IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.	Docket No. ARMY 20230498
Sergeant First Class (E7) **FREDDERICK V. NORMAN,** United States Army, Appellant	Tried at Camp Humphreys, Republic of Korea, on 30 June, 1, 11 and 28–31 August, and 1 September 2023 before a general court-martial convened by Commander, Eighth Army, Colonel Matthew S. Fitzgerald, Military Judge, presiding.

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

Assignment of Error I[1]

WHETHER THE MILITARY JUDGE ERRED WHEN HE FOUND THAT APPELLANT BREACHED A PREVIOUS PLEA AGREEMENT WHEN APPELLANT PLED AND WAS FOUND GUILTY AND THE ONLY CONDITION IN THE AGREEMENT WAS TO PLEAD GUILTY.

Assignment of Error II

WHETHER APPELLANT'S CONVICTION IN A GENERAL COURT-MARTIAL FOR THE SAME

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[1] The government has reviewed appellant's *Grostefon* matters and respectfully submits that they lack merit. The government recognizes this court's authority to elevate *Grostefon* matters deserving of increased attention. *United States v. Grostefon*, 12 M.J. 431, 437 (C.M.A. 1982). Should this court exercise such authority, finding any of appellant's *Grostefon* matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

OFFENSE HE HAD ALREADY BEEN CONVICTED OF IN A SUMMARY COURT-MARTIAL VIOLATED HIS CONSTITUTIONAL AND STATUTORY DUE PROCESS RIGHTS AND PROTECTIONS AGAINST SELF INCRIMINATION.

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Statement of the Case

On 1 September 2023, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of fraternization in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. §§ 892 (2019) [UCMJ]. (R. at 15, 1498; Charge Sheet).[2] The court-martial sentenced appellant to a reduction to the grade of E-6, restriction to Camp Humphreys for 60 days, and confinement for 101 days. (R. at 1570; Statement of Trial Results [STR]). The military judge credited appellant with 104 days of pretrial confinement credit. (R. at 1571). The convening authority took no action on the adjudged sentence. (Action). On 28 September 2023, the military judge entered judgment. (Judgment).

Statement of Facts

a. Multiple victims accused appellant of sexual assault.

Appellant's charges originated from a non-consensual sexual relationship with a subordinate, SPC [redacted]. (App. Ex. VIII-A). Over the course of nearly 18 months,[3] the government preferred charges, referred those charges to a general

[2] Appellant was acquitted of all other charges: seven specifications of Article 120 sexual assault, one specification of Article 92 fraternization, and one specification of Article 90 willfully disobeying superior commissioned officer. (R. at 1489).
[3] Charges were preferred against appellant on 16 March 2022; he was sentenced on 1 September 2023. (App. Ex. VIII-A; R. at 1569).

court-martial, accepted appellant's offer to plea at a summary court-martial, withdrew those charges after determining appellant did not comply with the deal, and then referred the charges to a general court-martial, where an enlisted panel found appellant guilty of a single specification of Article 92. (*Compare* App. Ex. VIII-A *with* Charge Sheet; App. Ex. VIII-G; App. Ex. VIII-D; R. at 1498, 1569–70). Two additional victims and investigations would also become a part of appellant's final court-martial, one involving PV2 [redacted] and another involving Ms. [redacted]. (R. at 992, 1007). Both would accuse appellant of sexually assaulting them in a manner similar to SPC [redacted]'s report. (R. 1044, 963, 637).

1. Specialist DP reports appellant for nonconsensual oral sex.

Specialist [redacted][4] met appellant, a Sergeant First Class, in February or March of 2021, while at work, in her duty uniform. (R. at 613; Pros. Ex. 19). She staffed the S6 help desk and interacted with appellant on a weekly basis. (R. at 614). The two exchanged emails which reflected their respective ranks. (R. at 614).

Appellant and SPC [redacted] eventually began spending time together. (R. at 615). They went out for meals and drinks together over the course of a couple

[4] Though she was a sergeant (E-5) at the time of trial, [redacted] was a specialist at the time the offenses occurred. (R. at 614).

weeks, which "if you looked at it from the outside, you would see them as dates." (R. at 616).

On 8 April 2021, the two drank together at appellant's senior living quarters. (R. at 626–27). This "led [to a] conversation about [SPC] not wanting to have sex with [appellant]." (R. at 626, 633). Throughout that night, appellant performed sexual acts upon SPC , which she described as nonconsensual. (R. at 637, 640, 642).

The following morning, SPC visited a sexual assault medical forensic examiner, submitted to an examination, and filed a restricted report with a victim advocate. (R. at 655–56). She began participating in a local sexual assault survivor support group and within weeks met another soldier who described appellant sexually assaulting her. (R. at 660). That soldier, PV2 [5], encouraged SPC to make her report of the sexual assault unrestricted. (R. at 663). Specialist did so on 29 April 2021. (R. at 665; App. Ex. XIV-A).

[5] was a PV2 at the time she met appellant, a PFC when she met SPC , and a SPC at the time of trial. (R. at 947, 970, 944). This brief refers to her as PV2 , as that was her rank at the time of the alleged sexual assault.

2. After hearing about SPC [redacted]'s experience with appellant, PV2 [redacted] reports appellant for nonconsensual oral sex.

Private [redacted] met appellant in August of 2020 while on duty at Camp Humphreys. (R. at 945). The two went out together after a couple weeks of texting. (R. at 947–48). Private [redacted] described being extremely intoxicated as appellant performed sexual acts upon her. (R. at 955). She described "black[ing] out" and resisting appellant as he continued to perform sexual acts. (R. at 962–63).

Though PV2 [redacted] felt that none of these sexual acts were consensual, PV2 [redacted] initially decided not to report appellant. (R. at 968). She had just joined the Army and did not want the stigma of being "that person, you know, that does a SHARP[6] case." (R. at 968). She also presumed that appellant had merely made an out-of-character mistake due to his alcohol consumption. (R. at 968, 971).

She did however begin attending a support group for survivors of sexual assault. (R. at 968–69). There, she eventually met SPC [redacted]. (R. at 970). After sharing her story in a group setting, SPC [redacted] approached her because they were in the same unit and several details between their experiences aligned. (R. at 661, 971). Upon hearing SPC [redacted] describe appellant, PV2 [redacted] decided to report her sexual assault. (R. at 971). She did so on 26 April 2021. (App. Ex. XIV-B).

[6] "Sexual Harassment/Assault Response and Prevention" per AR 600-52.

b. *Norman I* and the summary court-martial, *Norman II*.

On 16 March 2022, the government charged appellant with four violations of Article 120 sexual assault against Specialist (SPC) [redacted], plus one violation of Article 92, for "creating a clearly predictable perception of undue familiarity between" himself and SPC [redacted]. (App. Ex. VIII-A). After Article 32 review, the charges were referred to a general court-martial and served upon appellant on 29 June 2022. (App. Ex. VIII at p. 3). A military judge scheduled arraignment for 18 July 2022 and trial for 31 October – 4 November 2022. (App. Ex. VIII-C (Pretrial Order)).

Appellant requested a continuance via written motion on 15 September 2022, requesting 9–13 January 2023 or 20–24 February 2023 for trial. (App. Ex. XVIII-G). He cited a need for more time to complete his investigation and witness preparation. (App. Ex. XVIII-G). The court docketed the trial for 27 February – 3 March 2023. (App. Ex. XVIII at p. 3).

Before that trial could begin, SPC [redacted] decided that she did not want to participate in a court-martial. (App. Ex. XVIII-I). She notified the parties of this intention on 8 February 2023, and expressed a desire for appellant to face non-judicial administrative action. (App. Ex. XVIII-I). Shortly thereafter, the parties negotiated a plea agreement. (App. Ex. VIII-G).

1. Counteroffer to plea.

Appellant and the convening authority signed a plea agreement 16 February 2023. (App. Ex. VIII-G). Pursuant to the agreement, the convening authority would dismiss the sexual assault charge without prejudice and appellant would plead guilty to the fraternization charge at a summary court-martial. (App. Ex. VIII-G). The sexual assault charge would be dismissed with prejudice upon "announcement of sentence at the Summary Court-Martial." (App. Ex. VIII-G).

2. Appellant disputes the factual basis of the remaining charge during his guilty plea.

The summary court-martial conducted their hearing on 16 March 2023, one year after preferral of the original charges in *Norman I*. (App. Ex. XVIII-A; XVIII-E). "The only evidence presented at the [summary court-martial] was [appellant] admitting that he and [SPC [redacted]] had been familiar." (App. Ex. XVIII-C at para 3(a)). Appellant pled guilty to the summary court-martial officer (SCMO) but denied committing terminal elements of the offense during his unsworn sentencing statement. (App. Ex. XVIII-B). Appellant claimed that SPC [redacted] had deceived him about her rank. (App. Ex. XVIII-B). He read from Army Regulation (AR) 600-20, para. 4-14b(1)–(5)[7] and explained how his conduct did not violate

[7] "All relationships between Soldiers of different grades are prohibited if they—

any of the elements. (App. Ex. XVIII-B). Appellant then read from para. 4-14c(2)(b)[8] and interpreted it to create an exception for his situation, as he terminated his relationship with SPC [redacted] after he found out her true rank. (App. Ex. XVIII-B). After hearing appellant's defense, the SCMO sentenced appellant to a rank reduction to staff sergeant. (App. Ex. XVIII-A).

3. A third victim reports appellant for sexual assault.

Two days after appearing before a summary court-martial on the Art. 92 violation, appellant was again accused of sexual assault, this time by Ms. [redacted]. (R. at 1008, 1044). Ms. [redacted] described appellant performing sexual acts upon her when

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(1) Compromise, or appear to compromise, the integrity of supervisory authority or the chain of command.
(2) Cause actual or perceived partiality or unfairness.
(3) Involve, or appear to involve, the improper use of grade or rank or position for personal gain.
(4) Are, or are perceived to be, exploitive or coercive in nature.
(5) Create an actual or clearly predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission."

[8] "Situations in which a relationship that complies with this policy would move into noncompliance due to a change in status of one of the members (for instance, a case where two junior enlisted members are dating and one is subsequently commissioned or selected to be a WO, commissioned officer, or NCO). In relationships where one of the enlisted members has entered into a program intended to result in a change in his or her status from enlisted to officer or junior enlisted Soldier to NCO, the couple must terminate the relationship permanently or marry within 1 year of the date of the appointment or the change in status occurs."

she was in a highly intoxicated state.[9] (R. at 1044). Ms. [redacted] described those acts as nonconsensual and reported appellant shortly thereafter. (R. at 1044–45, 1055–56).

4. Defense counsel contests the findings of the SCMO.

Defense counsel submitted RCM 1306 post trial matters on 23 March 2023 to the convening authority, Eighth Army Commanding General Willard M. Burleson III, requesting disapproval or suspension of appellant's sentence. (App. Ex. XVIII-C).[10] He reiterated appellant's claims from appellant's unsworn statement, notably that "[t]he sentence which the [SCMO] imposed was not supported by the evidence." (App. Ex. XVIII-C at para 3).

Further, defense counsel made factual claims in direct conflict with the guilty plea. He asserted that SPC [redacted] "represented that she was a SGT" to appellant. (App. Ex. XVIII-C at para 3(a)). He offered that three witnesses had

[9] Though Ms. [redacted] couldn't quantify the number of alcoholic drinks she consumed that night, video footage from her apartment showed appellant propping her up in the elevator as she slumped over and fell over onto the ground. (R. at 1008, 1013; Pros. Ex. 18). Appellant lifted her up and she walked with his assistance into her apartment. (R. at 1041; Pros. Ex. 18).

[10] Appellant dedicates a section of his brief to concerns regarding trial counsel's presence at *Norman II*. (Appellant's Br. 3–6). Appellant cites to App. Ex. XVIII-A to support his assertions. Appellate Exhibit XVIII-A is the DD Form 2329, Record of Trial by Summary Court-Martial, which bears no mention of the trial counsel's presence or impact on the proceedings. However, support for this assertion can be found in appellant's 1306 matters. (App. Ex. XVIII-C).

testified words to the effect of "had [appellant] know[n] SPC [redacted]'s] rank from the start, he would have never gotten involved with her." (App. Ex. XVIII-C at para 3(c)).

5. Convening authority sets aside findings and withdraws from plea.

The convening authority set aside the finding of *Norman II* on 5 April 2023 and directed a rehearing. (App. Ex. XVIII-A). The Staff Judge Advocate's (SJA) advice on the matter cited the "post-trial matters submitted by the (appellant)," the lack of substantial performance of any promises contained in the plea agreement by appellant, and "probable cause to believe that (appellant) engaged in serious misconduct on 17–18 March 2023." (App. Ex. XVIII-E). On 12 April 2023, the convening authority withdrew from the plea agreement. (App. Ex. XVIII-E).

c. *Norman III* and the motion to dismiss.

The government re-preferred all but one of the specifications from *Norman I* on 31 May 2023, along with new alleged violations of Article 120 involving PV2 [redacted] and Ms. [redacted]. (Charge Sheet). Additionally, the government added a violation of Article 92 involving PV2 [redacted] and a charge of violating Article 90. (Charge Sheet). A preliminary hearing occurred on 6 June 2023, and on 12 June 2023 the hearing officer found probable cause for all but one specification. The PHO recommended referral to a general court-martial. (Preliminary Hearing Report).

The convening authority referred all charges on 21 June 2023. The military judge arraigned appellant on 30 June 2023 and appellant pled not guilty to all charges and specifications. (R. at 17; Charge Sheet).

Appellant moved to dismiss all specifications from *Norman I* based on a double jeopardy claim and a violation of speedy trial. (R. at 26; App. Ex. VIII). The military judge denied the motion to dismiss, finding that the summary court-martial guilty plea was improvident. (App. Ex. XXXV, p. 11). Additionally, the military judge found that the convening authority's decision to set aside the findings of the summary court-martial was lawful. (App. Ex. XXXV, p. 12–13). Further, the military judge found that appellant had "one promise[:] . . . . to plead guilty to the offense as charged and without exception and substitution." (App. Ex. XXXV at p. 13). The military judge found that appellant had not substantially performed that promise--rather, he had breached the agreement with assistance of counsel. (App. Ex. XXXV, p. 14). Therefore, the convening authority lawfully withdrew from the plea agreement. (App. Ex. XXXV, p. 14). The military judge also found that further prosecution of the offenses did not violate double jeopardy. (App. Ex. XXXV at p. 16).

Appellant contested the charges before an enlisted panel and was found guilty of only the Article 92 specification involving SPC [redacted], the same

specification considered at the summary court-martial of *Norman II*. (R. at 1489; App. Ex. VIII-A).

Assignment of Error I

WHETHER THE MILITARY JUDGE ERRED WHEN HE FOUND THAT APPELLANT BREACHED A PREVIOUS PLEA AGREEMENT WHEN APPELLANT PLED AND WAS FOUND GUILTY AND THE ONLY CONDITION IN THE AGREEMENT WAS TO PLEAD GUILTY.

Standard of Review

"The interpretation of a pretrial agreement is a question of law, which is reviewed under a de novo standard." *United States v. Acevedo*, 50 M.J. 169, 172 (C.A.A.F. 1999) (citations omitted). "[A]mbiguities in the interpretation of [plea agreements] are resolved in favor of the accused." *United States v. Davis*, 20 M.J. 903, 905 (Army Ct. Mil. R. 1985).

This court reviews a military judge's ruling on a motion to dismiss a charge for an abuse of discretion. *United States v. Shelby*, ___ M.J. ___, *3–4 (C.A.A.F. 2025). "Abuse of discretion occurs when the military judge: (1) bases a ruling on findings of fact that are not supported by the evidence; (2) uses incorrect legal principles; (3) applies correct legal principles in a clearly unreasonable way; or (4) does not consider important facts." *Id*. (citation omitted).

Law and Argument

A "pretrial agreement is created through the process of bargaining, similar to that used in creating any commercial contract," and as such a court of appeals looks "to the basic principles of contract law when interpreting" an agreement. *Acevedo*, 50 M.J. at 172. However, these principles are "outweighed by the Constitution's Due Process Clause protections for the accused." *Id*.

Under these principles, plea agreements bind the government to perform their promises so long as the accused carries out their "end of the bargain." *United States v. Castaneda*, 162 F.3d 832, 836 (5th Cir. Ct. App. 1998). "If a defendant 'materially breaches; his commitments under the agreement . . . the government can be released from its reciprocal obligations." *Id*.

a. The convening authority properly withdrew from the plea agreement when appellant "fail[ed] to fulfill the terms of the agreement."

The plea agreement between appellant and the convening authority placed only one condition upon appellant: that he plead guilty to fraternization. (App. Ex. VIII-G). Merely parroting "I plead guilty" did not fulfill that condition. Appellant also needed to establish a factual basis consistent with the plea. RCM 910(e). Rather than doing so, appellant argued his innocence. (App. Ex. XVIII-G).

The Rules for Court Martial (RCM) designate SCMOs as "military judge[s]" and as such, they have an affirmative duty to ensure that a factual basis exists

before accepting any guilty plea. RCM 103(15), 910(e); *United States v. Care*, 18 C.M.A. 535, 541–42 (C.M.A. 1969). They must do so by engaging in an inquiry with the accused and eliciting sufficient details about the offense to determine whether a substantial conflict exists between the facts and the plea. *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996). When an accused "'sets up matter inconsistent with the plea' *at any time* during the proceeding, the military judge must either resolve the apparent inconsistency or reject the plea." *Id*. (emphasis added). When substantial conflict does exist between the facts and the plea, "a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty." *United States v. Perron*, 58 M.J. 78, 81–83 (C.A.A.F. 2003) (citing Article 45(a) UCMJ).

Appellant called three witnesses who testified that "if [he] had know[n] [SPC DP]'s rank from the start, he would have never gotten involved with her." (App. Ex. XVIII-G at p.1). Appellant, testified that SPC [redacted] represented herself as an NCO. (App. Ex. XVIII-G). He also advanced a theory that the relationship was appropriate until SPC [redacted] was disqualified from BLC. (App. Ex. XVIII-G). When provided the Army Regulation governing fraternization, Appellant read subparagraphs (1)–(5) out loud and denied that he violated them. (App. Ex. XVIII-C; AR 600-20 para 4-14b).

Appellant made statements undermining his plea intentionally. With counsel present, he called witnesses to opine on his innocence and argued for no fine and no reduction in grade. Appellant did not "testif[y] against himself, admit[] guilt, and maintain[] his guilt in his post-hearing matters." **(**Appellant's Br. 23**)**. Rather, appellant relitigated his innocence to the convening authority in the guise of 1306 relief. (App. Ex. XVIII-C). Defense counsel used the opportunity to argue that his client was duped by the victim, and that he had broken off the relationship by 9 April 2021. (App. Ex. XVIII-C). This undermined appellant's plea by creating a substantial basis in fact to question the plea. The convening authority accepted his SJA's advice and set aside the findings and ordered a rehearing. A reminder of the moral: **"**If men had all they wished, they would be often ruined." Æsop, *The Tortoise and the Eagle*, in *Aesop's Fables* (George Fyler Townsend trans., 1867), https://www.gutenberg.org/ebooks/21.

Only after the convening authority set aside the findings of the summary court-martial and ordered a rehearing did defense counsel claim that his client's assertions were no more than pleas for sentencing relief. When this attempt to the weave the needle failed, defense cried foul.

b. A convening authority may withdraw from a plea agreement at any time "before substantial performance by the accused . . . ."

Rules for Court Martial 705(e)(4)(B) describes when a convening authority may withdraw from a plea. A convening authority may do so at

> any time before *substantial performance* by the accused of promises contained in the agreement, upon failure by the accused to fulfill any material promise or condition in the agreement, when inquiry by the military judge discloses a disagreement as to a material term in the agreement, or if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.

RCM 705(e)(4)(B)(2019)(emphasis added). This rule was revised in 2019 from its predecessor, RCM 705(d)(4)(B) (2016) ("any time before the accused *begins* performance . . . .")(emphasis added). Given the recency of this change, there is little military court precedent to draw from.

By using the term "substantial performance," the RCM adopts principles of contract law which are well settled in civilian jurisdictions. Substantial performance is an equitable doctrine which allows a party who has performed most of their obligations to still benefit from the contract, even if they have not fully completed their obligations as agreed. *Jacob & Youngs*, *Inc*. *v*. *Kent*, 129 N.E. 889, 890 (N.Y. 1921); *Kreyer v*. *Driscoll*, 159 N.W.2d 680, 682 (Wis. 1968). However, the performance must be close enough to the agreed terms that the essential purpose of the contract is fulfilled. "[A]n omission, both trivial and

innocent, will sometime be atoned for by allowance of the resulting damage, and will not always be the breach of a condition to be followed by a forfeiture." *Jacob & Youngs*, *Inc*. 129 N.E. at 890. (citations omitted). This doctrine allows minor deviations, those that may not exactly meet the contract terms, but do not defeat the contract's purpose. It also generally requires that a party act in good faith to benefit from the contract. *Id*. at 892; *Kreyer*, 159 N.W.2d at 682.

"The concept of the duty of good faith . . . is a stab at approximating the terms the parties would have negotiated had they foreseen the circumstances that have given rise to their dispute." *Market Street Assoc*. *Ltd*. *Partnership v*. *Frey*, 941 F.2d 588, 595 (7th Cir. Ct. of App. 1991). Further, "to [deliberately] take advantage of your contracting partner's mistake during the performance stage . . . is a breach of good faith." *Id*. at 597.

By failing to admit to an element of the offense he was pleading guilty to, he failed to provide a sufficient factual basis for his plea, and thus failed to substantially perform his end of the bargain. Though the plea agreement did not explicitly require appellant to be provident, providence is a basic requirement for any guilty plea before military courts. RCM 910(e). Further, appellant's plea agreement included an acknowledgment of "I am in fact guilty of the offenses to which I am pleading guilty." (App. Ex. VIII-G). This was after negotiating the dismissal of the most serious charges against him.

Appellant argues that the convening authority's dismissal and order for a rehearing of the summary court-martial was correct but attributes the necessity of those actions to the "improper actions" of government counsel. (Appellant's Br. 22–23). These "improper actions" amount to providing the SCMO an evidence packet that referred to the dismissed specifications, doing so in an *ex parte* fashion, and conducting the summary court-martial in the presence of trial counsel. (App. Ex. XVIII-C, para 4–5). These grievances originate from appellant's 1306 matters, and lack any independent corroboration.[11] Appellant did not even mention these alleged shortcomings in his *Norman III* motion to dismiss. (App. Ex. VIII). Rather, at that time appellant argued that the summary court-martial was lawful. (App. Ex. VIII, para. 17) ("The Court was properly convened, plea entered, evidence received, and findings and sentence adjudged on the same date."). This court is not well situated to investigate appellant's now alternative view on the summary court-martial.

[11] One reading appellant's brief might mistakenly believe that further support of improper government actions could be found in App. Ex. XVIII-A or App. Ex. XXXV, para 17. (Appellant's Br. 3–4, 7). First, App. Ex. XVIII-A is the record of summary court-martial which bears no reference to the presence of trial counsel or the existence of any *ex-parte* communications with the SCMO. Second, App. Ex. XXXV para 17 is the portion of the military judge's ruling where he summarizes the procedural complaints made by appellant in his 1306 matters. For example, when appellant cites "(App. Ex. XVIII-C, para 5(b); App. Ex. XXXV, para. 17(e))," he cites himself twice, as para 17(e) of Ap. Ex. XXXV cites to "para 5(b)" of appellant's own 1306 matters.

Given considerations of substantial performance and good faith, it is worth noting that one who "hokes up a phony defense to the performance of his contractual duties and then when the defense fails (at some expense to the other party) tries on another defense for size can properly be said to be acting in bad faith." *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 363 (7th Cir. 1990)(citations omitted). Here, appellant attempts to radically pivot from his position at trial concerning the summary court-martial; this court should reject this argument.

c. Appellant relies on inapplicable authority.

Appellant relies on the CAAF opinion, *United States v. Smead*, to support his argument that this court should grant relief on the basis of Constitutional Double Jeopardy; this reliance is misplaced. 68 M.J. 44 (C.A.A.F. 2009); (Appellant's Br. 17-18).[12] *Smead* involved a similar plea agreement[13], yet in that case, there was no question that Smead substantially performed and pled guilty to the agreed offenses. *Id*. at 47. Further, unlike appellant's case, the convening authority in *Smead* acted on the court-martial findings and sentence and the case

[12] Appellant also invokes *Smead* as a relevant authority on the issue of former jeopardy. This brief addresses those concerns in AEII.

[13] "Upon announcement of the sentence by the military judge, the withdrawn language and/or charge(s) and specification(s) will be dismissed with prejudice by the convening authority." *Id*. at 47.

came back *following* appellate review. *Id*. at 49. When contention arose in that case, Smead had already begun his confinement. *Id*. The issue in that case arose when the government failed to send Smead to an agreed upon confinement facility. *Id*. The plea agreement failed due to the government's inability to honor its commitments, not Smead's inability to uphold his end of the bargain. The convening authority sought to withdraw from the agreement *after* approving the findings and sentence of the general court-martial. *Id*. The facts here are fundamentally different--crucially RCM 705(e)(4)(B) performance was not at issue as Smead had completed performance and the convening authority already approved his findings and sentence. Here, the convening authority withdrew from the plea prior to approving the findings on the basis of appellant's failure to substantially perform and admit guilt at the summary court-martial. These differences make the case inapplicable to the issues presented here.

Appellant argues that the decision of the convening authority to withdraw from the plea agreement was made purely based on the report of appellant committing new sexual misconduct: "To be sure, the SJA's advice to withdraw included that Appellant had committed new misconduct – not that Appellant was improvident." (Appellant's Br. 17). This misconstrues the SJA's advice—the SJA stated that the convening authority may withdraw because "[Appellant] has not substantially performed any of the promises contained in the plea agreement . . . ."

(App. Ex. XVIII-E at p. 2). Appellant's only promise contained in the plea agreement was to plead guilty. (App. Ex. VIII-G). Providence is an implied condition for any guilty plea. RCM 910(e). Appellant's contention that the SJA did not note the providence issue in her advice is without merit.

d. The military judge heard and considered these same issues at trial. His ruling is correct in law and his findings of fact are not clearly erroneous.

Appellant previously litigated this same issue before the military judge who presided over *Norman III*. The military judge considered written motions, conducted a hearing, entertained argument, and issued a 22-page ruling. (R. at 26; App. Ex. XXXV). Appellant claims the military judge abused his discretion in formulating this ruling.

First, appellant decries the military judge's finding that appellant's *Norman II* guilty plea was improvident. Appellant claims that this finding lacked a "factual foundation." (Appellant's Br. 24). He then takes aim at the *factual foundation* the military judge relied upon: SPC [redacted]'s memorandum for record (MFR). (App. Ex. XVIII-B). According to appellant, this MFR "was created at the behest of trial counsel more than a week after the hearing and only after Appellant was accused of additional misconduct and placed into PTC." (Appellant's Br. 24). He provides no support for this speculative assertion that the MFR "was created at the behest of trial counsel." Further, he misstates the timeline as the MFR was written exactly

one week after the summary court-martial and before appellant was placed in PTC. (*Compare* E-ROT p. 471 (48-hour Memorandum) *with* App. Ex. XVIII-B).

It is true that SPC [redacted] drafted the MFR "only after Appellant was accused of additional misconduct . . . ." Appellant, however, committed his third alleged sexual assault within 48 hours of the *Norman II* hearing. The victim, Ms. [redacted], accused appellant shortly after the incident and reported the assault a few days later. (R. at 1055–56, 1139).

Regardless, the military judge properly relied on SPC [redacted]'s representation of what occurred at the summary court-martial and his findings of fact are not clearly erroneous. And contrary to appellant's representation, the military judge did not solely rely on the MFR in formulating his analysis and conclusions. In fact, the military judge attributed his finding in part to appellant's RCM 1306 matters: "the defense counsel shed considerable light on the matter being addressed by the SCMO when he stated: 'On 9 April 2021, [appellant] found out that [SPC [redacted]] was not going to attend BLC soon and he ended the relationship.'" (App. Ex. XXXV at para 52.c.).

Second, appellant claims that the military judge "wholly misstated [a]ppellant's RCM 1306 matters," and omitted key facts. (Appellant's Br. 25–26). This is also not true. The military judge went to great lengths to accurately summarize appellant's RCM 1306 matters. App. Ex. XXXV at paras 17.a.–g.,

18.a.–d. In his findings of fact, the military judge even captures the same timeline appellant advocates for in his brief: 29 March – 9 April. (App. Ex. XXXV para 18.b.–c.).

Appellant next takes issue that the military judge omitted from a portion of his analysis that the charging document reflected a date of "on or about 9 April 2021." (App. Ex. XXXV para 52.d.[14]). This complaint exaggerates the scope of the omission, as the military judge included the "on or about" language elsewhere in his ruling. (App. Ex. XXXV para 2.). Further, the military judge clearly made mention of the date for the purpose of emphasizing the conflicts of fact appellant introduced during his guilty plea.

Appellant also argues that the military judge "omitted that [a]ppellant claimed he did not know PFC [sic] [redacted]'s rank until 9 April 2021." Appellant, through his counsel, made the case that he became aware of SPC [redacted]'s rank on 29 March 2021. (App. Ex. XVIII-C). The military judge's omission of a competing theory that appellant did not know SPC [redacted]'s rank "until 9 April 2021" was not clearly erroneous. Especially so when appellant's counsel poorly developed and did not advanced the theory.

[14] Which reads: "Considering [appellant] was charged with fraternizing with [SPC [redacted]] on a very specific date, 9 April 2021, it is hard to reconcile how the accused could enter into a plea agreement where he would admit to both fraternizing and that he was not fraternizing on the very same date."

In conclusion, the military judge gave appropriate deference to the SCMO and appropriately considered the other available accounts of appellant's plea at *Norman II*. The military judge's findings were reasonable, well-articulated, and supported with defense and government exhibits. The military judge did not err in his ruling that appellant's guilty plea before the SCMO was improvident.

Assignment of Error II

WHETHER APPELLANT'S CONVICTION IN A GENERAL COURT-MARTIAL FOR THE SAME OFFENSE HE HAD ALREADY BEEN CONVICTED OF IN A SUMMARY COURT-MARTIAL VIOLATED HIS CONSTITUTIONAL AND STATUTORY DUE PROCESS RIGHTS AND PROTECTIONS AGAINST SELF INCRIMINATION.

Standard of Review

Double Jeopardy is an issue of law the court reviews de novo. *United States v. Driskill,* 84 M.J. 248, 252 (C.A.A.F. 2024).

Law and Argument

Double Jeopardy applies to military courts-martial through Article 44, UCMJ, which states, "No person may, without his consent, be tried a second time for the same offense." Article 44(a), UCMJ. In a judge alone trial, this rule applies

when the proceedings are terminated—without fault of the accused—"after introduction of evidence." Article 44(c), UCMJ.

While Double Jeopardy applies when the accused is acquitted, convicted, or pardoned, it does not apply when there is a dismissal that did not amount to a finding of not guilty. *United States v. Hunt*, 24 M.J. 725, 728 (A.C.M.R. 1987). "[T]he Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *United States v. McClain*, 65 M.J. 894, 900 (Army Ct. Crim. App. 2008) (quoting *United States v. Scott*, 437 U.S. 82, 89 (1978)). "It 'has long been the rule that when a defendant obtains a reversal of a prior, unsatisfied conviction, he may be retried in the normal course of events.'" *Smith v. United* States, 599 U.S. 236, 241 (2023) (quoting *United States v. Ewell*, 383 U. S. 116, 121 (1966)). The prohibition against double jeopardy—stemming from both statute and constitutional protections—does not encompass the situation here: an appellant, who fails to adhere to his plea agreement by improvidently pleading guilty at a summary court-martial, seeks protection through double jeopardy from his own voluntary actions.

This rule mirrors the RCM's requirement for judge advocate review of summary courts-martial and the convening authority's power to set aside findings. RCM 1307. The convening authority may order a rehearing or new trial following a summary court martial, so long as there is a finding of guilty and sufficient

evidence in the record to support the finding and any lesser charges. RCM 1307(f)(1)(c); 1306(b)(2)(B)(ii). In other words, if there is a finding of guilty and the convening authority orders a rehearing, there are no double jeopardy concerns in ordering a new hearing or trial. This logic is extended further in this case because appellant failed to perform his contractual obligations in accordance with his plea agreement, discussed *supra*. He should not now be allowed to seek the protection of Article 44, UCMJ.

Here, appellant argues that his convictions violate "constitutional and statutory due process and protections against self-incrimination." (Appellant Br. 33). By framing their argument this way, appellant ignores that a summary court-martial is "a noncriminal forum" and a guilty finding at this forum "does not constitute a criminal conviction." Art. 20(b), UCMJ; RCM 1301(b). Further, the Supreme Court has ruled that Fifth Amendment protections do not apply to those who voluntarily submit themselves to summary court-martial, because it does not constitute a "criminal prosecution." *Middendorf v. Henry*, 425 U.S. 25, 37 (1976); UCMJ Art. 20(b).

To make his argument, appellant alleges that he was "tried twice, found guilty twice, and punished twice" for the same crime. (Appellant Br. 35). Without citing any relevant authority, appellant then alleges that this violated double jeopardy because the "U.S. Government prosecuted appellant two times for the

same offenses in two different forums of competent jurisdiction." These assertions, while correct in principle, are inapplicable to guilty pleas at summary courts-martial. All cases appellant relies upon apply former jeopardy protections to general and special courts-martial.

Appellant relies on *United States v. Driskill*, generally throughout his brief for the assertion that jeopardy attaches when "presentation of the evidence on the general issue of guilt has begun." 84 M.J. 248, 252 (C.A.A.F. 2024); (Appellant's Br. 34). Appellant then boldly claims that in his case, "[j]eopardy attached once evidence was presented at appellant's summary court-martial." (Appellant Br. 35). Appellant offers no support for this assertion. Turning to *Driskill*, we can find the quote utilized by appellant. The full sentence adds some helpful clarification: jeopardy attaches when "*[i]n the case of a trial by military judge alone*, presentation of the evidence on the general issue of guilt has begun." *Id*.[15] For purposes of former jeopardy, a summary court-martial is not a "trial by military judge alone." Article 44(c)(1), UCMJ. Furthermore, this was a guilty plea.

[15] "Following *Easton*, Article 44 was amended to specify that jeopardy attaches differently depending on the forum. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5226, 130 Stat. 2000, 2910-11 (2016). In the case of a trial by military judge alone, jeopardy attaches on the presentation of evidence; in the case of a trial by member panel, jeopardy attaches when the members have been impaneled. *See* Article 44(c)(1)(A)-(2)(A), UCMJ, 10 U.S.C. § 844(c)(1)(A)-(2)(A) (2018); R.C.M. 907(b)(2)(C)(i)(I)-(II)." *Id*. at FN4.

Under appellant's reasoning, every improvident guilty plea would be subject to double jeopardy protections: criminals could agree to plead guilty, then fail to admit their guilt. But since "presentation of the evidence on the general issue of guilty ha[d] begun" the government would be barred from prosecuting the case. (Appellant Br. 34). This is nonsensical, legally baseless, and highlights the absurdity of appellant's argument.

Military courts have not answered the question: "when, if ever, does Article 44 jeopardy attach to a summary court-martial?" The most reasonable answer to this question turns to the Article itself. Article 44(b), UCMJ provides that "[n]o proceeding in which an accused has been found guilty by a court-martial upon any charge or specification is a trial in the sense of this article *until the finding of guilty has become final after review of the case has been fully completed*." (emphasis added). This clearly applies to summary courts-martial, as the forum relies on a SCMO, not a military judge, and independent judge advocate review prior to convening authority action. RCM 1307.[16]

[16] An argument could also be made that jeopardy attaches in summary courts-martial upon the effect of sentence. It is worth noting that appellant was never sentenced by the summary court-martial. Rules for Courts-Martial [RCM] 1102(a)(2) provides the effective date of sentences for summary courts-martial: "a sentence is executed and takes effect when the convening authority acts on the sentence." One of the enumerated exceptions to this rule is for reductions at summary court-martial. RCM 1102(b)(1)(A)(ii). In that case, the reduction is

The specific facts of this case do not merit application of constitutional or statutory double jeopardy. This court should deny the appellant any relief.

Conclusion

WHEREFORE, the government respectfully requests This Honorable Court affirm the findings and sentence.

ALEX J. BERKUN
CPT, JA
Appellate Attorney, Government
Appellate Division

MARC B. SAWYER
MAJ, JA
Branch Chief, Government
Appellate Division

RICHARD E. GORINI
COL, JA
Chief, Government Appellate
Division

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effective on "the date on which the sentence is approved by the convening authority."

CERTIFICATE OF SERVICE, U.S. v. NORMAN (20230498)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at ***usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@mail.mil*** on the 14th day of March, 2025.

[redacted]
Senior Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546
[redacted]