

**IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

UNITED STATES,  
Appellee

**BRIEF ON BEHALF OF  
APPELLEE**

v.

Docket No. ARMY 20210199

Lieutenant Colonel (O-5)  
**ROBERT M. BABA**  
United States Army,  
Appellant

Tried at Fort Knox, Kentucky, on 13–  
14 April 2021 before a general court-  
martial convened by Commander, 1st  
Theater Sustainment Command,  
Lieutenant Colonel Mary Catherine  
Vergona, Military Judge, presiding.

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES  
ARMY COURT OF CRIMINAL APPEALS**

**Assignment of Error<sup>1</sup>**

**WHETHER THE SPECIFICATIONS OF CHARGE  
III AND SPECIFICATIONS 1, 2, 3, 4, 5, 7, 8, 9 OF  
CHARGE IV ARE LEGALLY AND FACTUALLY  
SUFFICIENT.**

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<sup>1</sup> The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits that they lack merit. The government respectfully requests notice and opportunity to file a supplement brief should this court consider any of those matters meritorious.

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## **Statement of the Case**

On 14 April 2021, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of three specifications of wrongful possession of a controlled substance in violation of Article 112(a), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a, and nine specifications of larceny of military property in violation of Article 121, UCMJ, 10 U.S.C. § 921. (Statement of Trial Results).<sup>2</sup> The military judge sentenced appellant to be dismissed from service. (Statement of Trial Results; R. at 361). On 29 April 2021, the convening authority took no action on the findings and approved the adjudged sentence, and the military judge entered judgment on 4 May 2021. (Action; Judgment).

## **Statement of Facts**

Appellant is a 57-year-old pharmacist holding the rank of Lieutenant Colonel (LTC) in the United States (U.S.) Army Reserves. (Pros. Ex. 102, Pros. Ex. 107). Appellant has been a pharmacist for twenty-seven years. (Pros. Ex. 102, Pros. Ex. 107). He has served in that role in the U.S. Army Reserves for eighteen

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<sup>2</sup> Excluding appellant's *Grostepon* submissions, appellant only contests eight of the nine specifications of larceny of military property of which he was found guilty. Additionally, appellant was found guilty, in accordance with his plea, of one specification of negligent dereliction of duty in violation of Article 92, UCMJ, 10 U.S.C. § 892. This finding is also not contested by appellant. Appellant was found not guilty, in accordance with his plea, of one specification of providing a false official statement in violation of Article 107, UCMJ, 10 U.S.C. § 907. (Statement of Trial Results).

years, including multiple deployments. (Pros. Ex. 107). On 5 December 2019, appellant deployed to Camp Arifjan, Kuwait as the Officer in Charge (OIC) and Chief of Pharmacy for the 411th Hospital Center at the United States Military Hospital-Kuwait (USMH-K). (Pros. Ex. 102, Pros. Ex. 107).

Soldiers must be seen by a medical provider during pre-mobilization, prior to leaving the United States, in order to bring prescription medication into theater. (R. at 62). During this process, medical providers meet with the soldier-patients, review their medical records, and prescribe appropriate medication, which the soldier collects from the military pharmacy at the mobilization site. (R at 62.).

The USMH-K pharmacy's medication dispensation process required patients to present a valid identification card and their prescription or valid prescription refill, which were then logged into the computer system called "TC-2." (R. at 68). Pharmacy personnel were prohibited from prescribing themselves medication within the TC-2 system. (R. at 69).

The USMH-K pharmacy regularly inventoried for both controlled and non-controlled substances. (R. at 64-65). During a "left seat-right seat" transition with incoming pharmacy personnel toward the end of appellant's deployment, Corporal (CPL) ND discovered that two bottles of Hydroxychloroquine were missing.<sup>3</sup> (R.

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<sup>3</sup> Hydroxychloroquine is a legend medication used to treat malaria that at one time was viewed as a possible treatment for the COVID-19 virus. Legend medications

at 72-73). Sergeant First Class (SFC) ML, the outgoing non-commissioned officer-in-charge (NCOIC) of the pharmacy, and LTC EG, the incoming OIC, ran an inquiry in the TC-2 to investigate the issue. (R. at 74-75; Pros. Ex. 103). Lieutenant Colonel EG was able to get a prescription number for the Hydroxychloroquine which led to a patient profile connected with appellant as the patient. (Pros. Ex. 36; R. at 74). Two further inquiries were produced for appellant. (Pros. Ex. 32, Pros. Ex. 36). These inquiries indicated that appellant had various prescriptions ordered by medical providers, prompting them to notify Criminal Investigation Command (CID) and Military Police (MP) of appellant's unusual prescription history. (Pros. Ex. 32, Pros. Ex. 36; R. at 120-121.)

Appellant was interviewed during the ensuing joint CID and MP investigation and admitted to prescribing himself Metoprolol XL (Tropol XL), Metformin, and Citalopram. (R. at 128; Pros. Ex. 40). Appellant also consented to a search of his living quarters, a single occupant room. (R. at 125, 141). The MPs seized a number of pills found in unlabeled prescription bottles, in labeled prescription bottles, and in a "calendar container" from appellant's room.<sup>4</sup> (R. at 143, 145, 148; Pros. Ex. 4-12).

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are non-controlled substances that still require a prescription. (R. at 82-84; Pros. Ex. 3, p. 9).

<sup>4</sup> A calendar container is a container with a smaller section for to store pills for each day of the week. See Pros. Ex. 4-7 for visual depiction.

## **Standard of Review**

Questions of legal and factual sufficiency are reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

## **Law**

The standard for legal sufficiency is “whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.” *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). In resolving questions of legal sufficiency, the court is “bound to draw every reasonable inference from the evidence of record in favor of the prosecution.” *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). During its legal sufficiency review, the court considers all available facts within the record and is “not limited to the appellant’s narrow view of the record.” *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996). Regarding factual sufficiency, the test is “whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the service court are themselves convinced of appellant’s guilt beyond a reasonable doubt.” *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (quoting *United States v.*



*Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)). In its factual sufficiency review, this court “in considering the record . . . may weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.” Article 66(d)(1), UCMJ.

Further, this court has stated, “we are required to make credibility determinations on appeal, but those determinations . . . recognize the trial court’s superior position in making those determinations. Our assessment of evidence must be sifted through a filter that recognizes our inferior fact-finding viewpoint.” *United States v. Feliciano*, ARMY 20140766, 2016 CCA LEXIS 512, at \*8 (Army Ct. Crim. App. 22 Aug. 2016) (mem. op.) (citing *United States v. Arctie*, 57 M.J. 394, 399 (C.A.A.F. 2002). The Court of Appeals for the Armed Forces (CAAF) “has long recognized that the government is free to meet its burden of proof with circumstantial evidence.” *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (discussing *United States v. Kearns*, 73 M.J. 177 (C.A.A.F. 2014) and *United States v. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007)).

The elements of wrongful possession of controlled substances are: “(i) That the accused possessed a certain amount of a controlled substance; and (ii) that the possession was wrongful.” 10 U.S.C. § 912a, *Manual for Courts-Martial, United States* (2019 ed.) [MCM], pt. IV, ¶50b.(1). Possession “is wrongful if it is without legal justification or authorization.” MCM, pt. IV, ¶50c.(5). “Possession . . . of a

controlled substance may be inferred to be wrongful in the absence of evidence to the contrary.” *Id.* Deliberate ignorance of the presence of a controlled substance, or its contraband nature, is treated the same as actual knowledge for purposes of criminal liability. *MCM*, pt. IV, ¶50c.(11)

“Possession may be established by circumstantial as well as by direct evidence.” *United States v. Wilson*, 7 M.J. 290,293 (C.M.A. 1979). Possession is not wrongful if it is done pursuant to legitimate law enforcement activities, done by authorized personnel in the performance of medical duties, or without knowledge of the contraband nature of the substance. *Id.* A valid prescription for a controlled substance is defense against wrongful possession. *United States v. West*, 15 C.M.A. 3, 34 C.M.R. 449, 452 (C.M.A. 1964). “The element of ‘wrongfulness’ in charges of drug possession . . . involves . . . knowledge of the character of the substance involved.” *United States v. Mance*, 26 M.J. 244, 254 (C.M.A. 1988). “The ‘knowledge’ required to show possession . . . and the knowledge required to show wrongfulness may be inferred by the factfinder from the presence of the controlled substance.” *Id.*, at 254 (internal quotations omitted). “The permissive inference of wrongfulness and *the other evidence of knowledge* [may be] sufficient evidence to prove this element of the offense beyond a reasonable doubt.” *Id.*, at 253 (emphasis added). “Whether to draw an inference of wrongfulness is a question to be decided by the factfinder using the standard of

reasonable doubt. It may be drawn where no contrary evidence is admitted. . . .

Similarly, the inference of wrongfulness may be drawn where contrary evidence is admitted.” *United States v. Ford*, 23 M.J. 331, 335 (C.M.A. 1987).

“Words generally known and in universal use do not need judicial definition.” *United States v. Nelson*, 53 M.J. 319, 321 (C.A.A.F. 2000) (quoting *United States v. Shepard*, 1 U.S.C.M.A. 487, 4 C.M.R. 79 (1952)) (superseded by statute on other grounds). Black’s Law Dictionary defines *expired* as “a coming to an end or a formal termination on a closing date.” *Expiration*, Black’s Law Dictionary (9th ed. 2009). Similarly, Merriam-Webster’s Dictionary defines *expired* as “no longer valid; having exceeded its period of validity.” *Merriam–Webster’s Online Dictionary*, <https://www.merriam-webster.com/dictionary/expired> (last visited Sept. 27, 2022); *see also United States v. Schmidt*, 82 M.J. 68, 76 (C.A.A.F. 2022) (Ohlson, J., concurring) (stating that “when a word has an easily graspable definition outside of a legal context, authoritative lay dictionaries may . . . be consulted.”).

The elements of larceny of military property are: “(a) That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person, (b) that the property belonged to a certain person, (c) that the property was of a certain value, or of some value, (d) that the taking, obtaining, or withholding by the accused was with the intent permanently to

deprive or defraud another person of the use and benefit of the property or permanently to appropriate the property for the use of the accused or for any person other than the owner, and (e) that the property was military property.” 10 U.S.C. § 921, *MCM*, pt. IV, ¶64b.(1).

Military property is “all property, real or personal, owned, held, or used by one of the armed forces of the United States.” *MCM*, pt. IV, ¶64.c.(1)(h). The CAAF has elaborated, holding, “although there may be no direct evidence that the property in question was military property of the United States, circumstantial evidence that the property was of a type and kind *issued for use in, or furnished and intended for, the military service of the United States*, might, together with other proved circumstances, warrant the court in inferring that it was such military property of the United States.” *United States v. Hemingway*, 36 M.J. 349, 351. (C.A.A.F. 1993) (quoting *United States v. Schelin*, 15 M.J. 218 (C.M.A. 1983) (emphasis in original). “Absence of inventories and/or proof of a shortage are not fatal to proof of corpus delicti in cases involving theft of government property.” *United States v. Pabon*, 37 M.J. 836, 842 (A.F.C.M.R. 1993) (Citing *United States v. McKinney*, 1 C.M.R. 625 (A.F.B.R. 1949)). “When the property is subsequently withheld from the government, with the requisite intent to permanently deprive the government of its use and benefit, a larceny is complete.” *United States v. Sierra*, 62 M.J. 539, 543 (Army Ct. Crim. App. 2005).

The taking, withholding, or obtaining of property must be wrongful. *MCM*, pt. IV, ¶64.c.(1)(d). Obtaining property through false pretenses is unlawful. *Id.* “A false pretense may occur by an act, word, symbol, or token,” including “a false representation of past or existing fact.” *United States v. Dean*, 33 M.J. 505, 511. (A.F.C.M.R. 1991) (internal citations omitted). Military courts have held that forging and then filling prescriptions qualifies as larceny based on false pretenses. *United States v. Rubenstein*, 7 U.S.C.M.A. 523, 22 C.M.R. 313, 23 (1957) (discussing *United States v. Turiano*, 13 C.M.R. 753 (A.F.B.R. 1953)).<sup>5</sup>

## **Argument**

### **A. Appellant knowingly and wrongfully possessed Diazepam, Zolpidem, Oxycodone in Kuwait.**

Appellant seemingly does not contest that he possessed a certain amount of these controlled substances. Appellant’s convictions for wrongful possession of Diazepam, Zolpidem, and Oxycodone are legally and factually sufficient because the evidence established he lacked legal justification for ongoing, indefinite possession of expired prescription medicines.<sup>6</sup>

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<sup>5</sup> See *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012). Although the appellant challenged his convictions on multiplicity grounds, the CAAF’s decision is illuminating given the similarities to present case.

<sup>6</sup> Under the facts of this case appellant’s ongoing possession is clearly wrongful possession. *But see, United States v. Haller*, 2022 CCA LEXIS 50 (N-M Ct. Crim. App. Jan. 24, 2022), in which the court found that the appellant’s mere possession of expired, non-controlled medicine in his home did not rise to dishonorable or compromising conduct under Article 133, UCMJ. Appellant’s case is markedly

### Additional Facts

Law enforcement found and seized Diazepam, Zolpidem, and Oxycodone pills during their consensual search of appellant's quarters.<sup>7</sup> (R. at 125).

Diazepam are blue, round pills. (Pros. Ex. 11, Pros. Ex. 15). Oxycodone pills are round and white. (Pros. Ex. 20, Pros. Ex. 23).<sup>8</sup> Military police found the Diazepam and Oxycodone comingled in a prescription bottle labeled only for Oxycodone. (Pros. Ex. 11; R. at 293). Military Police found the Zolpidem—white, capsule-shaped pills—in an unmarked “Safeway” prescription bottle. (Pros. Ex. 12, Pros. Ex. 24).

The Army Criminal Investigation Laboratory (USACIL) examined the seized pills and confirmed that they were Diazepam, Zolpidem, and Oxycodone. (R. at 272, 275, 280; Pros. Ex. 15, Pros. Ex. 20, Pros. Ex. 24). Oxycodone is a

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distinguishable from *Haller*, however, given appellant's occupation, the controlled nature of the medications in question, the affirmative steps taken to mix or transfer them into nondescript containers, and the hand-on actions associated with carrying them from his CONUS residence to Kuwait. Most importantly, appellant was charged with a violation of Article 112(a), UCMJ and not a violation of Article 133, UCMJ.

<sup>7</sup> Diazepam is the generic name for Valium and Zolpidem is the generic name for Ambien. (R. at 87).

<sup>8</sup> Twenty-four pills are reflected USACIL report Exhibit 004.001. (Pros. Ex 23, p. 5). Twelve pills are reflected on the USACIL report Exhibit 004.003 and four on the USACIL Exhibit 004.004. (Pros. Ex 23, p. 6). Although forty Oxycodone pills were found in appellant's possession, the government charged appellant with wrongful possession of twenty-four pills (Charge III, Specification 3), and the military judge found him guilty of wrongfully possessing eight pills. (Charge Sheet; Statement of Trial Results; R. at 321).

schedule II controlled substance. (Pros. Ex. 27). Diazepam and Zolpidem are schedule IV controlled substances. (Pros. Ex. 28). Appellant had previously been prescribed Diazepam and Zolpidem, but his Diazepam prescription expired in July 2016, and his Zolpidem prescription expired in November 2011.<sup>9</sup> (Pros. Ex. 34, Pros. Ex. 32). Appellant received two prescriptions for Oxycodone while in Kuwait. He was prescribed six pills in February 2020 and ten pills in March 2020. (Pros. Ex. 36).

**1. Expired prescriptions do not create justification to possess.**

A valid prescription authorizes a specific patient to consume or possess a finite amount of the prescribed medication during a defined window of time. Said differently, a prescription for medication does not confer upon a patient an indefinite legal right to consume or possess the prescribed medication in whatever manner he deems fit. It is well established that having a *valid* prescription is a defense against unlawful possession. *See United States v. Rubenstein*, 7 U.S.C.M.A. 523, 22 C.M.R. (where the appellant used a stolen prescription pad to forge prescriptions for himself). However, appellant asks this court to ignore the plain meaning of the word “expired” and rely on Army Regulation 600-85,

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<sup>9</sup> Appellant’s brief references multiple prescriptions for Zolpidem between 2011 and 2016. (Appellant’s Br. 7). Prosecution Exhibit 32 shows the Appellant had prescriptions in 2011 but none after that year. Appellant appears to rely on trial counsel’s misstatement in closing argument, which trial counsel later corrected. (R. at 291, 292).

Personnel — General: The Army Substance Abuse Program (23 July 2020)[AR 600-85] to limit expiration to use but not possession.<sup>10</sup> Rather, this court should follow *United States v. Nelson* and use the generally known definition of expired – “cease to be valid” – and determine that the legal justification for possession ended when the prescription expired. (53 M.J. 319, 321 (C.A.A.F. 2000)).<sup>11</sup>

Assuming *arguendo* that the expired nature of the prescription does not make it invalid, even the mere existence of a valid prescription does not provide a person carte blanche for possession of controlled substances. See *United States v. Pariso*, 65 M.J. 722, 724 (A.F. Ct. Crim. App. 2007).<sup>12</sup> Even if appellant had valid prescriptions, he was well outside the scope of those prescriptions when he possessed the controlled substances years after the expiration date.<sup>13</sup> Further,

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<sup>10</sup> AR 600-85 para. 4-2(1)(7) prohibits the use of any prescription drug without a *current* prescription. This prohibition should logically be extended to limit the possession of prescription drugs under the same circumstances.

<sup>11</sup> Should the court disagree with the concurrence in *United States v. Schmidt* and use the definition found in Black’s Law Dictionary (9th Ed. 2009) the analysis remains the same. 82 M.J. at 76.

<sup>12</sup> While *Pariso* is a use case, the court’s discussion of wrongful in the context use and dispensing of controlled substances without legitimate medical reason can be applied to this case. Given that a prescription medication serves no purpose other than that triggered when consumed, the passing of a prescription’s expiration date as for its use may be inferred to extend to its possession.

<sup>13</sup> Appellant’s Diazepam prescription expired in July 2016 and his Zolpidem prescription expired in November 2011. (Pros. Ex. 34, Pros. Ex. 32). The expired medications in question were discovered in appellant’s quarters in September 2021. There was circumstantial evidence that the pills came from the expired prescriptions. (R. at 120).



appellant exceeded the terms of the prescriptions when he mixed Diazepam and Oxycodone into the same bottle and when he placed Zolpidem in an unmarked medicine bottle. (R. at 272, 274-275, 280; Pros. Ex. 11, Pros. Ex. 12). Regardless of a prescription's status, appellant's possession became wrongful when that possession strayed so far outside the scope of the prescription. Further, there can be little doubt that appellant knew of its wrongfulness given his experience as a pharmacist. (R. at 248).

Appellant relies on an interpretation of trial counsel's statement in closing argument to contend that the government conceded that expired prescriptions provide a measure of legal justification. (Appellant's Br. 19). Trial counsel's argument referenced a charging decision, not a statement of the law. *See United States v. Fletcher*, 62 M.J. 175, 183 (C.A.A.F. 2005) (citing *United States v. Clifton*, 15 M.J. 26, 29-30 (C.M.A. 1983) (stating that argument by counsel is not evidence.)) (R. at 293). Further, this trial was held before a military judge alone, who is presumed to know the law and would know what she was permitted to consider. *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997). There is no evidence on the record to support appellant's expired prescription argument.

Appellant's interpretation of legal justification for possession would allow a person to knowingly possess controlled substances for an indefinite period of time solely on the basis of expired prescriptions. (Appellant's Br. 19). This would lead

to results that are inconsistent with the federal government's efforts to regulate these narcotics. (Pros. Ex. 26).<sup>14</sup> Assuming without conceding that appellant's argument that his expired prescription for Oxycodone created legal justification, his conviction can still stand. Appellant possessed at least eight more Oxycodone pills than his Kuwait prescription called for. He was prescribed six pills in February 2020 and ten pills in March 2020, meaning he was authorized to possess at most sixteen pills. (Pros. Ex. 36, pp. 16, 18).<sup>15</sup> Forty pills were found in his quarters.<sup>16</sup> (Pros. Ex. 23, pp. 5-6). His possession was outside the scope of any prescription he had previously received and was therefore wrongful.

**2. Appellant is a pharmacist who knowingly hid controlled substances while deployed.**

The circumstantial evidence overwhelmingly proves appellant knew that his possession of Zolpidem, Diazepam, and Oxycodone was wrongful. Contrary to appellant's argument, the government did not just rely on AR 600-85 to demonstrate the basis of appellant's knowledge. (Appellant's Br. 20). Appellant presents a narrow reading of *Mance*, 26 M.J. at 254 to argue that a permissive inference of wrongfulness is only appropriate when the accused never had a

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<sup>14</sup> 21 CFR §1306.21 outlines the requirements and limitations of a prescription.

<sup>15</sup> Appellant had several previous Oxycodone prescriptions, the most recent of which had expired in February 2019. (Pros. Ex. 34).

<sup>16</sup> Appellant was found guilty of wrongfully possessing eight of those forty Oxycodone pills. (R. at 321)

prescription or the substance is illegal. (Appellant's Br. 20.) Furthermore, appellant argues that since the inference is inappropriate in this case, there is no evidence of knowledge. (*Id.*) Appellant ignores the significant circumstantial evidence of knowledge. The evidence not only makes the permissive inference appropriate, but standing on its own proves knowledge beyond a reasonable doubt.

Incumbent in appellant's civilian and military professional experience is an understanding of what one can and cannot do with prescription narcotics and controlled substances.<sup>17</sup> Like all deploying soldiers, a medical professional screened appellant during pre-mobilization, reviewed appellant's medical records, and wrote prescriptions for medication appellant was allowed to take in theater. (R. at 62.) Appellant received four prescriptions to carry with him, none of which were for Zolpidem, Diazepam, or Oxycodone. (Pros. Ex. 30). Given his experience and position, this fact alone indicates that appellant knew or should have known he could not possess the charged controlled substances.

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<sup>17</sup> Federal circuit courts have accepted this inference in the context of financial crimes when dealing with intent and knowledge of the law. *See United States v. Scholl*, 166 F.3d 964, 40 (9th Cir. 1999) (holding "Furthermore, a jury may infer knowledge of the law from a defendant's education and expertise.") and *United States v. Simon*, 85 F.3d 906, 12 (2d Cir. 1996) (holding "the trier of fact may properly consider the general educational background and expertise of the defendant as bearing on the defendant's ability to form the requisite willful [sic] intent."

Beyond his professional credentials and experience, appellant's actions prove knowledge beyond a reasonable doubt. In addition to the medication prescribed to him at the Fort Hood mobilization site, appellant carried thirty-three tablets of Zolpidem in an unmarked canister. (Pros. Ex. 12). Similarly, appellant mixed Oxycodone and Diazepam pills from long expired prescriptions in a bottle he received in Kuwait. (Pros. Ex. 11). He concealed the nature of the pills rather than carry them in their original containers. The very fact that he took such steps shows his consciousness of guilt and knowledge of the pills' contraband nature. *United States v. Tanner*, 53 M.J. 778 (A.F. Ct. Crim. App. 2000) (holding that an airman's demeanor and actions during a urinalysis may be sufficient to show her consciousness guilt and knowledge of the contraband, and therefore the permissive inference of knowledge was appropriate). This circumstantial evidence proved beyond a reasonable doubt that appellant knowingly possessed controlled substances without legal justification. 10 U.S.C. § 912a; Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 7-3 (29 Feb. 2020) [Benchbook]; *King*, 78 M.J. at 221.

Appellant's convictions for wrongful possession are legally and factually sufficient. When viewed in the light most favorable to the government, the evidence shows the conviction is legally sufficient. Further, after weighing the evidence this court can be assured of appellant's guilt beyond a reasonable doubt.

The evidence, both direct and circumstantial, show appellant possessed the drugs without legal justification as his prescriptions had long expired. *United States v. Rosario*, 76 M.J. at 117. Therefore, when considering the evidence in the light most favorable to the government, a reasonable factfinder certainly could have found all the essential elements beyond a reasonable doubt. *United States v. Turner*, 25 M.J. at 324.

**B. Appellant abused his position to steal military property from the USMH-K pharmacy.**

The convictions for Specifications 1, 2, 3, 4, 5, 7, 8, and 9 of Charge IV are legally and factually sufficient. The significant direct and circumstantial evidence supports the convictions for all specifications challenged. Appellant's reiteration of the defense theory at trial is an unpersuasive argument as it is not supported by the evidence.<sup>18</sup> This theory was rejected at trial and this court should do the same on appeal.

**Additional Facts**

Appellant gave the MPs a handwritten list of some of the medications he had in his living quarters, including Metformin and Metoprolol, that "he wasn't

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<sup>18</sup> Appellant raises defense counsel's theory that appellant printed labels to avoid seizure of the medication by customs when returning to the United States, which cuts directly against appellant's earlier assertion that his possession of narcotics was not wrongful. (Appellant's Br. at 22).

supposed to have.”<sup>19</sup> (R. at 129; Pros. Ex. 105). Appellant further admitted self-prescribing Metoprolol XL (Toprol XL), Metformin, and Citalopram, and explained that the missing Hydroxychloroquine totaled 200 pills. (Pros. Ex. 40). He also claimed to have been prescribed Ketorolac<sup>20</sup> from the Veteran’s Administration (VA) or “Darnell.”<sup>21</sup> Appellant was not prescribed Ketorolac during his pre-mobilization processing. (Pros. Ex. 30). Likewise, there are no prescriptions for Ketorolac in appellant’s VA records. (Pros. Ex. 34).

Law enforcement’s search of appellant’s living quarters yielded significant evidence. Military Police recovered an unopened bottle with the prescription number AA115108. (Pros. Ex. 60, Pros. Ex 63). This matched a prescription for a fifty-day, fifty-pill supply of Metoprolol Tartrate purportedly prescribed to appellant by Major (MAJ) RA. (Pros. Ex. 103, p. 2). Military Police also recovered a bottle of sixty 200 mg pills of Albendazole with a prescription number ending in 5107. (Pros. Ex. 64, Pros. Ex. 67).<sup>22</sup> This information matches a prescription for appellant also allegedly ordered by MAJ RA. (Pros. Ex. 103, p. 3).

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<sup>19</sup> Metoprolol is a drug used to treat high blood pressure or hypertension. (R. at 91 and 226).

<sup>20</sup> Ketorolac is an anti-inflammatory that can also be used for pain management. (R. at 92).

<sup>21</sup> “Darnell” appears to be a typographical error when referencing the Carl. R. Darnall Medical Center at Fort Hood, TX (Pros. Ex. 30).

<sup>22</sup> The prescription shows “Albenza” which appears to be a shortened name for Albendazole. Albendazole is a deworming drug. (R. at 91).

The MPs additionally found half of a round, white pill with the partial marking of “A m”. (Pros. Ex. 9). The partial pill was roughly five millimeters in size. (Pros. Ex. 9). The marking “A ms” on a round, white, unbroken ten millimeter pill denotes Metoprolol XL (Tropol XL). (Pros. Ex. 22). Additionally, the lettering font, size, and format of a capital “A” on top and lowercase “m” offset below it found on the partial pill perfectly matches the lettering font, size, and format found on a standard Metoprolol XL (Tropol XL) pill. (Pros. Ex. 9, Pros Ex. 22). Military Police also discovered a bottle of Ketorolac. (Pros. Ex. 73). Both Metoprolol XL (Tropol XL) and Ketorolac appear on the prescription inquiry as having been prescribed to appellant. (Pros. Ex. 103). Finally, the MPs seized a large number of Piroxicam pills from appellant’s quarters.<sup>23</sup> (Pros. Ex. 76-82, Pros. Ex. 85-89).

The government called three medical providers to testify regarding the prescriptions and medications. Colonel (COL) JO testified that he had no recollection of prescribing appellant Ketorolac, Piroxicam, or Hydroxychloroquine, despite being listed as the authorized provider for all three medications. (Pros. Ex. 103; R. at 249-50, 252). The prescription inquiry listed LTC EZ as the ordering physician for the 1 July 2020 Piroxicam prescription, but he testified that he did not prescribe Piroxicam to appellant. (R. at 211; Pros. Ex.

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<sup>23</sup> Piroxicam is a non-steroidal used for pain management. (R. at 250).

36). Major RA testified he had no memory of prescribing the appellant Alebndazole or Metoprolol Tartrate. (R. at 227-28). Major RA further testified, on cross examination, that he gave appellant verbal authorization for Piroxicam. (R. at 242).

Sergeant First Class ML testified that the drugs within the pharmacy have monetary value. (R. at 67-68). SFC ML testified that the pharmacy carried Metformin, Albendazole, Ketorolac, and Piroxicam. (R. at 67).<sup>24</sup> He further testified that the pharmacy carried “Metoprolol” but did not specify XL or Tartrate. (R. at 67). The government also called two soldiers listed as having entered prescriptions for appellant into the TC-2 system. Sergeant VW purportedly entered a prescription for Hyrdroxychloroquine on 29 July 2020. (Pros. Ex. 36, p. 7). Sergeant VM testified that she did not recall entering that prescription. (R. at 195). Corporal ND supposedly entered the 31 July 2020 prescription for Ketorolac. (Pros. Ex. 103). Corporal ND testified that he did not recall entering

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<sup>24</sup> Medicine contained within the USMH-K pharmacy is military property as the medicine was owned, held, and used by the U.S. Army. 10 U.S.C. § 921, *MCM*, pt. IV, ¶64.c.(1)(h). Further, the medication in the pharmacy was of a type and kind issued for use in, or furnished and intended for, the military service of the United States. *Hemingway*, 36 M.J. at 351.



that prescription. (R. at 173). The remaining prescriptions in question were entered by appellant. (Pros. Ex. 36, Pros. Ex. 103).<sup>25</sup>

### **1. Charge IV, Specification 1: Larceny of Metformin**

Appellant relies on an absence of direct evidence when citing a lack of testimony regarding missing Metformin, but this ignores the fact that the government may prove elements through circumstantial evidence. *King*, 78 M.J. at 221. Appellant had access to Metformin and the prescription entry system. (R. at 67, 71). The evidence at trial demonstrates that appellant had the means to manipulate the system in such a way so that his theft would not create discrepancies or indicate that pills were missing, as they had been self-prescribed via false pretenses. (R. at 69, 71, 130, 225; Pros. Ex. 32, Pros. Ex. 40, Pros. Ex. 105).

Appellant's argument is predicated on disregarding of the evidence presented. Appellant admitted to wrongfully possessing self-prescribed medication. (R. at 130; Pros. Ex. 40, Pros. Ex. 105). In light of that admission, MAJ RA's testimony that he never prescribed the medication logically implies that appellant fraudulently entered prescriptions into the system to steal the government property in question. (Pros. Ex. 32, R. at 225). The presence of the Metformin

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<sup>25</sup> These prescriptions, which appellant did not have the authority to enter on his own behalf, include Metformin, Metoprolol XL, Albendazole, Metoprolol Tartrate, both Piroxicam prescriptions.

discovered in appellant's living quarters proves this.<sup>26</sup> (Pros. Ex. 23; Pros. Ex. 10). Metformin was carried by the USMH-K pharmacy and can logically be said to be intended for the military service of the United States. (R. at 67). *Hemingway*, 36 M.J. at 351. The evidence supports that appellant used the TC-2 system to fill and dispense a fraudulent prescription for Metformin which was military property.

## **2. Charge, IV Specification 2: Larceny of Metoprolol XL (Tropol XL).**

The only reasonable inference from the evidence is that appellant took Metoprolol XL (Tropol XL) from the USMH-K pharmacy.<sup>27</sup> Metoprolol XL (Tropol XL) appears on the USMH-K inventory, circumstantial evidences shows that the USMH-K pharmacy carried it. (Pros. Ex. 103; Appellant's Br. 10). Appellant admitted to wrongly dispensing the medicine for himself along with two drugs, Citalopram and Metformin, confirmed to have been carried by the USMH-K pharmacy. (Pros. Ex. 40, Pros. Ex. 105; R. at 67). He further admitted that he should not have the Metoprolol XL. (Pros. Ex. 40, Pros Ex 105; R. at 130). These facts combined with the presence of Metoprolol XL on the prescription inquiry

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<sup>26</sup> Appellant's argument that law enforcement would have found more pills in his living quarters is unpersuasive; a larceny is complete when the property is taken or withheld with the intent to permanently deprive the owner—in this case, the military—of its use and benefit. *Sierra*, 62 M.J. at 543.

<sup>27</sup> Appellant does not raise a legal sufficiency argument in his brief regarding Charge III, Specification II. Appellant only references factually sufficiency as to military property and possession in his brief. (Appellant's Br. 23).

show that the drug was taken from the USMH-K pharmacy, and is thus military property. *Hemingway*, 36 M.J. at 351. (Pros. Ex. 103).

Further, law enforcement found a broken round white pill bearing the partial marking of “A ms” in appellant’s quarters, and his unlawful possession proves he stole the medication. (Pros. Ex. 9). “A ms” on a round, white, ten-millimeter pill is the imprint used to denote the pill is Metoprolol XL (Tropol XL). (Pros. Ex. 22). A factfinder comparing the pill seized to the images contained in Pros. Ex. 22 could come to no other reasonable conclusion than that the pill was Metoprolol XL (Tropol XL). The government produced clear evidence that the USMH-K pharmacy stocked Metoprolol XL (Tropol XL) and overwhelming circumstantial evidence that the appellant possessed the pills from the pharmacy after acquiring them through false pretenses. *See King*, 78 M.J. at 221. (holding that the government may meet its burden with circumstantial evidence).

### **3. Charge IV, Specifications 3, 4, & 5: Larceny of Albendazole, Metoprolol Tartrate, and Ketorolac.**

Appellant apparently concedes that the drugs in question were found in his quarters and that the pills were what the government claimed them to be.

Appellant points to a lack direct evidence that the drugs were military property to

support his claim.<sup>28</sup> (Appellant's Br. 11-13). However, SFC ML testified that the pharmacy carried Albendazole and Ketorolac. (R. at 67). SFC ML further testified that the pharmacy carried "Metoprolol" but did not specify Metoprolol Tartrate. (R. at 67). Additionally, there is overwhelming circumstantial evidence to prove that the Albendazole, Metoprolol Tartrate, and Ketorolac seized from appellant's quarters were military property. *See King*, 78 M.J. at 221 and *Hemingway*, 36 M.J. at 351. The argument that the government did not present evidence that the pills were from the USMH-K pharmacy ignores the direct and circumstantial evidence that clearly makes that connection.

The data on the Albendazole bottle's label matches the prescription found in the USMH-K pharmacy. The matching data includes the identical type of drug, identical amount prescribed, identical size of pill, and the last four digits of the prescription number. (Pros. Ex. 64; Pros. Ex. 67; Pros. Ex. 103).<sup>29</sup> This is irrefutable evidence that the Albendazole in appellant's possession was military property. Appellant's apparent demand for more direct, tangible evidence connecting appellant to larceny of military property ignores the overwhelming amount and weight of circumstantial evidence.

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<sup>28</sup> Again, appellant appears to only contest that the drugs found in his possession were military property and, as such, only the legal and factual sufficiency of that element will be discussed.

<sup>29</sup> MAJ RA had no recollection of prescribing Albendazole to appellant despite his name appearing as the prescribing physician. (Pros. Ex. 103; R. at 227).

Law enforcement found bottles of Metoprolol Tartrate and Ketorolac in appellant's quarters. (Pros. Ex. 63, Pros. Ex. 73). The prescription inquiry contained both medications showing the pharmacy stocked them. (Pros. Ex. 103). Appellant inappropriately entered the Metoprolol Tartrate prescription for himself. (Pros. Ex. 103). Likewise, appellant used CPL ND's name without authority to enter the Ketorolac prescription. (R. at 173; Pros. Ex. 103). Additionally, the prescription found on the bottle of Metoprolol Tartrate matches the prescription in the inquiry exactly. (Pros. Ex. 60, Pros Ex 103, p. 2). Appellant fraudulently filled prescriptions for both medications using different providers' names.<sup>30</sup> (R. at 228; R. at 249).

Furthermore, appellant's claim that the inquiry shows it was a "test" is not persuasive given the other evidence surrounding the Metoprolol Tartrate. (Appellant's Br. 12). The bottle matching the inquiry is clear evidence that the most recent prescription entry was not a test but rather the medication was dispensed. This fact is supported by the second entry on the inquiry which reads "dispensed." (Pros. Ex. 60, Pros. Ex. 103, p. 2). In the light of this evidence, there is no reasonable explanation for the origin of the Metoprolol Tartrate and Ketorolac found in appellant's quarters other than the USMH-K pharmacy.

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<sup>30</sup> At trial MAJ RA testified he had no recollection of prescribing appellant Metoprolol Tartrate while COL JO testified to the same regarding Ketorolac. (Pros Ex. 103; R. at 228, 249).

Appellant's claim that the government failed to verify that the medication was military property ignores the substantial circumstantial evidence the government used to verify that fact. *See Hemingway*, 36 M.J. at 351 (in which circumstantial evidence was used to determine stolen money was military property). This court can be satisfied that the evidence adduced at trial shows beyond a reasonable doubt that the appellant stole military property in the form of Albendazole, Metoprolol Tartrate, and Ketorolac from the USMH-K pharmacy.

#### **4. Charge IV, Specification 7: Larceny of Hydroxychloroquine.**

Appellant relies on a misstatement of the law to argue that his conviction for Specification 7 of Charge IV is insufficient.<sup>31</sup> (Appellant's Br. 14, 25). Appellant contends that the government did not prove that he stole the Hydroxychloroquine by unpersuasively arguing that because the government failed to prove continued *possession* of Hydroxychloroquine, his conviction for *larceny* of Hydroxychloroquine cannot stand.<sup>32</sup> He points to the fact that law enforcement did not find Hydroxychloroquine in his living quarters as proof that someone simply misplaced the drug. (Appellant's Br. 25). Appellant further argues that law

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<sup>31</sup> Appellant's argument references a lack of proof of possession of the property. Possession is not an element of larceny. Further, larceny is complete when the property is taken or withheld with the intent to permanently deprive the government of its use and benefit. *Sierra*, 62 M.J. at 543.

<sup>32</sup> Appellant apparently does not contest that the Hydroxychloroquine was military property, that was taken without authority by someone, with the intent to deprive permanently.

enforcement's investigation was deficient in eliminating other potential perpetrators. (Appellant's Br. 25). However, the evidence is clear that neither the lack of Hydroxychloroquine in appellant's living quarters nor the alleged deficiencies in the law enforcement investigation amount to reasonable doubt.

The circumstantial evidence unequivocally shows that appellant abused the TC-2 system to fraudulently enter a Hydroxychloroquine prescription for himself. *See King*, 78 M.J. at 221. Two bottles of Hydroxychloroquine were missing from the pharmacy which appellant told law enforcement totaled 200 pills. (R. at 74; Pros. Ex. 40).<sup>33</sup> Two hundred pills of Hydroxychloroquine prescribed to appellant were dispensed on 29 July 2020. (Pros. Ex. 36, p. 7). Appellant used other soldiers' names to conceal his abuse of the system. Colonel JO stated that he never prescribed Hydroxychloroquine to appellant. (R. at 251). Further, SGT VW stated that she did not recall entering the prescription into the system. (R. at 195). The matter of on-going possession is immaterial.<sup>34</sup> That does nothing to cast doubt upon the larceny itself.

Appellant's argument that law enforcement should have investigated other potential suspects is unsupported by the evidence. Only the pharmacy personnel

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<sup>33</sup> The presence of the Hydroxychloroquine in the USMH-K pharmacy shows that drug was issued for use in, or furnished and intended for, the military service of the United States and thus was military property. *Hemingway*, 36 M.J. at 351.

<sup>34</sup> Forty days elapsed from the dispensing of the medicine to the search of appellant's quarters.

had access to the vault containing the Hydroxychloroquine. (R. at 81). The missing pills were only discovered during left seat-right seat transition as new pharmacy unit was set to take over, which, paired with the regular inventories, limits the pool of those who had access to appellant and the pharmacy personnel. (R. at 69, 73-74). There was no reason to believe, or evidence in the record to support, that anyone other than the appellant was abusing the TC-2 system and stealing from the pharmacy. After LTC EG and SFC ML, the incoming OIC and outgoing NCOIC of the pharmacy, discovered missing Hydroxychloroquine tied to appellant's patient number in the TC-2 system, they checked the system further and discovered appellant had a concerning number of prescriptions, purportedly issued by several providers. Their suspicions led them to alert Military Police. Armed with this information, law enforcement took adequate steps to investigate the larceny and understandably followed the only lead that flowed from the evidence, eliminating other pharmacy workers as the investigation led them to appellant.

This court can be certain of appellant's guilt as the evidence establishes that appellant abused the system to take Hydroxychloroquine from USMH-K pharmacy without authority and with the intent to permanently deprive the military of its property.



## **5. Charge IV, Specifications 8 & 9: Larceny of Piroxicam.**<sup>35</sup>

Appellant's convictions for larceny of Piroxicam are legally and factually sufficient as appellant's actions and the actual prescriptions entered into and dispensed by the TC-2 system show his guilt beyond a reasonable doubt. Appellant relies solely on testimony from MAJ RA, obtained on cross examination, that he verbally authorized a Piroxicam prescription. Defense counsel questioned MAJ RA several times during cross examination about this verbal authorization. The line of questioning began with his uncertain recollection of a conversation with the prosecution. (R. at 238). Major RA eventually affirmed that he gave a verbal authorization to enter a Piroxicam prescription *under MAJ RA's name*. (R. at 239). Major RA explained that the process was uncommon in the military and he could not remember if the prescription was for Piroxicam or another anti-inflammatory medicine. (R. at 240). Finally, MAJ RA stated that he would not typically give verbal authorization but did in this instance for appellant. (R. at 242).

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<sup>35</sup> Appellant seemingly only contests that he wrongfully took, obtained, or withheld the Piroxicam and appears to not challenge the remaining elements of larceny. SFC ML testified that the USMH-K pharmacy carried Piroxicam. (R. at 67). The fact that the Army hospital in Kuwait carried indicates that the drug was issued for use in, or furnished and intended for, the military service of the United States and thus was military property. *Hemingway*, 36 M.J. at 351.


This testimony is inconsistent with the other evidence in the case. Surely appellant would have felt comfortable using MAJ RA's name if he actually did have verbal authorization to do so. Appellant clearly had no issue using MAJ RA's name as provider for other medication for which he did not have prescriptions. (Pros. Ex. 32, Pros. Ex. 103). Even assuming *arguendo* that MAJ RA gave the verbal authorization, it was only for appellant to enter the prescription *under MAJ RA's name*, not anyone else's; yet, appellant used LTC EZ and COL JO's names instead. (Pros. Ex. 36, pp. 9, 12). It is clear that appellant acted well outside the scope of MAJ RA's supposed verbal authorization when entering the two Piroxicam prescriptions, abusing the system without authorization.

Further, the very nature of the prescription entered indicates that appellant was not innocently following the verbal authorization of MAJ RA. Appellant filled two prescriptions for a total of 360 pills of Piroxicam over a span of seven days. (Pros. Ex. 36). The dosage for both prescriptions was one pill to be taken once a day. (Pros. Ex. 36, pp. 9, 12). Appellant thus entered and dispensed nearly one year's worth of the drug in those two instances, just a week apart, under false pretenses. That cannot reasonably be squared with someone — let alone a pharmacist — acting under the verbal authorization of a medical provider. Simply put, appellant's argument that he was acting under a valid verbal authorization is not supported by a fair reading of the evidence presented at trial. The only


reasonable inference from the evidence is that appellant did not act within the purported verbal authority; rather, he stole the medicine without authority through false pretenses.<sup>36</sup>

### **Conclusion**


WHEREFORE, the government respectfully requests this honorable Court affirm the findings and sentence as approved by the convening authority.




CPT, JA  
Appellate Attorney, Government  
Appellate Division



JACQUELINE J. DEGAINE  
LTC, JA  
Deputy Chief, Government  
Appellate Division



KALIN P. SCHLUETER  
MAJ, JA  
Branch Chief, Government  
Appellate Division



CHRISTOPHER B. BURGESS  
COL, JA  
Chief, Government  
Appellate Division

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<sup>36</sup> If this court finds any or all of the contested convictions insufficient, the adjudged sentence would still be appropriate. Given the limitations of the plea agreement, this court can be reasonably certain appellant would have been dismissed for any surviving offenses. *See United States v. Winckelmann*, 73 M.J. 11, at 15-16 (C.A.A.F. 2013).

# APPENDIX

**United States v. Feliciano**

United States Army Court of Criminal Appeals

August 22, 2016, Decided

ARMY 20140766

**Reporter**

2016 CCA LEXIS 512 \*

UNITED STATES, Appellee v. Private E-2 JEFFRY A. FELICIANO, JR., United States Army, Appellant

**Notice:** NOT FOR PUBLICATION

**Subsequent History:** Review granted by, in part United States v. Feliciano, 76 M.J. 37, 2016 CAAF LEXIS 1042 (C.A.A.F., Dec. 5, 2016)

Motion denied by United States v. Feliciano, 76 M.J. 131, 2017 CAAF LEXIS 178 (C.A.A.F., Feb. 16, 2017)

Affirmed by United States v. Feliciano, 2017 CAAF LEXIS 482 (C.A.A.F., May 17, 2017)

**Prior History:** [\*1] Headquarters, I Corps. Andrew J. Glass, Military Judge (arraignment), Samuel A. Schubert, Military Judge (trial), Colonel Randall J. Bagwell, Staff Judge Advocate (pre-trial), Lieutenant Colonel Christopher A. Kennebeck, Acting Staff Judge Advocate (post-trial).

**Counsel:** For Appellant: Lieutenant Colonel Charles D. Lozano, JA; Major Christopher D. Coleman, JA; Captain Jennifer K. Beerman, JA (on brief).

For Appellee: Colonel Mark H. Sydenham, JA; Major Daniel D. Derner, JA; Captain Steve T. Nam, JA (on brief).

**Judges:** Before CAMPANELLA, PENLAND, and WOLFE, Appellate Military Judges. Senior Judge CAMPANELLA and Judge PENLAND concur.

**Opinion by:** WOLFE

**Opinion**

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MEMORANDUM OPINION

WOLFE, Judge:

We discuss three issues in this appeal.<sup>1</sup> First, we address appellant's assigned errors that the evidence is legally and factually insufficient. After reviewing the record, we find the evidence both legally and factually sufficient. Next, we determine that appellant's two convictions for attempted sexual assault were unreasonably multiplied when there was only a single attempt. Accordingly, we conditionally dismiss one of the specifications. Finally, we discuss the military judge's instructions to the panel on sex offender registration. As we [\*2] find the military judge did not commit error, we order no relief.

At a general court-martial, appellant pleaded guilty to one specification of disrespect towards a non-commissioned officer, one specification of disobeying a non-commissioned officer, two specifications of wrongfully using marijuana, and one specification of being disorderly, in violation of Articles 91, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 891, 912a, 934 (2012) [hereinafter UCMJ]. Contrary to his pleas, an officer and enlisted panel convicted appellant of two specifications of attempted sexual assault in violation of Article 120, UCMJ. The court-martial sentenced appellant to be discharged from the Army with a bad-conduct discharge, to be confined for one year, to forfeit all pay and allowances, and to be reduced to the grade of E-1. The convening authority approved the sentence as adjudged.

## BACKGROUND

On 22 January 2011, appellant, Specialist (SPC) Schwartz and Private (PV2) KF went out drinking. As the night out [\*3] concluded, SPC Schwartz drove the trio back to the barracks. En route, they were pulled over by the police. Specialist Schwartz barely passed a breathalyzer test. The officer released them after determining that SPC Schwartz was the *most* sober individual. They then drove back to the barracks, stopping to buy more alcohol. When they returned to the barracks, appellant and PV2 KF continued drinking. Eventually, all three went to bed in appellant's bed. Specialist Schwartz, however, eventually left the bed to sleep in a nearby chair. Specialist Schwartz awoke a short time later to see appellant on top of PV2 KF. Appellant was holding himself up with one hand while "starting to pull his britches down" with the other. Specialist Schwartz testified that PV2 KF's "britches" were around her knees. Later he answered the question, "where were her pants?" by saying "By her knees." He also testified that she was saying "no, no, no" and that she was in "a state of unconsciousness" and was "passed out." SPC Schwartz confronted appellant and told appellant that "what he was doing was rape" and "that if he continued along they would definitely get him for rape. . . ." Appellant responded by saying [\*4] "You know what? You're right" and got off of PV2 KF.

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<sup>1</sup> Appellant also personally raised several issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Except for appellant's claim of unreasonable multiplication of charges, the matters raised by appellant warrant neither discussion nor relief.

Private KF was not called by the government. She testified briefly for the defense. Appellant did not testify.

## LAW AND ANALYSIS

### *A. Factual and Legal Sufficiency*

In accordance with Article 66(c), UCMJ, we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (internal citations omitted); *see also United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). In resolving questions of legal sufficiency, we are "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325.

Appellant's claim that the evidence is legally and factually insufficient boils down to questioning the credibility of SPC Schwartz. By the time of trial, SPC Schwartz had been chaptered out of the Army for using marijuana. The [\*5] defense called five witnesses who said SPC Schwartz had a reputation for being untruthful. Additionally, the defense elicited from SPC Schwartz that he was a reluctant witness and that he was testifying, at least in part, in order to get the per diem accorded to travelling witnesses. The government responded that none of the reputational witnesses were aware of SPC Schwartz ever lying to them, and that he was entirely honest when directly confronted.

The following exchange between the defense counsel and SPC Schwartz demonstrates his bluntness while testifying:

Q: And you've already testified that you're not employed at all so you're not getting any money from an employer? A: No, sir.

Q: Now, you are getting per diem for participating in this trial, aren't you?

A: Yes, sir.

Q: So they're paying you a few hundred dollars to come out here and be present?

A: I guess. I haven't been told anything really about any money.

Q: And outside in this waiting room just a few minutes ago you said "I don't care about this. I'm just doing this for the money?"

A: I don't care about this. Even when [appellant and PV2 KF] were in my life, they were menial [sic] people to me.

Q: And you're just doing this for [\*6] the money?

A: I'm doing this to tell the truth. Also for the money.

Q: Get a few hundred extra dollars?

A: Oh, yeah. Everybody can use some money.

A short while later, the trial counsel attempted to rehabilitate SPC Schwartz and give him an opportunity to explain why he was testifying. The trial counsel was only partially successful:

Q: Mr. Schwartz, why are you testifying today?

A: Well, I told that girl back in 2011 that I would do whatever she decided. I mean, it took quite a while for her to decide what she was going to do. And I feel that it's right to testify for her. But at the same time, I do need the money. I am having a baby and I am unemployed. So yes, I do need the money.

Certainly, appellant's view that SPC Schwartz's testimony presents clear evidence of bias is a reasonable one. However, on the other hand, SPC Schwartz's lack of defensiveness may also be viewed as a display of unusual candor. Specialist Schwartz did not shy away from the allegation of bias.

In *United States v. Crews* we discussed the relative disadvantage of an appellate court in attempting to assess credibility from a cold transcript:

The deference given to the trial court's ability to see and hear the witnesses [\*7] and evidence—or "recogni[tion]" as phrased in Article 66, UCMJ—reflects an appreciation that much is lost when the testimony of live witnesses is converted into the plain text of a trial transcript. While court-reporter notes may sometimes reflect a witness's gesture, laugh, or tearful response, they do not attempt to reflect the pauses, intonation, defensiveness, surprise, calm reflection, or deception that is often apparent to those present at the court-martial. A panel hears not only a witness's answer, but may also *observe* the witness as he or she responds. For instance, a transcript may state "I am showing the witness prosecution exhibit 13 for identification" but will leave unstated the witness's demeanor—whether surprise, recognition, or dread, when reviewing or confronted with evidence.

To say that an appellate court is at a relative disadvantage in determining questions of fact as compared to a trial court is to state the obvious.

*United States v. Crews*, ARMY 20130766, 2016 CCA LEXIS 127, at \*11-12 (Army. Ct. Crim. App. 29 Feb. 2016). Similarly, in *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015) (en banc), we noted that "the degree to which we 'recognize' or give



deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witness [\*8] is at issue." At least as far back as 1990, we discussed the degree of deference given to a trial court's ability to see the witnesses. *United States v. Johnson*, 30 M.J. 930, 934 (A.C.M.R. 1990) (inartfully stating that we "hesitate to second-guess" a trial court's findings that depend on credibility determinations).

Put differently, we are required to make credibility determinations on appeal, but those determinations are made with the "admonition" that we recognize the trial court's superior position in making those determinations. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Thus, while we give no deference to the factual sufficiency *decisions* of the trial court, *Id.*, our assessment of the evidence must be sifted through a filter that recognizes our inferior fact-finding viewpoint.

With this recognition, we assess SPC Schwartz to be credible. Accordingly we affirm the findings as factually and legally sufficient in all but one regard. As alleged, appellant was charged with, and found guilty of, attempted sexual assault by pulling down PV2 KF's pants *and underwear*. The record is devoid of any evidence, regardless of credibility, regarding whether appellant pulled down PV2 KF's underwear and that part of the specification is therefore legally insufficient. Accordingly, we will provide [\*9] relief in our decretal paragraph.

### *B. Unreasonable Multiplication of Charges*

Appellant was convicted of attempted sexual assault under the theory that PV2 KF was incapacitated and under the theory that appellant was attempting to commit a sexual assault by bodily harm. At trial, while appellant successfully objected to the two offenses as being unreasonably multiplied for sentencing, he never objected to the offenses as being unreasonably multiplied for findings. Additionally, while the two offenses appeared to have been charged in the alternative, (to address SPC Schwartz's perhaps conflicting testimony that PV2 was both unconscious and saying "no"), the government never explicitly stated so. Accordingly, this case falls outside our superior court's decision in *United States v. Elespuru*, 73 M.J. 326, 329-30 (C.A.A.F. 2014)(dismissing a specification where the government states it was charged in the alternative.).

Therefore, appellant has forfeited any error. Additionally, the detailed motion practice on merging the specifications for sentencing show that appellant was at the threshold—if not crossing it—of waiving the error. In short, there was no error by the military judge, plain or otherwise. Nonetheless, as an exercise of our discretionary authority [\*10] under Article 66(c) we will notice the issue and provide relief.

We find the *Quiroz* factors weigh in favor of dismissing one specification. *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001). Specifically, we give great weight to our determination that a conviction for two specifications of attempted sexual assault unreasonably exaggerated appellant's criminality.

Accordingly, we *conditionally* dismiss Specification 1 of Charge I, which alleged an attempted sexual assault while PV2 KF was substantially incapable of apprising the nature of the sexual act. *See United States v. Britton*, 47 M.J. 195, 203 (C.A.A.F. 1997)(J. Effron concurring); *United States v. Hines*, 75 MJ 734 , 2016 CCA LEXIS 439, \*7-8 fn4 (Army. Ct. Crim. App. 27 Jul. 2016); *United States v. Woods*, 21 M.J. 856, 876 (A.C.M.R. 1986). Our dismissal is conditional on Specification 2 of Charge I surviving the "final judgment" as to the legality of the proceedings. *See* Article 71(c)(1) (defining final judgment as to the legality of the proceedings).

### *C. Sentencing Instructions on Sex Offender Registration*

At the presentencing proceedings, appellant introduced two unsworn statements. The first unsworn statement consisted of training certificates and family photos.<sup>2</sup> The second unsworn statement was read by appellant's counsel and consisted entirely of the following:

"I am Jeffrey A. Feliciano, Junior. I am a registered sex offender." This is the panel's findings [\*11] on Charge I and that is a phrase that Private Feliciano will now say the[] rest of his life. He will not be permitted to pick [his child] up from school, or attend school sporting events. He is, for the rest of his life, a sex offender.

The military judge then gave the panel sentencing instructions. Over defense objection, the instructions included the following:

The accused's unsworn statement included the mention that the accused will have to register as a sex offender. An unsworn statement is a proper means to bring information to your attention, and you must give it appropriate consideration. Your deliberations should focus on an appropriate sentence for the accused for the offenses of which the accused stands convicted. Under DOD instructions, when convicted of certain offenses, including an offense here, the accused may have to register as a sex offender with appropriate authorities in the jurisdiction in which he resides, works, or goes to school. Such registration [\*12] is required in all 50 states; though the requirements may differ between jurisdictions. Thus, specific requirements are not necessarily predictable.

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<sup>2</sup>Government counsel did not object to the use of photos as an unsworn statement or the unsworn statements of *others* (as contained in various training certificates) being introduced as the unsworn statement *of the accused*.

It is not your duty to attempt to predict sex offender registration requirements, or the consequences thereof.

While the accused is permitted to address these matters in an unsworn statement, these possible collateral consequences should not be part of your deliberations in arriving at a sentence. Your duty is to adjudge an appropriate sentence for this accused based on the offenses for which he has been found guilty that you regard as fair and just when it is imposed and not one whose fairness depends upon possible requirements of sex offender registration, and the consequences thereof, at certain locations in the future.

In short, the military judge permitted the accused in his unsworn statement to raise the issue of sex offender registration, and then instructed the panel not to consider the information when deliberating on a sentence. Given the brevity of appellant's unsworn statement, the only portion of appellant's statement that the panel was instructed to consider during deliberations was "I am Jeffrey A. Feliciano, Junior." Nonetheless, [\*13] this instruction was not error and was consistent with our superior court's decision in *United States v. Talkington*, 73 M.J. 212, 218 (C.A.A.F. 2014).

In *Talkington*, our superior court decided that sex offender registration is: 1) a collateral effect of findings not sentencing; and 2) "is a consequence . . . that is separate and distinct from the court-martial process." *Id.* at 217 (internal citations and quotations omitted). The *Talkington* court then found no error in the military judge having told the panel that sex offender registration "should not be a part of your deliberations . . . ." *Id.* at 214, 218.

The court in *Talkington* was fully aware of the dilemma this caused. "[T]here is a 'tension between the scope of pre-sentencing unsworn statements and the military judge's obligation to provide proper instructions.'" *Id.* at 216 (internal citations omitted). However, the court did not address the tension because it was not raised. *Id.* This case presents two concerns about the current state of the law.

First, in cases such as this one, the net effect of the military judge's instructions is to tell the panel to ignore the accused's unsworn statement. At this stage of trial a panel will often be familiar with curative instructions and how they come to pass (i.e. someone made a mistake). [\*14] When the military judge tells the panel they should not consider the accused's statements about sex-offender registration it resembles a curative instruction. The danger is that a panel infers from the tailored instruction that the accused was trying to subvert the sentencing rules. That is, by telling the panel to ignore what the accused just stated, the panel may be left with the impression that the accused's statement was impermissible.<sup>3</sup> Moreover, a panel at sentencing which has just rejected an accused's

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<sup>3</sup> The panel was instructed that the accused's statements "were permissible." However, in the context of an entire trial, where matters are admitted based on rules of evidence, the members may find it perplexing that the accused is permitted to raise matters that the military judge then instructs them to disregard. And, even if the members can set aside this dissonance, they may still be left with the impression that the

theory of the case may be predisposed to adopt such a viewpoint. Here, to the extent that appellant may be seen as having invited this risk, he was informed of the military judge's instructions only after he made the unsworn statement.

Second, while correct, it is unusual for a military judge to allow inadmissible information to come in front of the panel only to then tell the panel to ignore it. The alternative—prohibiting the information from coming in the first instance—would appear to be preferable.<sup>4</sup> As the court discussed in *Talkington*, this is the turbulence caused from the convergence of two unrelated lines of cases. *Id.* at 213, 215. ("This Court has explained that while the right of allocution includes the right to present evidence that is not relevant as extenuation, mitigation, or rebuttal, the military judge may 'put the information in proper context by effectively advising the members to ignore it.'").

As *Talkington* acknowledges, this is a problem created entirely by case law, and is contrary to Rule for Courts-Martial [hereinafter R.C.M.] 1001(c)(2)(A), which limits the accused's unsworn statement to matters in extenuation, mitigation, or in rebuttal. *See also* Military Rules of Evidence [hereinafter Mil. R. Evid.] 1101 (rules of evidence applicable to sentencing); 402 (irrelevant evidence is inadmissible). It would also appear to be tautological that there is little to be gained by allowing the introduction of inadmissible information. The military judge is the presiding officer at a court-martial. R.C.M. 103(15); Article 26, UCMJ. The current state of the law would appear to elevate the right of the accused to admit irrelevant information over the military judge's authority to exclude that same information under the rules. In a case where the accused is only informed of the military judge's instructions after having made the statement, this may be to the detriment of the accused.

In our view, the "tension" described in *Talkington* is best resolved by allowing the military judge to limit unsworn statements to the matters allowed under the rules. Such a resolution [\*17] is per se not prejudicial, is in accord with the rules for court-martial, and properly reflects the military judge's role as the presiding officer. The status quo, where the military judge is prohibited from enforcing the rules for courts-martial, is at least problematic. Additionally, such an interpretation prevents the prejudice to an accused that may arise when a panel is told to give no weight to portions of an accused's unsworn statement.

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accused was using a technicality [\*15] to get impermissible information before them. There is nothing in the trial experience that would explain to panel members why it is not error to present information that they are not supposed to consider.

<sup>4</sup>Consider the following: Were a military judge to prevent an accused from mentioning sex offender registration during an unsworn statement, such an action will almost certainly be harmless error. Since the panel may be instructed to ignore the information during deliberations, there cannot be prejudice from excluding in [\*16] the first instance what the panel would be told to ignore in the second.

Nonetheless, the resolution of this issue here is entirely determined by our superior court's decision in *Talkington*. As the military judge's actions were entirely in accord with *Talkington*, there is no error, and appellant is not entitled to any relief.

## CONCLUSION

The finding of guilty of Specification 1 Charge I is *conditionally* DISMISSED. This court AFFIRMS only so much of the finding of guilty of Specification 2 of Charge I as finds that:

[appellant] did, at or near Joint Base Lewis-McChord, Washington, on or about 23 January 2011, attempt to commit the offense of aggravated sexual assault, to wit: penetrating Private (E-2) [KF]'s vulva with his penis, by causing bodily harm to her, to wit: pulling down the pants of the said Private [KF] with [\*18] the specific intent to engage in a sexual act with Private [KF], and that the accused's actions would have resulted in the commission of the offense but for the intervention of Specialist (E-4) R.S.

The remaining findings of guilty are AFFIRMED.

Applying the factors set out by our superior court in *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013), we are confident that reassessment is appropriate. There is no change to the penalty landscape because the military judge had already merged the two specifications of Charge I for sentencing. Reassessing the sentence on the basis of the noted error, the remaining findings of guilty, and the entire record, we AFFIRM the sentence as approved by the convening authority. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by our decision, are ordered restored. *See* UCMJ arts. 58b(c) and 75(a).

Senior Judge CAMPANELLA and Judge PENLAND concur.

## **United States v. Haller**

United States Navy-Marine Corps Court of Criminal Appeals

January 24, 2022, Decided

No. 202100069

### **Reporter**

2022 CCA LEXIS 50 \*; 2022 WL 200362

UNITED STATES, Appellee v. Mark E. HALLER, Lieutenant Commander (O-4),  
Medical Corps, U.S. Navy, Appellant

**Notice:** THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT UNDER NMCCA RULE OF APPELLATE PROCEDURE 30.2(A).

**Prior History:** Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Kevin S. Woodard. Sentence adjudged 22 December 2020 by a general court-martial convened at Marine Corps Base Camp Lejeune, North Carolina, consisting of a military judge sitting alone. Sentence in the Entry of Judgment: letter of reprimand and a dismissal. [\*1] <sup>1</sup>

**Counsel:** For Appellant: Captain Thomas P. Belsky, JAGC, USN.

**Judges:** Before STEPHENS, GERRITY, and DEERWESTER, Appellate Military Judges.

**Opinion by:** GERRITY

### **Opinion**

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GERRITY, Judge:

Appellant was convicted, in accordance with his pleas, of violating Article 92, Uniform Code of Military Justice, [UCMJ] for dereliction of duty for willfully failing to practice medicine in accordance with Naval standards by prescribing controlled substances to his wife and his daughter's boyfriend; of violating Article 112a, UCMJ, for wrongful possession of a controlled substance, and of violating Article 133, UCMJ, for wrongfully possessing, in his home, non-controlled prescription medications for which he had no valid, current prescription. <sup>2</sup>

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<sup>1</sup> The Convening Authority disapproved the letter of reprimand as a matter of clemency.

<sup>2</sup> 10 U.S.C. § 892, 912(a), 933 (2016).

Appellant does not assert any assignments of error.

Based on our independent review of the record of trial under Article 66, UCMJ, we question his conviction under Article 133, UCMJ. The issue is whether simple possession, without more, of [\*2] two prescription non-controlled substances in a private, off-base residence constitutes conduct unbecoming an officer. Both substances were prescribed for anxiety and sleep issues and obtained in approximately 2014; one was obtained by Appellant with a legitimate prescription but was retained after it expired, and the other was obtained from a family member while Appellant was on leave. We find insufficient factual and legal bases to support Appellant's guilty plea to this offense and take action in our decretal paragraph.

## I. BACKGROUND

A search of Appellant's on-base office and his off-base private residence found controlled substances hidden in his office and expired non-controlled prescription medicine at his home. Appellant, a Navy psychiatrist, then pleaded guilty to a willful dereliction of duty for prescribing controlled substances to his wife and his daughter's boyfriend, illegally possessing a controlled substance in his office,<sup>3</sup> and conduct unbecoming for possessing two prescription, non-controlled substance medications at his off-base home without a current valid prescription.<sup>4</sup> With respect to the Article 133 offense, Appellant possessed 13 Sertraline pills, which were properly prescribed [\*3] to him in approximately 2014, but the prescription had expired; and 9.5 Trazodone pills, which he believed he had a prescription for but were in fact given to him by a family member in approximately 2014. There was no evidence Appellant ever did anything more than simply possess these substances. The wrongfulness of the possession—relied upon by the military judge and the parties—is defined by SECNAVINST 5300.28F, dated 23 April 2019, as "possession of a . . . prohibited substance without legal or medical justification or authorization."<sup>5</sup>

## II. DISCUSSION

### A. Standard of Review

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<sup>3</sup> After prescribing a controlled substance for his wife in violation of Naval standards for practicing medicine, Appellant then wrongfully took pills out of the prescription bottle for himself and hid them in his office.

<sup>4</sup> The daughter's boyfriend had no affiliation with the military.

<sup>5</sup> Sec'y of the Navy Instr. 5300.28F, *Military Substance Abuse Prevention and Control*, para. 18 (Apr. 23, 2019) [SECNAVINST 5300.28F].

Prior to accepting a guilty plea, the military judge must ensure the plea is supported by a factual basis.<sup>6</sup> The military judge must elicit sufficient facts to satisfy every element of the offense in question, and the military judge's decision to accept a plea of guilty is reviewed for an abuse of discretion.<sup>7</sup> Questions of law arising from the guilty plea are reviewed de novo.<sup>8</sup>

A military judge abuses his discretion if a ruling is based on an erroneous view of the law or if the military judge fails to obtain an adequate factual basis for the plea—however, the factual basis is an area the military [\*4] judge is afforded significant deference.<sup>9</sup> A reviewing appellate court may only reject a guilty plea if there is a substantial basis in law or fact to question the plea.<sup>10</sup>

An accused may express his willingness to admit guilt to an offense, but that alone is not sufficient to establish the providence of a plea of guilty as it only reflects his subjective belief that his conduct as alleged was criminal. Assuming that the language of the specification sufficiently states an offense, the accused must also reveal factual circumstances that objectively establish his guilt within the "four corners" of the specification.<sup>11</sup> A conviction cannot be upheld even if an accused pleads guilty to a conduct unbecoming charge when there are not sufficient facts to reasonably support the charge.<sup>12</sup>

## **B. Providence Inquiry for Article 133**

Article 133 contains two elements: (1) that the accused did or omitted to do certain acts; and (2) that under the circumstances, these acts or omissions constituted conduct unbecoming an officer and a gentleman. When such acts are in an unofficial capacity, the acts must be ones that "in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer." [\*5]<sup>13</sup> The acts must be dishonorable and compromising, constituting serious breaches of the standards of morality and integrity, and exceeded the limit of tolerance based on customs of the service.<sup>14</sup> When the

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<sup>6</sup> *United States v. Price*, 76 M.J. 136, 138 (C.A.A.F. 2017).

<sup>7</sup> *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

<sup>8</sup> *Id.*

<sup>9</sup> *United States v. Simpson*, 77 M.J. 279, 282 (C.A.A.F. 2018) (quoting *United States v. Nance*, 67 M.J. 362, 365 (C.A.A.F. 2009)).

<sup>10</sup> *Inabinette*, 66 M.J. at 322.

<sup>11</sup> *United States v. Chambers*, 12 M.J. 443, 444 (C.M.A. 1982).

<sup>12</sup> *United States v. Norvell*, 26 M.J. 477, 480 (C.M.A. 1988) (footnote omitted).

<sup>13</sup> Article 133(c)(2), UCMJ.



government's theory of criminality is based on an enumerated article, the elements of that article, in this case Article 92, are additional elements to the Article 133 charge. The military judge properly provided Appellant both the Article 133 and 92 elements.<sup>15</sup>

The military judge instructed, consistent with the stipulation of fact between the parties, that to meet the wrongfulness element, under SECNAVINST 5300.28F, Appellant had to possess the two substances without legal or medical justification or authorization; and had to have a duty to obey the SECNAVINST. Appellant, in the stipulation of fact and during the providence inquiry, stated the only basis for the possession being wrongful was that the possession violated the SECNAVINST, as there was no legal or medical justification or authorization to possess the substances. Outside of conclusory statements by Appellant, however, the military judge did not address how this conduct by Appellant, as an officer, was dishonorable and compromising, constituting serious [\*6] breaches of the standards of morality and integrity, and exceeded the limit of tolerance based on customs of the service<sup>16</sup>

Using the violation of SECNAVINST 5300.28F for having expired medication as the sole basis for the wrongfulness of conduct unbecoming, and Appellant's assertion that the conduct was serious misbehavior, dishonorable, dishonest, morally unfitting and unworthy of someone being an officer, the military judge entered a finding of guilty consistent with Appellant's plea.<sup>17</sup>

### **C. Dishonorable and Compromising Conduct under Article 133**

Article 133 does not apply to every negative or even minor criminal fact pattern involving an officer. The focus is on the effect of the conduct on the person's status as an officer generally, not on the person's status as a professional, e.g., a doctor or an engineer.<sup>18</sup> The gravamen of the offense of conduct unbecoming an officer, when such action is in a

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<sup>14</sup> *United States v. Nelson*, 80 M.J. 748, 755-57 (N-M. Ct. Crim. App. 2021), *review granted*, 81 M.J. 452 (C.A.A.F. 2021) (mem.). *See also United States v. Giordano*, 15 C.M.A. 163, 35 C.M.R. 135, 140 (C.M.A. 1964). We note the record is silent whether such possessions would have been a violation of North Carolina or any other state law or if the possession would cause the Appellant to lose his license to practice medicine.

<sup>15</sup> The conduct unbecoming charge did not mention an orders violation but was based on wrongfully and dishonorably possessing prescription medications without a valid prescription.

<sup>16</sup> *Nelson*, 80 M.J. at 755-57.

<sup>17</sup> We note SECNAVINST 5300.28F was effective on 23 April 2019, yet Appellant was charged with and pled to wrongful possession from on or about 18 October 2017 to on or about 14 June 2019. The military judge did not address any prior order or other theory of wrongfulness prior to 23 April 2019. In the stipulation the parties agreed only to wrongful possession on 14 June 2019 and although the Appellant admitted to possession for a longer period during the providence inquiry, the military judge never addressed another theory for wrongfulness pre-23 April 2019.

<sup>18</sup> *Nelson*, 80 M.J. at 755.

private capacity, is an "action or behavior dishonoring or disgracing the officer personally, [which] seriously compromises the person's standing as an officer."<sup>19</sup>

The essential question is whether the conduct meets the standard for conduct unbecoming an officer, not whether the conduct merely amounts to some other offense. [\*7] <sup>20</sup> If the conduct constituted a criminal offense, there must still be sufficient evidence that the conduct constitutes serious breaches of standards of morality and integrity and exceeded the limit of tolerance based on customs of the service.<sup>21</sup> For an officer's conduct to be punishable under Article 133, it must be so disgraceful as to render an officer unfit for service; otherwise, every dereliction or misstep by an officer could be prosecuted as conduct unbecoming. <sup>22</sup>

Acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty exemplify behavior that violates Article 133, while conduct amounting to minor derelictions, even though criminally offensive, do not.<sup>23</sup> "If the act, though ungentlemanlike be of a trifling character, involving no material prejudice to individual rights, or offence against public morals or decorum, it will not in general properly be viewed as so affecting the reputation of the officer or the credit of the service as to be made the occasion of a prosecution under the Article."<sup>24</sup>

We must resolve the question of whether the matters elicited during the plea inquiry objectively furnished a factual predicate for Appellant's plea. [\*8] Recognizing that a military judge is entitled to much deference when it comes to accepting guilty pleas, he must nevertheless elicit facts from which he can determine the factual basis for the plea, and "mere conclusions of law recited by an accused are insufficient to provide a factual basis for a guilty plea."<sup>25</sup>

Regarding the Sertaline medication, Appellant had a legal prescription for it and simply kept it for several years beyond the expiration date. The pills were only found during a search of his private off-base residence. There was no evidence Appellant abused the

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<sup>19</sup> Article 133(c)(2), UCMJ; *See also United States v. Guaglione*, 27 M.J. 268, 271 (C.M.A. 1988).

<sup>20</sup> *Nelson*, 80 M.J. at 756 (citations omitted). This case is distinguishable from the wrongful *use* of a previously-prescribed controlled substance for a purpose other than for which it was prescribed. *See United States v. Mull*, 76 M.J. 741, 745-46 (A.F. Ct. Crim. App. 2017) (en banc).

<sup>21</sup> *Id.*

<sup>22</sup> *Guaglione*, 27 M.J. at 271.

<sup>23</sup> *MCM*, pt. IV, para. 90(c)(3).

<sup>24</sup> *United States v. Brown*, 55 M.J. 375, 382 (C.A.A.F. 2001) (quoting William Winthrop, *Military Law and Precedents* 711-12 (2d ed. 1920 Reprint) (footnotes omitted)).

<sup>25</sup> *United States v. Outhier*, 45 MJ 326, 331 (C.A.A.F. 1996) (citation omitted).

medication or even used it at all after it expired. There was no evidence of fraud or deception. There was no evidence this possession was so disgraceful to make Appellant unfit to serve. There was no evidence in the record that this possession would have even had any negative impact on Appellant's professional status or his ability to be a doctor. There was no evidence that his possession violated any state law. In sum, there was no factual basis in the record to support Appellant's conduct being so offensive as to constitute a serious breach of the standards of morality and integrity.

With regard to the Trazadone medication, [\*9] Appellant stated that he believed he had a prescription, but while on leave years ago, obtained the Trazadone on from his relative. Like the Sertaline, the pills were found during a search of the Appellant's off-base house and there was no evidence he abused the medication or even used it at all. There was no evidence of fraud or deception. There was no evidence this possession was so disgraceful to make Appellant unfit to serve. There was no evidence in the record that this possession would have even had any negative impact on his ability to be a doctor. There was no evidence that his possession violated any state law. Thus, like the possession of the Sertaline, there was no factual basis in the record to support Appellant's conduct being so offensive as to constitute a serious breach of the standards of morality and integrity.

The record contains only hollow conclusory statements from Appellant that his actions dishonored or disgraced him personally and seriously compromised his standing as an officer. But the basis for these statements was simply that Appellant had been charged with this offense and people knew he had been charged. No evidence was submitted on how possessing old [\*10] non-controlled substances was disgraceful, dishonoring, or seriously compromising to Appellant's standing as an officer. Thus, irrespective of whether or not the possession of these non-controlled substances amounted to an orders violation, without more, the evidence in the record is factually and legally insufficient to support acceptance of the guilty plea for conduct unbecoming an officer. We therefore find the military judge abused his discretion in accepting Appellant's plea to this offense and set it aside the guilty finding.

#### **D. Sentence Reassessment & Sentence Appropriateness**

Though this case arises under the 2016 Military Justice Act's [MJA 2016] sentencing scheme—with its segmented and unitary sentencing—we are only focused on the dismissal Appellant received. Because the dismissal is the only remaining part of the unitary sentence (and the only remaining part of the sentence overall following action by the

convening authority), we can proceed with the traditional sentence reassessment we have conducted prior to MJA 2016.<sup>26</sup>

Having set aside the guilty findings to Charge III and its sole Specification, we must determine if we can reassess the sentence "more expeditiously, more [\*11] intelligently, and more fairly than a new court-martial."<sup>27</sup> In reassessing sentences, we "act with broad discretion."<sup>28</sup>

If we are able to determine that the sentence imposed on Appellant, absent the error, would have been at least of a certain magnitude and no higher than would have been received without the error, we may reassess the sentence.<sup>29</sup> A sentence we seek to affirm has to be "appropriate," meaning it is not only "purged of prejudicial error [but] also . . . 'appropriate' for the offense involved." <sup>30</sup>

We look to the non-exclusive list of five factors in *United States v. Winckelmann* to determine whether to reassess a sentence or to order a sentencing rehearing: (1) whether there has been a dramatic change in the penalty landscape and exposure; (2) the forum of the court-martial; (3) whether the remaining offenses capture the gravamen of the criminal conduct; (4) whether significant aggravating circumstances remain admissible and relevant; and (5) whether the remaining offenses are the type with which we as appellate judges have experience and familiarity to reasonably determine what sentence would have been imposed at trial.<sup>31</sup>

Under all the circumstances presented, we find that we can reassess the sentence and [\*12] it is appropriate to do so. The change in the penalty landscape is minimal, as the maximum punishment for confinement has been reduced from seven years and six months to five years and six months and the plea agreement did not permit any confinement.<sup>32</sup> Appellant

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<sup>26</sup> See *United States v. Alkazahg*, 81 M.J. 764, 785 (N-M. Ct. Crim. App. 2021).

<sup>27</sup> *United States v. Winckelmann*, 73 M.J. 11, 15 (C.A.A.F. 2013) (internal quotation marks omitted).

<sup>28</sup> *Id.*

<sup>29</sup> *Nelson*, 80 M.J. at 759 (citations omitted).

<sup>30</sup> *Id.* (citations omitted).

<sup>31</sup> *Winckelmann*, 73 M.J. at 15-16.

<sup>32</sup> Although the Government and Defense originally stated the maximum confinement was six years and six months, the plea agreement stated, and all parties and the military judge agreed, that the maximum confinement was ten years and six months. However, the actual maximum confinement was seven years and six months (all parties incorrectly used five years for a violation of Article 112a for the Article 133 instead of the correct two years for an Article 92 violation). The plea agreement only allowed for a sentence of a dismissal and any other lawful punishment (in this case, a reprimand, which was disapproved during clemency) while dismissing multiple specifications which would have increased the confinement maximum by twenty-eight years to thirty-five years and six months. Looking at all the circumstances in the case, including the dismissal of multiple charges and the potential for years in confinement, we find that the error in advice by the military

was not sentenced to any confinement and the adjudged reprimand was disapproved as a matter of clemency. The remaining serious offenses relating to controlled substances, namely the possession of a controlled substance and a willful dereliction of duty by prescribing controlled substances to his wife and his daughter's boyfriend, capture the gravamen of the criminal conduct for which Appellant was sentenced. Additionally, we have significant experience and familiarity with the offenses that remain and conclude that sentence reassessment is appropriate.

Absent the error, we are confident that the military judge would have imposed a sentence no lesser than a dismissal.

With regard to sentence appropriateness, we take into account Appellant's service and personal circumstances, to include his meritorious period of sixteen years of service. However, as an officer and a doctor, he used his ability to write prescriptions for the [\*13] Navy to write prescriptions for controlled substances for his daughter's boyfriend and his wife, then wrongfully possessed the controlled substance he prescribed for his wife by taking them out of the pill bottle and then keeping them hidden in his office on base.

Considering all the circumstances, we determine that Appellant's sentence as reassessed to a dismissal, is appropriate.

### III. CONCLUSION

The findings of guilty to Charge III and its Specification are **SET ASIDE** and **DISMISSED WITH PREJUDICE**. After careful consideration of the record, the remaining findings and the reassessed sentence of dismissal are correct in law and fact and no error materially prejudicial to Appellant's substantial rights remains.<sup>33</sup> Accordingly, the remaining findings and sentence as reassessed by this Court are **AFFIRMED**.

Senior Judge STEPHENS and Judge DEERWESTER concur.

### ENTRY OF JUDGMENT

On 22 December 2020, the Accused was tried at Marine Corps Base Camp Lejeune, North Carolina, by a general court-martial, consisting of a military judge sitting alone. Military Judge Kevin S. Woodard presided.

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judge, as well as the error in the plea agreement, was not a substantial factor in Appellant's decision to plea. *See United States v. Hemingway*, 36 M.J. 349, 353 (C.M.A. 1993).

<sup>33</sup> Articles 59 & 66, UCMJ.

## **FINDINGS**

The following are the Accused's pleas and the Court's findings to all offenses the convening authority referred [\*14] to trial:

### **Charge I: Violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892.**

*Plea:* Not Guilty.

*Finding:* Guilty.

#### **Specification 1: Violation of a Lawful General Order on or about 14 June 2019 by wrongfully possessing Mitragynine.**

*Plea:* Not Guilty.

*Finding:* Dismissed.

#### **Specification 2: Violation of a Lawful General Order on or about 14 June 2019 by wrongfully possessing Methocarbamol.**

*Plea:* Not Guilty.

*Finding:* Dismissed.

#### **Specification 3: Violation of a Lawful General Order on or about 14 June 2019 by wrongfully possessing Sertraline.**

*Plea:* Not Guilty.

*Finding:* Dismissed

#### **Specification 4: Violation of a Lawful General Order on or about 14 June 2019 by wrongfully possessing Trazodone.**

*Plea:* Not Guilty.

*Finding:* Dismissed.

#### **Specification 5: Willful Dereliction of Duty between 5 March 2018 and 14 June 2019 by willfully failing to practice medicine in accordance with the standards outlined in the Manual of the Medical Department.**

*Plea:* Not Guilty.

*Finding:* Guilty.

**Charge II: Violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a.**

*Plea:* Not Guilty.

*Finding:* Guilty.

**Specification 1: Wrongful Possession of Clonazepam, a Schedule IV controlled substance on or about 14 June 2019.**

*Plea:* Not Guilty.

*Finding:* Dismissed.

**Specification [\*15] 2: Wrongful Possession of Lisdexamfetamine, a Schedule IV controlled substance, at or near Hampstead, North Carolina, on or about 14 June 2019.**

*Plea:* Not Guilty.

*Finding:* Dismissed.

**Specification 3: Wrongful Possession of Lisdexamfetamine, a Schedule IV controlled substance, at or near Marine Corps Base Camp Lejeune, North Carolina, on or about 14 June 2019.**

*Plea:* Guilty.

*Finding:* Guilty.

**Specification 4: Wrongful Possession of marijuana on or about 14 June 2019.**

*Plea:* Not Guilty.

*Finding:* Dismissed.

**Specification 5: Wrongful Use of Oxycodone on or about 14 June 2019.**

*Plea:* Not Guilty.

*Finding:* Dismissed.

**Charge III: Violation of Article 133, Uniform Code of Military Justice, 10 U.S.C. § 933.**

*Plea:* Guilty.

*Finding:* Dismissed.

**Specification: Conduct Unbecoming an Officer between on or about 18 October 2017 and on or about 14 June 2019 by wrongfully and dishonorably: possessing various prescription medications without a valid prescription; possessing various controlled substances and drug paraphernalia; prescribing controlled substances to two persons; and using Oxycodone.**

*Plea:* Not Guilty, but Guilty of wrongfully and dishonorably possessing Sertraline and Trazodone without a valid prescription.

*Finding:* Dismissed. [\*16]

## **SENTENCE**

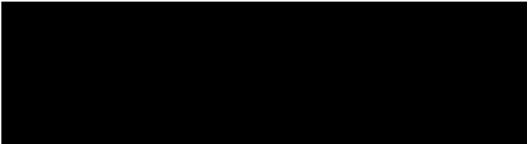
On 22 December 2020, the Accused was sentenced by a military judge. The Accused was adjudged the following sentence as modified by this Court:

**A Dismissal from the Service.**



**CERTIFICATE OF SERVICE, U.S. v. BABA (202100199)**

I certify that the foregoing was sent via electronic submission to the Defense Appellate Division, at *usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@army.mil* and on the 11th day of October, 2022.



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