "waive all waivable motions." When asked by the military judge what specific motions the Defense was waiving, trial defense counsel explained, "[W]e had contemplated a filing of a preclusion-type issue related to Spec[ification] 1 of Charge IV," but "elected to pursue the plea agreement for strategic reasons." The military judge drilled down further and asked, "[W]hat do you believe to be the factual basis of that motion or any other motions that might be covered by this term of the plea agreement?" Trial defense counsel unambiguously responded, "[T]he legal theory that we had looked into was whether or not Spec[ification] 1 was precluded by a separate UCMJ provision."

⁴ The CAAF cited language from the *Manual for Courts-Martial, United States* (2012 ed.), pt. IV, ¶ 60.c.(6)(c), which stated, "If conduct by an accused does not fall under any of the listed offenses for violations of Article 134 in this Manual (paragraphs 61 through 113 of this Part), a specification not listed in this Manual may be used to allege the offense."

⁵ See, e.g., *United States v. Gagnon*, 470 U.S. 522, 528 (1985) (right to be present at all stages of criminal trial); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (privilege against compulsory self-incrimination, right to jury trial, and right to confront one's accusers); *Levine v. United States*, 362 U.S. 610, 619 (1960) (closure of courtroom and right to public trial); *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) (right to counsel); *Seguro v. United States*, 275 U.S. 106, 111 (1927) (right against unlawful search and seizure).

It cannot be seriously contended Appellant’s unconditional guilty plea was anything but an explicit and intentional relinquishment of a known right (*i.e.*, the preemption issue for which Appellant now seeks relief). Nor can it be maintained the Appellant relied on erroneous advice from the military judge that would preclude waiver.⁶

Numerous federal circuit courts of appeals are in accord that improper assimilation is not jurisdictional, but instead resembles a challenge to an indictment. These cases recognize that a case properly assimilated provides jurisdiction under the ACA, and a crime not properly assimilated provides jurisdiction under the federal statutes.⁷ Either way, there is jurisdiction.

Because the instant case does not involve an assimilated offense, it does not squarely fall within *Robbins*’ holding that improperly assimilated state crimes relate to subject matter jurisdiction. 52 M.J. at 160. Second, the reasoning of post-*Robbins* federal circuit appellate courts equally applies here, *i.e.*, a court-martial has the adjudicative capacity to hear Article 117a, UCMJ, offenses, as well as conduct unbecoming offenses under Article 133, UCMJ. There is jurisdiction in either case.

Likewise, in *Gleason*, 78 M.J. at 474, there was no discussion or inference that the “novel” specification under Article 134, UCMJ, implicated subject-matter jurisdiction. Rather, the issue was framed as whether the challenged specification failed to state an offense and was reviewed for plain error.

Neither does a preemption claim seem more “jurisdictional” (and hence unwaivable) than claims of double jeopardy or multiplicity (waivable). Both preemption and multiplicity tests seek to ascertain congressional intent, given Congress’s authority to create and define offenses. Both tests, depending on the state of the legislative record, turn to a “residuum of” or “separate” elements construction to ascertain congressional intent. Indeed, if a federal court exceeds its authority by imposing multiple punishments not authorized by Congress, “it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty.” *United States v. Whalen*, 445 U.S. 684, 689 (1980) (footnote omitted). If this specific double constitutional protection is waivable, it seems to me a preemption claim, borne out of the constitutional structure and comity concerns, ought likewise to be. Nor does this case concern concepts of federalism in the relationship between military and state law; this is not a clause 3, Article 134, UCMJ, prosecution.

⁶ See *United States v. Day*, 83 M.J. 53, 56 (C.A.A.F. 2022) (stating that “the military judge’s advice to the appellant prevented the possibility of waiver”).

⁷ See cases cited, *supra* n.3.

Separated from its “jurisdictional” moniker, and presenting no more compelling reason not to treat preemption claims just as waivable as other constitutionally-derived protections, I would find Appellant’s unambiguous agreement to waive the preemption motion and enter an unconditional guilty plea, waived his present claim.

In evaluating *stare decisis*, we consider “whether the prior decision is unworkable or poorly reasoned; any intervening events; the reasonable expectations of servicemembers; and the risk of undermining public confidence in the law.” *United States v. Blanks*, 77 M.J. 239, 242 (C.A.A.F. 2018) (quoting *United States v. Quick*, 74 M.J. 332, 336 (C.A.A.F. 2015)).

I would depart from our court’s holding in *Jones*. First, with the understanding it is our superior court’s prerogative to overrule its own decisions, I believe our court in *Jones* overread *Robbins*, which addressed whether a non-military offense was cognizable by a court-martial. Second, post-*Robbins* opinions from both the Supreme Court and our superior court have held defective specifications do not deprive a court of its adjudicative power. *See Cotton*, 535 U.S. at 631; *Humphries*, 71 M.J. at 213. Third, a determination that Appellant’s claim cannot be waived is inconsistent with numerous Supreme Court decisions permitting waiver of an array of constitutional protections, *see supra* note 5, including both individual protections as well as those designed to prevent aggrandizement by one branch of the Government at the expense of another.

Assuming *arguendo* Appellant’s claim is not waived and there is something for this court to review, then consistent with *Gleason*, *Cotton*, and *Humphries*, Appellant’s claim, raised for the first time on appeal, should be reviewed for plain error.

Material prejudice to a substantial right is evaluated by “reference to the nature of the violated right.” *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019). In *Humphries*, trial defense counsel failed to object to the omission of a terminal element on one of the charges, and CAAF reversed the conviction finding a violation of the appellant’s constitutional rights to notice. 71 M.J. at 211, 215. In this case, Appellant does not argue he lacked notice of what he was to defend against, which is made clear by the factual basis he provided during his guilty plea inquiry.

III. CONCLUSION

In this case, the Government charged Appellant with several specifications in violation of Articles 80, 120b, 128b, 133, and 134, UCMJ. The Appellant negotiated a plea agreement that ensured dismissal of all specifications relat-

ing to Articles 120b, 128b, and 134—Specifications 1–3 of Charge II, the Specification of Charge III, and Specifications 1–2 of Charge V.⁸ I would find his agreement to “waive all waivable motions,” specifically to the issue he raises now, and to enter an unconditional guilty plea, waived his present complaint. However, as stated above, even if Appellant’s failure to object amounted to no more than forfeiture, any error (plain or otherwise) did not prejudice Appellant.

For these reasons, I would overturn this court’s ruling in *Jones* and affirm the findings of guilty to the sole specification of Charge I, and the three specifications of Charge IV; but specifically, as to Specification 1 of Charge IV, for reasons separate from the majority as stated above.



FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

⁸ All these specifications would be “[w]ithdrawn and dismissed without prejudice, to ripen into prejudice upon completion of appellate review where the findings and sentence have been upheld.”