

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee

v.

Warrant Officer 1  
**JOSEPH S. BURCH**  
United States Army,  
Appellant

**BRIEF ON BEHALF OF  
APPELLANT**

Docket No. ARMY 20230576

Tried at Fort Novosel, Alabama on 10 April, 28 July, and 06 November 2023 before a general court-martial appointed by Commander, Fort Novosel, Lieutenant Colonels Trevor Barna (arraignment) and Pamela Jones (trial), military judges, presiding.

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

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

- I. WHETHER THE MILITARY JUDGE ERRED WHEN, AFTER BEING ALERTED OF AN OBJECTION AND A MATERIAL DISAGREEMENT TO A TERM IN THE PLEA DEAL, SHE FAILED TO HOLD A POST-TRIAL 39A, ORDERED BRIEFS, AND *THEN* SIGNED THE ENTRY OF JUDGMENT TO AVOID HOLDING A POST-TRIAL ARTICLE 39A**
- II. WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY FAILING TO INFORM APPELLANT OF LAUTENBERG DURING HIS PROVIDENCY WHEN THE ONLY OFFENSE WAS A MISDEMEANOR (UNDER 6 MONTHS) AND THE LANGUAGE REGARDING A QUALIFYING RELATIONSHIP WAS NOT IN THE SOLE SPECIFICATION**

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<sup>1</sup> Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in the Appendix.

**III. WHETHER A SUB ROSA AGREEMENT BETWEEN GOVERNMENT AND DEFENSE COUNSEL THAT APPELLANT WAS NOT PLEADING TO A LAUTENBERG QUALIFYING OFFENSE EFFECTED THE VOLUNTARINESS OF APPELLANT'S PLEA (OR, IN THE ALTERNATIVE, WHETHER THERE WAS A MISUNDERSTANDING AS TO THE MEANING AND EFFECT OF THE GUILTY PLEA UNDER *UNITED STATES V. PARRISH*)**

**IV. WHETHER THE MILITARY JUDGE ERRED BY NOT DISCUSSING CONSENT, MISTAKE OF FACT AS TO CONSENT, OR THE DEFENSE IN THE MANUAL THAT "IT IS ALSO NOT A BATTERY TO TOUCH ANOTHER TO ATTRACT THE OTHER'S ATTENTION" WHEN APPELLANT'S ADMISSION WAS TO WAKING UP HIS SPOUSE BY TOUCHING HER WRIST**

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## Table of Contents

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Statement of the Case .....	1
Statement of the Facts.....	2
A. The Background and Plea Negotiations – Lautenberg is the Central Issue. ...	2
B. The Plea – Failing to inform of Consent, Mistake of Fact as to Consent, and the Manual for Court-Martial provision exempting the underlying behavior.....	4
<b>I. WHETHER THE MILITARY JUDGE ERRED WHEN, AFTER BEING ALERTED OF AN OBJECTION AND A MATERIAL DISAGREEMENT TO A TERM IN THE PLEA DEAL, SHE FAILED TO HOLD A POST-TRIAL 39A, ORDERED BRIEFS, AND <i>THEN</i> SIGNED THE ENTRY OF JUDGMENT TO AVOID HOLDING A POST-TRIAL ARTICLE 39A .....</b>	<b>4</b>
Additional Facts – Post Trial Processing and Government Counsel and the Military Judge’s failures to follow RCM 1101(d) and Army Regulation 27-10, para. 5-42a.....	4
Standard of Review .....	7
Law and Argument.....	7
A. Both the Military Judge and Trial Counsel failed to follow mandates to provide and review the STR to Appellant’s Trial Defense Counsel .....	7
B. Appellant alerted the court to a discrepancy and made a motion prior to the judge signing the EOJ .....	8
C. When <i>both</i> the trial counsel and military judge fail to follow binding guidance in failing to provide the STR to the defense, the EOJ should not be considered valid when there is an objection without holding a post-trial 39a ...	10
D. The OSJA is attempting to administratively separate the appellant pursuant to the plea agreement which was not knowing and voluntary; this is prejudice.....	13
<b>II. WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY FAILING TO INFORM APPELLANT OF LAUTENBERG DURING HIS PROVIDENCY WHEN THE ONLY OFFENSE WAS A MISDEMEANOR (UNDER 6 MONTHS) AND THE LANGUAGE REGARDING A QUALIFYING RELATIONS WAS NOT IN THE SOLE SPECIFICATION .....</b>	<b>14</b>

Additional Facts .....	14
Standard of Review .....	16
Law and Argument.....	16
A. The military judge must inform the accused of a number of collateral consequences.....	17
B. For Lautenberg, this case squarely falls into the exception and provides the appropriate vehicle to answer the question of the military judge’s role when there is <i>only</i> a misdemeanor offense and the spouse is neither named on the charge sheet nor is there an Article 128B offense.....	19
<b>III. WHETHER A <i>SUB ROSA</i> AGREEMENT BETWEEN GOVERNMENT AND DEFENSE COUNSEL THAT APPELLANT WAS NOT PLEADING TO A LAUTENBERG QUALIFYING OFFENSE EFFECTED THE VOLUNTARINESS OF APPELLANT’S PLEA (OR, IN THE ALTERNATIVE, WHETHER THERE WAS A MATERIAL MISUNDERSTANDING AS TO THE MEANING AND EFFECT OF THE GUILTY PLEA UNDER <i>UNITED STATES V. PARRISH</i>.....</b>	<b>22</b>
Standard of Review .....	22
Law and Argument.....	22
A. <i>Sub Rosa</i> Agreements are disfavored and can cause a guilty plea to be set aside .....	23
B. <i>Sub Rosa</i> agreements have been found even when both government and defense counsel disclaim their existence to the CCA.....	26
C. This Court has provided relief even where a <i>sub rosa</i> agreement did not exist when the military judge’s actions contributed to an Appellant’s (mis)understanding on whether an agreement may have existed.....	27
D. Even when a <i>sub rosa</i> agreement does not exist, if government counsel and defense counsel leave the appellant mislead, the case should still be sent back .....	28
<b>IV. WHETHER THE MILITARY JUDGE ERRED BY NOT DISCUSSING CONSENT, MISTAKE OF FACT AS TO CONSENT, OR THE DEFENSE IN THE MANUAL THAT “IT IS ALSO NOT A BATTERY TO TOUCH ANOTHER TO ATTRACT THE OTHER’S ATTENTION” WHEN APPELLANT’S ADMISSION WAS TO WAKING UP HIS SPOUSE BY TOUCHING HER WRIST.....</b>	<b>33</b>

Standard of Review.....	34
Law and Argument .....	34

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---

## Table of Authorities

---

### THE SUPREME COURT OF THE UNITED STATES

<i>Brady v. United States</i> , 397 U.S. 742 (1970).....	16
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008) .....	20
<i>McDonald v. Chicago</i> , 561 U.S. 742 (2010) .....	20
<i>New York State Rifle &amp; Pistol Association, Inc. v. Bruen</i> , 597 U.S. 1 (2022) .....	20
<i>Padilla v. Kentucky</i> , 559 U.S. 356 (2010) .....	17, 20

### RULES FOR COURTS-MARTIAL

R.C.M. 1101(d) .....	7, 8, 10
R.C.M. 1111 .....	9, 10, 31
R.C.M. 705(e) .....	23
R.C.M. 905(a) .....	8, 9
R.C.M. 905(b) .....	8, 9
R.C.M. 910(f).....	9, 12, 23
R.C.M. 1104(a) .....	9, 12

### COURT OF APPEALS FOR THE ARMED FORCES

<i>United States v. Clark</i> , 28 M.J. 401 (C.M.A. 1989) .....	34, 36
<i>United States v. Cooke</i> , 11 M.J. 257 (C.M.A. 1981) .....	23
<i>United States v. Davenport</i> , 9 M.J. 364 (C.M.A. 1980) .....	35
<i>United States v. Felder</i> , 59 M.J. 444 (C.A.A.F. 2004) .....	23, 24, 26
<i>United States v. Garlick</i> , 61 M.J. 346 (C.A.A.F. 2005) .....	16
<i>United States v. Green</i> , 1 M.J. 453 (C.M.A. 1976) .....	23
<i>United States v. Griffith</i> , 27 M.J. 42 (C.M.A. 1988) .....	11
<i>United States v. Hayes</i> , 70 M.J. 454 (C.A.A.F. 2012).....	16
<i>United States v. Hilton</i> , 39 M.J. 97 (C.M.A. 1994) .....	34
<i>United States v. Inabinette</i> , 66 M.J. 320 (C.A.A.F. 2008) .....	15, 19, 33
<i>United States v. Jordan</i> , 57 M.J. 236 (C.A.A.F. 2002) .....	34, 35
<i>United States v. Kho</i> , 54 M.J. 63 (C.A.A.F. 2000) .....	7
<i>United States v. King</i> , 3 M.J. 458 (C.M.A. 1977) .....	23, 25
<i>United States v. Logan</i> , 47 C.M.R. 1 (C.M.A. 1973) .....	35
<i>United States v. Mader</i> , 81 M.J. 105 (C.A.A.F. 2021).....	34, 35, 36

<i>United States v. Miller</i> , 82 M.J. 204 (C.A.A.F. 2002).....	7
<i>United States v. Mitchell</i> , 15 M.J. 238 (C.M.A. 1983).....	24, 27, 31
<i>United States v. Moglia</i> , 3 M.J. 216 (C.M.A. 1977).....	35
<i>United States v. Mooney</i> , 47 M.J. 496 (C.A.A.F. 1998).....	13, 23
<i>United States v. Outhier</i> , 45 M.J. 326 (C.A.A.F. 1996) .....	35
<i>United States v. Parrish</i> , 65 M.J. 361 (C.A.A.F. 2007) .....	<i>passim</i>
<i>United States v. Partin</i> , 7 M.J. 409 (C.M.A. 1979) .....	17
<i>United States v. Perron</i> , 58 M.J. 78 (C.A.A.F. 2003) .....	16
<i>United States v. Prater</i> , 32 M.J. 433 (C.M.A. 1991).....	34
<i>United States v. Riley</i> , 72 M.J. 115 (C.A.A.F. 2013) .....	<i>passim</i>
<i>United States v. Scaff</i> , 29 M.J. 60 (C.M.A. 1989) .....	11, 12, 43
<i>United States v. Smauley</i> , 42 M.J. 449 (1995).....	34
<i>United States v. Smith</i> , 34 M.J. 319 (C.M.A. 1992) .....	34
<i>United States v. Soto</i> , 69 M.J. 304 (C.A.A.F. 2011).....	16, 17, 18
<i>United States v. Troglin</i> , 44 C.M.R. 237 (1972).....	25
<i>United States v. Yanger</i> , 67 M.J. 56 (C.A.A.F. 2008) .....	35, 36

## **COURTS OF CRIMINAL APPEALS**

<i>United States v. Armentaruiz</i> , 2023 CCA LEXIS 389, *2 (A.C.C.A. 2023) (mem. op.) .....	36
<i>United States v. Corriere</i> , 24 M.J. 701 (A.C.M.R. 1987).....	24, 25
<i>United States v. Groomes</i> , 2014 CCA LEXIS 752 (A.F.C.C.A. 2014) (unpublished).....	19, 21
<i>United States v. Horton</i> , 55 M.J. 585 (A.F. Ct. Crim. App. 2001), <i>pet.</i> <i>denied</i> , 56 M.J. 203 (2001) .....	34
<i>United States v. Myles</i> , 7 M.J. 132 (C.M.A. 1979).....	24
<i>United States v. Rhule</i> , 53 M.J. 647 (A.C.C.A. 2000).....	<i>passim</i>
<i>United States v. Williams</i> , 13 M.J. 843 (A.C.M.R. 1982) .....	25
<i>United States v. Wilson</i> , 2006 CCA LEXIS 530 (A.C.C.A. 2006) (mem. op.) .....	<i>passim</i>

## **MISCELLANEOUS SOURCES**

Army Regulation 27-10, <i>Military Justice</i> , para 5-50b.....	12
Army Regulation 27-10, <i>Military Justice</i> , para 5-50a.....	8, 9, 11
Army Regulation 27-10, <i>Military Justice</i> , Para. 5-42(b).....	8
Dep’t of the Army Pamphlet 27-9, <i>Military Judge’s Benchbook</i> , para. 2-2-9. (2023 edition) .....	17

MCM, Para. 77.c.(3)(d).....	4, 33
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## **Statement of the Case**

Following an RCM 802 session to “ensure a meeting of the minds amongst the parties as it pertains to the Article 128 offense”, on 6 November 2023, a military judge sitting as a general court-martial convicted Appellant, WO1 Joseph Burch, pursuant to his plea, of one charge with one specification of assault consummated by a battery in violation of Article 128, UCMJ. 10 U.S.C. § 128. (R. at 75, 109; Statement of Trial Results; App. Ex. XIV).<sup>2</sup>

Appellant was sentenced to no punishment that same day pursuant to the plea agreement. (Appellate Exhibit (AE) XIV-B; Statement of Trial Results; R. at 135). Government Counsel never served the Statement of Trial Results on defense, and the Military Judge did not consult with the defense on the Statement of Trial Results despite the respective requirements of RCM 1101(d) and Army Regulation 27-10 para. 5-42a. The Military Judge signed the Statement of Trial Results on 6 November 2023. (Statement of Trial Results).

The Convening Authority took no action on the finding and sentence on 14 December 2023. (Judgment of the Court). The entry of Judgment was signed on 15 December 2023. (Judgment of the Court)

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<sup>2</sup> The Government dismissed all other charges and specifications (R. at 110; Statement of Trial Results).

Appellant elected to appeal and this Court referred the case for designation of counsel on 31 January 2024. (Referral and Designation; Election to Appeal).<sup>3</sup>

### **Statement of the Facts**

#### **A. The Background and Plea Negotiations – Lautenberg is the Central Issue.**

Appellant was an 11b for years including an Afghanistan deployment and multiple overseas tours before being accepted into the aviation program and promoted to Warrant Officer. (R. at 128; Pros Ex. 2). The underlying charges and specifications take place during various times before and after 1 June 2019.<sup>4</sup>

Following the Article 39a on 28 July 2023, the parties engaged in good-faith plea negotiations. (App. Ex. XIV, Para 6; R. at 74-75; Def. App. Ex. B-C). The Government offered a no-punishment deal if the accused pled to a single Article 128b specification. (App. Ex. XIV, Para. 8; *See* R. at 75-76; Def. App. Ex. B-C).

After consulting with Appellant, it became clear to his Trial Defense Counsel that Appellant would not plea to any Lautenberg qualifying offenses.

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<sup>3</sup> Appellant's Election to Appeal was not contained in the Electronic Record of Trial, but the first undersigned counsel is aware it exists through email from Trial Defense Counsel.

<sup>4</sup> Appellant elected to be sentenced under the rules for offenses *after* 1 January 2019. (R. at 8-9; App. Ex. XIV). However, all other charges were dismissed and the only remaining offense took place on or about 15 November 2018. (Statement of Trial Results).

(App. Ex. XIV, Para 8; Def. App. Ex. A-C). This is because Appellant is an avid hunter who hunts with his son and is a member of a paid hunting club. (Def. App. Ex. A, B, & C). In short, Appellant strongly believes in his second amendment rights. (Def. App. Ex. A).

This was communicated to the Government, and in exchange for the Appellant's wish to avoid Lautenberg, the Government requested Appellant waive his right to an administrative separation board not conditioned on any specific characterization of service. (App. Ex. XIV, para 8.b.; App. Ex. XI; App. Ex. XIV-A; Def. App. Ex. B-C.).

After the military judge received the plea agreement, she held an RCM 802 session where, among other things, she recapped about whether there was “a meeting of the minds amongst the parties as it pertains to the Article 128 offense listed in Paragraph 8 of the plea agreement.” (R. at 75).<sup>5</sup>

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<sup>5</sup> It becomes clear that the defense and military judge believe this conversation covered different areas. The defense indicates that they brought up Lautenberg and that it did not apply in the 802. (App. Ex. XIV; Def. App. Ex. B-C). The Military Judge counters saying that Lautenberg was not discussed and she is sure Lautenberg did apply. However, she does not explain that if she knew that, why she *failed to advise* the Appellant during his *Care* inquiry regarding Lautenberg. This supports the defense's contention about why she did not advise on Lautenberg. (App. Ex. XIV; App. Ex. XV; Def. App. Ex. B-C). Either way, it is clear there is a delta between the two sides understandings of what was said.

**B. The Plea – Failing to inform of Consent, Mistake of Fact as to Consent, and the Manual for Court-Martial provision exempting the underlying behavior**

Appellant woke up his sleeping spouse in order to engage in sexual intercourse. (R. at 90). To do that, he grabbed her wrist. (R. at 89-90). When she awoke, she was not pleased and did not consent to sexual intercourse, so Appellant dropped the subject. (R. 89-92). He does not recall shaking or applying pressure to her wrist. (R. at 89-92). The military judge did *not* go over if Appellant thought he could wake his spouse up (or why he would have known he could not), or if there was a mistake of fact as to consent.

The military judge did not go over MCM, Para. 77.c.(3)(d) which explicitly states the acts here are not an assault consummated by a battery.

**I. WHETHER THE MILITARY JUDGE ERRED WHEN, AFTER BEING ALERTED OF AN OBJECTION AND A MATERIAL DISAGREEMENT TO A TERM IN THE PLEA DEAL, SHE FAILED TO HOLD A POST-TRIAL 39A, ORDERED BRIEFS, AND *THEN* SIGNED THE ENTRY OF JUDGMENT TO AVOID HOLDING A POST-TRIAL ARTICLE 39A**

**A. Additional Facts – Post Trial Processing and Government Counsel and the Military Judge’s failures to follow RCM 1101(d) and Army Regulation 27-10, para. 5-42a.**

After trial was complete, the trial counsel prepared the Statement of Trial Results (STR) on Military Justice Online. (Def. App. Ex. B). The trial counsel did

not follow the procedures prescribed in RCM 1101(d) and forwarded the STR directly to the military judge. (Def. App. Ex. B – Email to Court Reporter).

Instead of following Army Regulation 27-10, para. 5-42a's requirement to "review the STR for accuracy with . . . counsel for the accused," the military judge signed the STR on 6 November 2023. (Statement of Trial Results; App. Ex. XIV; Def. App. Ex. B). Neither the military judge, nor the trial counsel, forwarded the STR to the defense. (App. Ex. XIV; Def. App. Ex. B - C).

Out of an abundance of caution, the defense counsel inquired with the court-reporter about the STR on 7 December 2023 given the time that had passed on a straight-forward one specification/no punishment plea. (App. Ex. XIV; Def. App. Ex. B). The court-reporter then provided a copy of the STR to the defense. (App. Ex. XIV; Def. App. Ex. B). The defense, noticing the Lautenberg box was checked, then emailed the chief of justice to attempt to correct the mistake and explained to the chief of justice, since he was not part of the plea negotiations, the materiality of Lautenberg. (Def. App. Ex. B – Email to COJ).

At the same time, the defense emailed the court and government counsel with an objection and noting a disagreement as to the plea term. (App. Ex. XIV; Def. App. Ex. B.). The military judge acknowledged the objection on that same

day, and told defense to submit a post-trial motion. (App. Ex. XIV; Def. App. Ex B; C).

Meanwhile, the Convening Authority took no action on 14 December 2023, and forwarded it to the military judge the same day. (Convening Authority Action) Instead of *sua sponte* calling a post-trial 39a or inquiring further with the parties despite knowing a post-trial motion (that she ordered) was forthcoming from the defense, the military judge signed the EOJ the very next day on 15 December 2023. (Entry of Judgment; App. Ex. XIV).<sup>6</sup> Defense counsel also submitted its motion on 15 December 2023. (App. Ex. XIV).

The Military Judge responded that because she signed the EOJ, she would no longer consider the motion and that the defense would have to take up “those issues up [with] the CCA.” (App. Ex. XIV; App. Ex. XV). The Military Judge did not address the propriety of her and the government’s failure to follow RCM 1101(d) and Army Regulation 27-10 para 5-42(a) to see how that affected the EOJ’s finality, nor did she note that RCM 1111(c)(1) may have been an avenue.

Further, the Military Judge also did not append either Defense’s original 7 December objection or its later objection where they point out that the signing of

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<sup>6</sup> Despite being a digital CAC card signature, the Military Judge’s signature does not contain a timestamp.

the EOJ was invalid since the Government and Military Judge had not properly complied with Army Regulation 27-10 and RCM 1101(d). (Def. App. Ex. B).<sup>7</sup>

### **Standard of Review**

A military judge's decision to hold an Article 39(a) is reviewed for an abuse of discretion.<sup>8</sup> However, a military judge's compliance with the Manual for Courts-Martial and Army Regulations during post-trial processing is reviewed *de novo*. *United States v. Miller*, 82 M.J. 204 (C.A.A.F. 2002) (citing *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000) ("The standard of review for determining whether post-trial processing was properly completed is *de novo*").

### **Law and Argument**

#### **A. Both the Military Judge and Trial Counsel failed to follow mandates to provide and review the STR to Appellant's Trial Defense Counsel**

Rules for Court-Martial 1101(d) mandates the trial counsel provide a copy of the STR to defense counsel. *Id.* ("shall be provided to the accused or to the

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<sup>7</sup> Those emails are attachments to Defense Appellate Exhibit B.

<sup>8</sup> Appellant's counsel has not found case-law on the standard of review for whether to hold an Article 39a session. However, almost all discretionary acts are reviewed for an abuse of discretion. *See e.g., United States v. Clayton*, 67 M.J. 283 (C.A.A.F. 2009); *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003) (denial of a motion for mistrial is abuse of discretion); *United States v. Heifner*, 2007 CCA LEXIS 126, \*10 (A.F.C.C.A. 2007) (decision to inform members about the reason for a recess should be reviewed for an abuse of discretion); *Cf. Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964) (Constitutional claims are reviewed *de novo*). Since there was a request/objection, that is the appropriate analysis in this case.

accused's defense counsel"). Likewise, Army Regulation 27-10 mandates that "[b]efore signing the STR, the military judge *will* review the STR for accuracy with . . . counsel for the accused. *Id.* at Para. 5-42(b). The discussion in RCM 1101(d) indicates the mandatory reviews/forwarding are to prompt the defense to be able "address[] post-trial motions and proceeding to resolve allegations of error in a Statement of Trial Results." *See* R.C.M. 1101(d) Discussion. In this case, both the trial counsel and the military judge failed in their duties, and that error materially affected the Appellant's right to seek post-trial relief and make clear there was a material discrepancy in the plea agreement which would have invalidated the plea.

**B. Appellant alerted the court to a discrepancy and made a motion prior to the judge signing the EOJ**

The defense emailed the judge with their written objection prior to her signing the EOJ.<sup>9</sup> (Def. App. Ex. B; C). After the Judge requested a written motion, the defense provided her the written post-trial motion within the fourteen days allotted by Army Regulation 27-10 para 5-50a. (App. Ex. XIV; Def. App. Ex.

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<sup>9</sup> Rules for Court-Martial 905 defines a motion as "an application to the military judge for a particular relief." (R.C.M. 905(a)). These Motions can be made "orally, or at the discretion of the military judge, [in] writ[ing]." (R.C.M. 905(a)). A motion is defined as "*any* defense, *objection*, or request which is capable of determination without the trial . . ." R.C.M. 905(b) (emphasis added).



B; C). However, the objection/initial email on 7 December 2023, alone was enough to trigger a mandatory hearing.

That is because “[t]he substance of the motion, not its form or designation, shall control.” (R.C.M. 905(a)). Although that rule is labeled as pre-trial motions, there is no meaningful distinction based on RCM 905(a)’s guidance above that a motion is essentially “*any* defense, *objection*, or request which is capable of determination without the trial . . .” (R.C.M. 905(b)) (emphasis added).

With that guidance as to the liberal nature of ‘what’ a motion is, RCM 1104(a)(1) notes that upon motion by either party “or *sua sponte*” the military judge may direct a post-trial Article 39(a) session at any time before the entry of judgment under RCM 1111.<sup>10</sup>

While most 39(a)’s would be discretionary, the RCM’s make this particular type of hearing mandatory: “If the accused after entering a plea of guilty sets up a matter inconsistent with the plea, the military judge *shall* resolve the inconsistency or reject the plea.” *See* Discussion, R.C.M. 910(f)(4)(B)(ii) (emphasis added). That same guidance is found in RCM 910(f)(4)(A)-(B)(ii). Since the defense counsel

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<sup>10</sup> Although not at issue here since the defense discovered the STR on or after 7 December 2023 and filed its written motion, as directed by the military judge, on 15 December 2023, AR 27-10 para 5-50a indicates that the motion should be within fourteen days after it is presented to the defense. *Id.* at para 5-50a.

alerted the military judge to a potential discrepancy as evidenced in her email (App. Ex. XV; Def. App. Ex. B) and the defense's post-trial motion (App. Ex. XIV), it was an abuse of discretion not to resolve a potential inconsistency prior to signing the EOJ.

**C. When *both* the trial counsel and military judge fail to follow binding guidance in failing to provide the STR to the defense, the EOJ should not be considered valid when there is an objection without holding a post-trial 39a**

The rules are silent about whether the EOJ is valid when both the trial counsel and military judge fail to follow Army Regulation 27-10 and the RCM 1101(d) by not informing the defense of the STR. This is highlighted because the STR *is part of the EOJ* according to RCM 1111(b)(4), so complying with both the President's mandate and the Service Secretary's requirement to provide a copy to the defense appears to be potentially a condition precedent to a valid EOJ. That is what the discussion of RCM 1101(d) indicates about the disclosure being to allow the defense to make post-trial motions.

Although the rule is silent about when material errors are discovered *after* the judge's signature on the EOJ, judicial efficiency and CAAF precedent indicate that the rule has some flexibility. *See* RCM 1111(c)(1). For example, RCM 1111(c)(1) gives the military judge authority to alter portions of the EOJ and STR for certain errors. *Id*; RCM 1111(b)(4). Army Regulation 27-10 requires those

types of motions to be filed “within five days after a party receives a copy of the EOJ.” *Id.* at. Para 5-50(a)(2).

In *United States v. Scaff*, the Court of Military Appeals noted that a military judge is authorized under the Uniform Code “to take such action after trial and before authenticating the record as may be required in the interest of justice.” *Scaff*, 29 M.J. 60, 65 (C.M.A. 1989) (string cite omitted). The CMA referenced, among other cases, *United States v. Griffith*, 27 M.J. 42 (C.M.A. 1988) adopting its logic:

if a military judge realizes that [s]he has erred in [her] ruling or if some other reason moves [her] to reconsider [her] decision, then justice would be thwarted if a strict interpretation precludes h[er] from correcting h[er] own error. I believe such construction of the military judge's power will, in the long run, inure to the Government's benefit, for it provides an opportunity to clear up matters before the appellate processes take over.

*Id.* (citing *Griffith*, 27 M.J. at 49 (concurring)). The court then expressly held that “until the military judge authenticates the record of trial, [s]he may conduct a post-trial session to consider newly discovered evidence and, in proper cases, may set aside findings of guilty and sentence. *Id.* The CMA even noted that even if a petition for new trial was submitted under then Article 73, it does not limit that power. *Id.*

In this case, the military judge was alerted, prior to signing the EOJ, that the defense was never provided the STR as required by RCM or Army Regulation. She

was further alerted that there may have been an apparent *sub rosa* agreement regarding Lautenberg's application to the pled offense or a misunderstanding to the plea's meaning and effect. This should have triggered her *sua sponte* duty under RCM 910(f) and 1104 to direct a post-trial Article 39(a) session in order to address these issues.

Likewise, both Army Regulation 27-10 para 5-50b(1), (3), and (4) all were triggered by defense counsel's *initial* email. (Def. App. Ex. B). Instead of waiting for the motion that *she directed* or *sua sponte* holding a hearing, the military judge inexplicably signed the EOJ and told defense to essentially 'take it up with the CCA.' (App. Ex. XV).<sup>11</sup>

Not only was this error for failing to hold the hearing or rule, it was error under *Scaff* to find that the signing of the EOJ terminated her authority since the Record of Trial was not complete. Although the RCMs have been amended, there is no indication that it overrides *Scaff* or its lineage which were rooted in the UCMJ and judicial efficiency.

Instead of saving months of time for something that could have been resolved with a thirty-minute hearing, the military judge abused her discretion

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<sup>11</sup> Those provisions are (1) Any claim of error in the acceptance of a guilty plea; (3) A material error in the STR; and (4) Any error in the post-trial processing of the court-martial [including the judge's own error].

knowing there were potentially multiple disagreements and signed the EOJ with knowledge of defense counsel's post-trial objection. *See United States v. Rhule*, 53 M.J. 647 (A.C.C.A. 2000) ("demonstrating a voluntary, knowing, and intelligent waiver of rights is more easily done at the time of trial than through appellate affidavits years later"). This is even more apparent since the record was not complete for more than another month, and the military judge attached *her own email* to the record *after* signing the EOJ (but not the other emails). *See United States v. Mooney*, 47 M.J. 496, 497 (C.A.A.F. 1998) (The goal of these rules "is to avoid misunderstandings and preclude unnecessary appellate litigation.").

**D. The OSJA is attempting to administratively separate the appellant pursuant to the plea agreement which was not knowing and voluntary; this is prejudice**

Making matters worse, instead of resolving the discrepancy in the plea agreement or whether it was a knowing and voluntary plea (since the military judge did not go over Lautenberg at trial), the military judge has added months to the review process.

During that time, the same OSJA office that knows there is a disagreement, and that Appellant has opted into the appeal process, is attempting to administratively separate him. (Def. App. Ex. A). In an ironic twist, they are using the plea agreement that the trial defense counsel, and now appellant counsel, is

challenging to try and move forward without an administrative board before he can enter the Medical Evaluation Board process due to an upcoming surgery. (Def. App. Ex. A.)

Thus, unlike cases where the judge's errors may not affect the post-trial processing, the judge created a situation that may end up terminating the chance for appellate relief including overturning the conviction allowing the Appellant to undergo and complete his medical evaluation board.

## **II. WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY FAILING TO INFORM APPELLANT OF LAUTENBERG DURING HIS PROVIDENCY WHEN THE ONLY OFFENSE WAS A MISDEMEANOR (UNDER 6 MONTHS) AND THE LANGUAGE REGARDING A QUALIFYING RELATIONSHIP WAS NOT IN THE SOLE SPECIFICATION**

### **A. Additional Facts**

The military judge discussed with the defense counsel the switch between an Article 120 to an Article 128 offense. (App. Ex. XIV; Def. App. Ex. B-C; App. Ex. XV). The discussion also brought up Article 128b. (App. Ex. XIV; Def. App. Ex. B-C; App. Ex. XV). The defense indicates that Lautenberg and its non-applicability came up in that discussion. (App. Ex. XIV; Def. App. Ex. B; C). The military judge appended an email chain to the record indicating that she knows Lautenberg applied. (App. Ex. XIV).

During the *Care* inquiry, the military judge did not discuss Lautenberg or its effects with the accused. That failure reenforced to Appellant that Lautenberg did not apply. (Def. App. Ex. A).

### **Standard of Review**

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

### **Law**

Article 45(a), UCMJ provides:

If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or *through lack of understanding of its meaning and effect*, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

*Id.* (emphasis added); *Riley*, 72 M.J. at 119.

This article "includes procedural requirements to ensure that military judges make sufficient inquiry to determine that an accused's plea is knowing and

voluntary, satisfies the elements of charged offense(s), and more generally that there is not a basis in law or fact to reject the plea.” *Riley*, 72 M.J. at 120 (citing *United States v. Hayes*, 70 M.J. 454, 457 (C.A.A.F. 2012)). In order to determine whether Appellant’s plea was knowing and voluntary, this court “look[s] to the record of trial and the documents considered by the court below.” *Id.* (citing *United States v. Garlick*, 61 M.J. 346, 350 (C.A.A.F. 2005)).

A “guilty plea is a grave and solemn act” which should be accepted “only with care and discernment.” *Id.* (citing *Brady v. United States*, 397 U.S. 742, 748 (1970)). “Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.” *Id.* (citing *Brady*, 397 U.S. at 748).

“It is axiomatic that ‘[t]he military justice system imposes even stricter standards on military judges with respect to guilty pleas than those imposed on federal civilian judges.’” *United States v. Soto*, 69 M.J. 304, 306 (C.A.A.F. 2011) (alteration in original) (quoting *United States v. Perron*, 58 M.J. 78, 81 (C.A.A.F. 2003)); *Riley* 72 M.J. at 120. “[I]t is the military judge’s responsibility to police the terms of pretrial agreements to insure compliance with statutory and decisional law as well as adherence to basic notions of fundamental fairness.” *Riley*, 72 M.J. at 120 (internal citations and quotations omitted).



**A. The military judge must inform the accused of a number of collateral consequences**

The CAAF held in *Riley* that the military judge erred by not advising the Appellant of sex offender registration. *Id.* at 122-23. *Riley* noted that the military judge must inform the accused of certain collateral consequences. *Id.* The reason for the change was the Supreme Court decision in *Padilla v. Kentucky* for a *different* collateral consequence – deportation. *Id.* at 120.

The Supreme Court in *Padilla* held “that ‘[d]eportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or collateral consequence.’” *Riley*, 72 M.J. at 120 (citing *Padilla v. Kentucky*, 559 U.S. 356 (2010)). Because of that “close connection to the criminal process”, the Supreme Court states the “collateral versus direct distinction is ill suited” in resolving the issue of deportation. *Padilla*, 559 U.S. at 364. At the end of the day, deportation is now a collateral consequence that a military judge must inform the accused over. *See* Dep’t of the Army Pamphlet 27-9, *Military Judge’s Benchbook*, para. 2-2-9. (2023 edition).

*Riley* applied that same logic to sex offender registration agree[ing] with *Padilla’s* reasoning: (1) sex offender registration “is not a criminal sanction, but it is a particularly severe penalty”; (2) there are unique ramifications stemming from it; (3) it is “intimately related to the criminal process;” and (4) the “automatic

result” of sex offender registration for certain defendants makes it difficult to “divorce the penalty from the conviction . . . .” *Riley*, 72 M.J. at 120-121 (citing *People v Fonville*, 291 Mich. App. 363, 804 N.W.2d 878, 894 (Mich. Ct. App. 2011)).

*Riley* went on to note the “role of the military judge.” *Id.* at 121. “In order to ensure that pleas of guilty are not only knowing and voluntary but appear to be so, detailed procedural rules govern the military judge’s duties with respect to the plea inquiry.” *Id.* at 122 (citing *Soto*, 69 M.J. at 306 (internal citations omitted)). The Court stated “[t]he trial judge must shoulder the primary responsibility for assuring on the record that an accused understands the meaning and effect of each condition as well as the sentence limitations imposed by any existing pretrial agreement,’ it was incumbent upon the military judge to ensure that [Appellant’s] plea was a ‘knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences.’” *Id.* (quoting *Brady*, 397 U.S. at 748). The CAAF then held that “[t]he failure to inform a pleading defendant that the plea will necessarily require registration as a sex offender affects whether the plea was knowingly made.” *Id.* (citing *Fonville*, 804 N.W.2d at 895). The military judge’s failure to go over it on the record results in “a substantial basis to question the providence of [Appellant’s] Plea.” *Id.* at 122 (citing *Inabinette*, 66 M.J. at 322).

**B. For Lautenberg, this case squarely falls into the exception and provides the appropriate vehicle to answer the question of the military judge's role when there is *only* a misdemeanor offense and the spouse is neither named on the charge sheet nor is there an Article 128B offense**

One of the few cases to apply *Riley* to Lautenberg is easily distinguishable and provides the perfect vehicle to answer the question regarding the military judge's responsibilities with Lautenberg. In *United States v. Groomes*, [2014 CCA LEXIS 752, \\*17-18](#) (A.F.C.C.A. 2014) (unpublished), the Air Force court of criminal appeals held it was not error for the military judge to inform the accused of Lautenberg *because* “under the facts of this case, the appellant’s conviction for “domestic violence” offense created *no consequences for him beyond those he already faced.*” (*Id.* at \*18). That is because appellant was also convicted of “multiple crimes punishable by over one year of confinement” which also triggered the ban on owning a firearm. *Id.* (citing 18 U.S.C. § 922(g)(1)). That court further distinguished that his defense counsel were not ineffective since there was no evidence the plea itself was contingent on Lautenberg. *Id.* at \*19-20. In other words, even if they were deficient in failing to inform the difference between the misdemeanor crime of domestic violence and the “one year” or above requirement, it had no bearing on the appellant’s willingness to plea. *Id.*

## Argument

Given the unique facts of a single misdemeanor level specification, assault consummated by a battery, that did not contain language indicating a spouse, no Article 128b offense, and the pivotal nature of the Lautenberg amendment on the plea (outlined in App Ex. XIV; Def. App. Ex. A-C), the military judge erred by failing to inform Appellant of Lautenberg’s meaning and effect. Therefore, like *Riley*, there is a substantial basis to question the voluntariness of his plea.

Here, unlike sex offender registration or deportation, the right to possess firearms is a *constitutional right* and more sacrosanct. *See New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022) (When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct); *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. Chicago*, 561 U.S. 742 (2010). It follows that if non-constitutional consequences require informing the accused of his rights for a plea to be knowing and voluntary, a constitutional right deserves the same protection.

Similar to *Riley* and *Padilla*, the Lautenberg consequences have a “close connection to the criminal process.” *Padilla*, 559 U.S. at 364. Therefore, like *Riley* and *Padilla*, the “collateral versus direct distinction is ill suited” in resolving this right – so this Court should look to *Riley*’s analysis.

Here, the same analysis applies (1) Lautenberg “is not a criminal sanction, but it is a particularly severe penalty”; (2) there are unique ramifications stemming from it; (3) it is “intimately related to the criminal process;” and (4) the “automatic result” of Lautenberg for certain defendants makes it difficult to “divorce the penalty from the conviction . . . .” *Riley*, 72 M.J. at 120-121 (citing *Fonville*, 291 Mich. App. 363).

Even more important, unlike *Groomes*, here there was no other felony conviction which the government could fall back on indicating that firearm forfeiture would have occurred anyways. Assault consummated by a battery has a six-month maximum punishment. Even more telling, the specific move from Article 128b to Article 128 during plea negotiations (App. Ex. XIV; Def. App. Ex. B-C) manifests the parties understanding of Appellant’s desire as to the Lautenberg consequence. Further, unlike *Groomes*, here there is direct evidence in App. Ex. XIV and Def. App. Ex. A – C that Appellant *would not have entered the agreement if he thought Lautenberg applied*. Therefore, this is the unique case where there is no other misconduct with over one year as punishment and Lautenberg was critical to plea (since there was no other punishment).

Lautenberg was central to the plea, so like *Riley*, since “there is no evidence on the record as to why the military judge failed to ensure that appellant

understood the [ ] consequences . . .”, a rehearing is proper. *Riley*, 72 M.J. at 122.

“A rehearing will provide [appellant] with the opportunity to enter a guilty plea, or plead not guilty, with full knowledge of the consequences of [his] decision.” *Id.* at 123.

**III. WHETHER A *SUB ROSA* AGREEMENT BETWEEN GOVERNMENT AND DEFENSE COUNSEL THAT APPELLANT WAS NOT PLEADING TO A LAUTENBERG QUALIFYING OFFENSE EFFECTED THE VOLUNTARINESS OF APPELLANT’S PLEA (OR, IN THE ALTERNATIVE, WHETHER THERE WAS A MISUNDERSTANDING AS TO THE MEANING AND EFFECT OF THE GUILTY PLEA UNDER *UNITED STATES V. PARRISH*)**

**Standard of Review**

Since the nature of *sub rosa* agreements is usually unknown to the military judge, appellate courts have reviewed the issue *de novo* since it is a question of fact whether an agreement existed and a question of law of its effect on the plea deal. *See e.g., United States v. Rhule*, 53 M.J. 647 (A.C.C.A. 2000). However, if there is evidence that one existed and the military judge knew about it, the standard is then whether the “military judge abused that discretion, i.e., that the record shows a substantial basis in law or fact to question the plea.” *United States v. Phillips*, 74 M.J. 20, 21-22 (C.A.A.F. 2015) (citing *United States v. Finch*, 73 M.J. 144, 148 (C.A.A.F. 2014); *Inabinette*, 66 M.J. at 322.

## Law

Rules for Court-Martial 705(e)(2) requires plea agreements to be in writing and signed by the accused and the convening authority. *Id*; *see also* R.C.M. 705(e)(3)(A); *Rhule*, 53 M.J. at 648. Likewise, RCM 910(f)(3) requires plea agreements to be disclosed to the military judge so that she can determine if the terms conflict with RCM 705 and whether the accused understands its meaning and effect. *Id*; *see also Rhule* 53 M.J. at 653 (referencing *United States v. Cooke*, 11 M.J. 257, 260 (C.M.A. 1981)); *United States v. King*, 3 M.J. 458, 459 (C.M.A. 1977); *United States v. Green*, 1 M.J. 453, 456 (C.M.A. 1976)).

### **A. Sub Rosa Agreements are disfavored and can cause a guilty plea to be set aside**

The purpose of RCM 705(e)(3)(A) and 910(f)(3) “is to avoid misunderstandings and preclude unnecessary appellate litigation.” *Mooney*, 47 M.J. at 497. This is to ensure “not only the agreement’s impact on the charges and specifications which bear on the plea, the limitation on the sentence, but also other terms of the agreement, including consequences of future misconduct or waiver of various rights.” *United States v. Felder*, 59 M.J. 444, 445 (C.A.A.F. 2004); *see also King*, 3 M.J. 459 (it “also will provide invaluable assistance to appellate tribunals by exposing any secret understandings between the parties and by clarifying on the record any ambiguities which lurk within the agreements.”).

The military judge must ensure that an accused understands any plea agreement to which he is a party and that all the parties thereto agree to the terms of the agreement. *See Felder*, 59 M.J. at 445 (describing as “paramount” the duty of military courts to “ensure there is a knowing, voluntary plea and that the ‘accused understands the agreement’ and the ‘terms’ of that agreement.”). If the plea agreement contains any unclear or ambiguous terms, the military judge should obtain clarification from the parties. *United States v. Wilson*, [2006 CCA LEXIS 530, \\*12](#) (A.C.C.A. 2006). An inadequate inquiry into the meaning and effect of a plea agreement may render a guilty plea improvident. *Id.*

*Sub rosa* agreements are generally “condemned.” *Rhule*, 53 M.J. at 653; *see also United States v. Mitchell*, 15 M.J. 238, 239 n.2 (C.M.A. 1983) (*sub rosa* understandings are “not an accepted method of practice at courts-martial”); *United States v. Corriere*, 24 M.J. 701 (A.C.M.R. 1987). This is because, as the CMA explained: (1) the accused might be unaware of the agreement at all; (2) he might be unaware of exactly what he is waiving; (3) the agreement might impact public policy concerns by impermissibly waiving issues central to a fair trial; and (4) it circumvents judicial scrutiny. *United States v. Troglin*, 44 C.M.R. 237, 241-42 (1972); *see also Rhule*, 53 M.J. at 654 (“waiver of constitutional, statutory, or procedural rights of an accused should not be done in



secret, not only for the protection of the accused, but also to enhance public confidence in the integrity of the military justice system.”). The concern is “[t]he understanding . . . was contrary to public policy and all the more insidious since, being unrecorded, it was ostensibly hidden from the light of judicial scrutiny.” *Rhule*, 53 M.J. at 653 (quoting *Troglin*, 44 C.M.R. at 242).

Despite the above condemnation of *sub rosa* agreements, courts have stopped short of a *per se* rule requiring corrective action instead opting to examine the agreement’s effects on the trial.<sup>12</sup> See *Rhule*, 53 M.J. at 654 (“while we will continue to test the impact of *sub rosa* agreements for prejudice to the substantial rights of the accused pursuant to Article 59(a), UCMJ, when agreements are disclosed on the record and discussed by the accused and the military judge, prejudice is much less likely to be found.”). Examples of such prejudice can include, but are not limited to, the fact that “[a]ppellant misunderstood the terms of his agreement, that the operation of any term was frustrated, [or] that [a]ppellant’s

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<sup>12</sup> See e.g., *Corriere*, 24 M.J. at 706-07; *United States v. Williams*, 13 M.J. 843, 845 (A.C.M.R. 1982); *Myles*, 7 M.J. at 133; *Rhule* 53 M.J. at 653; see also *United States v. Miller*, 48 M.J. 790, 794 (N.M. Ct. Crim. App. 1998) (refusing to require corrective action in spite of an undisclosed agreement to elect trial by military judge alone and to forgo challenge to assigned judge in exchange for agreement not to proceed on additional charges).

participation in the agreement was anything other than wholly voluntary.” *Wilson*, 2006 CCA LEXIS 530, \*13 (citing *Felder*, 59 M.J. at 446).

**B. *Sub Rosa* agreements have been found even when both government and defense counsel disclaim their existence to the CCA**

*Sub Rosa* agreements can be found even when the parties disclaim their existence. *See e.g., Rhule* 53 M.J. at 653. This is because the court looks to the actions of the parties as well as the Appellant’s understanding. *Id.*

For example, in *Rhule*, despite all counsel denying the existence of a *sub rosa* agreement, the court found that one existed after the accused was found to be improvident, and in order not to lose the military judge who was traveling/going TDY, the accused elected to proceed immediately with a judge-alone contest and the government dismissed charges it easily could have proven from the evidence presented. *Id.* at 648-650. In finding a *sub rosa* agreement existed, the court looked at the circumstantial evidence of the trial counsel’s actions dismissing certain specifications and modifying others as well as the affidavits of all parties to indicate a *sub rosa* agreement existed to have the accused elect trial by military judge alone. *Id.* However, the court found no prejudice since (1) appellant knew what he was waiving (panel), (2) knew what he was obtaining (dismissed charges), (3) and the decision was “indeed, his voluntary decision.” *Id.* at 655. The court also pointed out there was no indication of government overreaching in order to obtain

this deal. *Id.*; see also *Mitchell*, 15 M.J. at 240 (indicating no prejudice despite a *sub rosa* agreement with the convening authority because the appellant did not bring up any issue post-trial until appellate counsel was assigned).

**C. This Court has provided relief even where a *sub rosa* agreement did not exist when the military judge’s actions contributed to an Appellant’s (mis)understanding on whether an agreement may have existed**

On the other hand, in *Wilson*, the trial counsel, defense counsel, and military judge *agreed* at trial *and* in affidavits that no *sub rosa* agreement existed. *Wilson*, 2006 CCA LEXIS 530 at \*14. Despite those concessions, this Court looked at the record and indicated there was contradicting evidence based on a comment by the military judge and potential threats to withdrawal from the deal if the trial was delayed (the potential *sub rosa* agreement was to the trial date). *Id.* at \*14-15. The court ultimately found no *sub rosa* agreement because “the parties could not agree in any legally significant way as to a trial date because it is the military judge who shall” determine that date. *Id.* at \*15-16. The court found that both the trial counsel and defense counsel erred in respective ways about this agreement, but “notwithstanding these oversights by counsel, and the difficulties that they created” the actual enforceable agreement was contained in writing. *Id.* at \*16.

Most importantly, this Court still provided relief because the judge’s actions gave the accused the impression that there was an enforceable *sub rosa* agreement

and caused him to proceed forward when he had absolute right not to go forward on different terms. *Id.* at \*24 (“To the extent that the statements by the military judge at that point led appellant to a contrary impression, we must conclude that appellant’s misapprehension was a substantial factor in his decision [to proceed].”).

**D. Even when a *sub rosa* agreement does not exist, if government counsel and defense counsel mislead the appellant in error, the case should still be sent back**

In *United States v. Parrish*, 65 M.J. 361, 364 (C.A.A.F. 2007), the CAAF set aside this Court’s decision and returned the case for a *Dubay* hearing when the appellant and his spouse indicated that they were misinformed by *both* the trial counsel and defense counsel as to whether a reduction in grade (deferral of the adjudged reduction) would take place (and how it affected waiver). *Id.* The PTA contained a deferral of forfeitures and a waiver provision, but nothing regarding deferral of rank reduction. *Id.* The appellant and his spouse indicated that he was informed by both the trial counsel, SJA, and his defense counsel that his wife would be paid at the E-7 rate. *Id.* at 364-65. The court concluded that there was no *sub rosa* agreement, however, the CAAF went further indicating that it appears there still was a “misunderstanding” as to the terms of the agreement by all parties;

a “mutual misunderstanding as to the terms of the agreement.” *Id.*<sup>13</sup> Since this misunderstanding was not addressed by the CCA, it appeared there an apparent disagreement as to the plea terms which required a *Dubay*. *Id.* at 365.<sup>14</sup>

## ARGUMENT

In this case, the military judge abused her discretion because she was alerted, like *Parrish*, to a material misunderstanding before she signed the EOJ, but declined to address it as RCM 705 and 910 require.

In this case, like *Rhule*, there is evidence of a *sub rosa* agreement that Lautenberg did not apply to the offense to which the Appellant pled guilty. Even more in Appellant’s favor than in *Rhule*, here there is more than circumstantial evidence - the defense counsel stated in App. Ex. XIV and in an email *before* filing that motion that there was a mutual understanding that Lautenberg did not apply

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<sup>13</sup> At its core, the trial counsel and defense counsel did not understand the difference between deferral or rank reduction, deferral of forfeitures, and the effective dates of those actions. *Id.* This was the “mutual misunderstanding”.

<sup>14</sup> The *Dubay* judge found that both the accused and “at least two government representatives were confused concerning the import of the term relating to deferment in the PTA”, however, “the deferment of reduction in grade was not material to [appellant’s] decision to enter a guilty plea.” *United States v. Parrish*, 2009 CCA LEXIS 179, \*6 (A.C.C.A. 2009) (unpublished) *aff’d without opinion by United States v. Parrish*, 2009 CAAF LEXIS 622 (C.A.A.F., June 9, 2009). This court then found that the term was not material to the agreement given appellant’s own admission at the hearing, so there was no prejudice despite the misunderstanding. *Id.* at \*11-12.

(to which he had advised the Appellant). (Def. Ex. A-C). Like *Rhule*, the additional circumstantial evidence supports that conclusion and is indicative of the outline of that agreement. Specifically, the government counsel dismissed all charges that had the word “spouse,” and deliberately changed the charge to an Article 128, assault consummated by a battery, rather than an Article 128b. This was partially discussed in the RCM 802 discussion as the military judge recapped. (R. at 175)

Further, like *Wilson*, the Appellant’s confusion was largely due to the comments made by the military judge on the record. The reason for the change in the charges was discussed in some form or fashion in an RCM 802 session as the Judge noted in her recap about whether there was “a meeting of the minds amongst the parties as it pertains to the Article 128 offense listed in Paragraph 8 of the plea agreement.” (R. at 75). Then, the judge failed to inform Appellant of Lautenberg during his *Care* inquiry which could be explained by her knowing the parties made the changes to avoid Lautenberg. (Def. App. Ex. A).<sup>15</sup> These statements reenforced the accused understanding (or misunderstanding) similar to the Judge’s comments in *Wilson*. This is as strong of evidence as in *Rhule* and *Wilson*, both of which had *all* counsel denying the existence of a *sub rosa* agreement.

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<sup>15</sup> Even if the parties were both wrong on this area, that does not change whether there was a mutual understanding (even if a legally incorrect one) like in *Parrish* that still resulted in the case being sent back.

While it is axiomatic that the counsel should have informed the judge *on the record* if such an agreement existed, this mutual (mis)understanding only became apparent when defense counsel had to go and find the STR on his own to see the box checked. *See supra* First Assignment of Error.<sup>16</sup>

Importantly, unlike *Parrish, Mitchell, Wilson, and Rhule*, here the *sub rosa* agreement would change the outcome of Appellant's willingness to plea. (Def. App. Ex. A-C; App. Ex. XIV). App Ex. XIV makes clear the reason for the plea agreement and how the negotiations unfolded: "Defense reached out to Government and informed them the Accused would not accept the proposed offer because he would lose his right to own and possess firearms under Lautenberg." (App. Ex. XIV, para 6). Lautenberg was a central issue for the Appellant. (App. Ex. XIV; Def. App. Ex. A-C). This is the unique case where there is no other misconduct with over one year as punishment and Lautenberg was critical to the Appellant's decision plea (since there was no punishment).

If the government had other evidence to secure a conviction, they would have not accepted a no punishment deal for alleged years of sexual assault and

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<sup>16</sup> Why the government counsel made the concessions on the charge sheet and altered the charges to constructively refer an Article 128, but then checked "yes" to Lautenberg and did not inform the defense as required under RCM 1111 has not been explained to date by government counsel.

domestic violence over the victim's unhappiness as evidenced in her Victim Impact Statement. (R. at 113-14); *See Rhule*, 53 M.J. at 651-53 (evidence of a *sub rosa* agreement existed because of the government's dismissal of multiple charges).

Here, there would also be prejudice unlike *Rhule*. Here, unlike *Rhule*, Appellant completely misunderstood what the implications of the key term of the agreement was. *Id.* at 655. Moreover, while there is no allegation that the Special Victim's Prosecutor intentionally misled Appellant to induce him to plea, it appears the parties were under a mutual misunderstanding (and then, for an unknown reason, failed to inform the defense of the change on the STR as required by the Rules for Court-Martial).<sup>17</sup>

Finally, even if this Court finds there was no *sub rosa* agreement, like *Parrish*, there appears to be, and always has been, either a mutual misunderstanding or a misunderstanding between the parties as to the meaning and effect of Appellant's plea. That, like *Parrish*, is reason enough to send this case back.

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<sup>17</sup> From the email correspondence attached to Def. App. Ex. B., it appears the Chief of Justice, who was not part of the plea negotiations and unfamiliar with the terms, completed/reviewed the STR. It is unclear if he consulted with those who did the negotiations from the Government side and what, if anything, was relayed.



**IV. WHETHER THE MILITARY JUDGE ERRED BY NOT DISCUSSING CONSENT, MISTAKE OF FACT AS TO CONSENT, OR THE DEFENSE IN THE MANUAL THAT “IT IS ALSO NOT A BATTERY TO TOUCH ANOTHER TO ATTRACT THE OTHER’S ATTENTION” WHEN APPELLANT’S ADMISSION WAS TO WAKING UP HIS SPOUSE BY TOUCHING HER WRIST**

**ADDITIONAL FACTS**

In addition to the last paragraph of the “Statement of the Facts” *supra*, the military judge did not ask Appellant if he knew of, had discussed with his counsel, or disavowed consent or mistake of fact as to consent.

The Stipulation of Fact does not mention nor disavow Mistake of Fact as to Consent. The only language that touches the subject is that the Appellant had no legal justification or excuse for the touching. (Stipulation of Fact).

**STANDARD OF REVIEW**

The decision to accept a guilty plea is reviewed for abuse of discretion. *Inabinette*, 66 M.J. at 322. Failure to obtain an adequate factual basis from an accused to support the plea and any ruling based on an erroneous view of the law constitutes an abuse of discretion. *Id.* (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002))

**LAW**

The manual for courts-martial states “[i]t is also not a battery to touch another to attract the other’s attention.” MCM para 77.c.(3)(d). In the last three

years, the CAAF reaffirmed the simple proposition that consent and mistake of fact to consent are defenses to assault consummated by a battery. *United States v. Mader*, 81 M.J. 105, 108 (C.A.A.F. 2021).

Statements raising or indicating the possibility of an affirmative defense constitute a matter in substantial conflict with a guilty plea. *United States v. Clark*, 28 M.J. 401, 406-07 (C.M.A. 1989). The standard of review for determining the providency of a guilty plea is whether there is a substantial conflict raised in the record between the appellant's plea and some inconsistent statement or factual assertion. *United States v. Smauley*, 42 M.J. 449 (1995); *United States v. Prater*, 32 M.J. 433 (C.M.A. 1991); *United States v. Horton*, 55 M.J. 585 (A.F. Ct. Crim. App. 2001), *pet. denied*, 56 M.J. 203 (2001). In answering that question, this Court considers the entire record. *Smauley*, 42 M.J. at 452; *United States v. Hilton*, 39 M.J. 97, 101 (C.M.A. 1994); *United States v. Smith*, 34 M.J. 319, 324 (C.M.A. 1992).

An accused may not plead guilty unless the plea is consistent with the actual facts of his case. *United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977); *see also United States v. Logan*, 47 C.M.R. 1, 2-3 (C.M.A. 1973). "An accused may not simply assert his guilt"; the military judge must elicit facts as revealed by the accused himself to support the plea of guilty. *Jordan*, 57 M.J. at 238 (citing

*United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)); *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996). While the accused can plead guilty when a defense may be applicable, the military judge has a *sua sponte* and awesome duty to inform the accused of the law/defense, ensure the accused understands that defense, and then get the accused to explain why the defense does not apply. *United States v. Yanger*, 67 M.J. 56, 57 (C.A.A.F. 2008).

In *Yanger*, the military judge recognized the *possibility* of a defense and thoroughly questioned both the appellant and his counsel about it. *Id.* After informing the appellant of the defense, the appellant acknowledged that he and his counsel had discussed the possible defense, that he did not wish to raise it, and that he did not feel coerced or induced to violate the no-contact order. *Id.* at 57-58.

Likewise, in *Mader*, the CAAF reversed the CCA since the CCA did not hold that consent and mistake of fact as to consent were a defense to assault consummated by a battery *even when* the CCA found that the victim was unable to consent. *Mader*, 81 M.J. at 108. In rejecting the government argument and CCA's holding, the CAAF found that both consent and mistake of fact to consent are always a potential defense to assault consummated by a battery even when the harm/injury is severe and even disregarding a public policy argument for "society's need to protect victims from this type of harm." *Id.* (internal citation omitted). The

court further rejected the Government’s argument that the assault was equivalent to an aggravated assault so the defense should not apply. *Id*; see also *United States v. Armentaruiz*, [2023 CCA LEXIS 389, \\*2](#) (A.C.C.A. 2023) (“Even when an appellant agrees that the elements read to him correctly describe what he did, the military judge must elicit actual facts from an accused and not merely legal conclusions”).

### **ARGUMENT**

In this case, the MCM makes the exact touching here *not* an assault consummated by battery. Further, even if it was, as in *Mader* and *Yanger*, the military judge was obligated to go over both consent and mistake of fact as to consent, ensure the Appellant understood them, and then obtain a disavowal from the Appellant. None of that happened, and therefore the plea is improvident under *Clark* and *Yanger*.


Appellant pled guilty to attempting to wake up his sleeping spouse in order to engage in sexual intercourse. (R. at 90). To do that, he grabbed her wrist. (R. at 89-90). When she awoke, she was not pleased and did not consent to sexual intercourse, so Appellant dropped the subject. (R. 89-92). He does not recall shaking or applying pressure to her wrist. (R. at 89-92). The military judge did *not*

go over if Appellant thought he could wake his spouse up (or why he would have known he could not), or if there was a mistake of fact as to consent.


The exception in the MCM is common sense. A spouse may have woken up his/her spouse in the same manner if a child had a bad dream and Appellant had to work early the next morning. Or, it could be Appellant was feeling ill and wanted to get assistance even though the “man-flu” was not life threatening. Likewise, Appellant could have woken up his spouse to let their dogs go out to the restroom. The fact that Appellant woke up his spouse to engage in consensual intercourse, and then when rejected, did not press the subject, makes no difference – the same exception in the MCM and multiple defenses would apply. Especially here where the intent was not to cause pain, but to potentially do the complete opposite.

### **Conclusion**

Based on the foregoing, this Court should set aside appellant’s conviction.

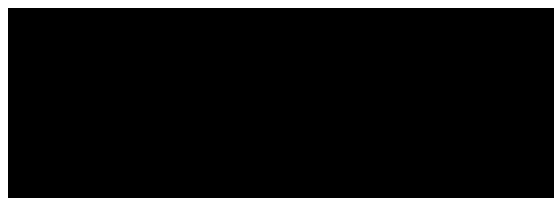


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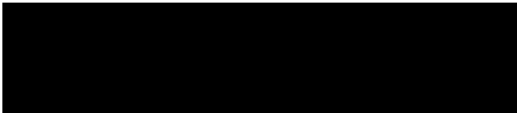
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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on February 14, 2024.



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