No. _____

IN THE

Supreme Court of the United States

JAMES M. HALE,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Judicial deference "'is at its apogee' when reviewing congressional" decisions related to military discipline. *Weiss v. United States*, 510 U.S. 163, 177 (1994) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)). Congress exercised its constitutional authority over such matters to narrowly limit court-martial jurisdiction to try reserve members of the military. U.S. CONST. art. I, § 8, cl. 14; 10 U.S.C. § 802(a).

In this case, the trial judge instructed that a conviction for attempted larceny could rest on any or all of three overt acts, two of which fell outside those jurisdictional limits. The Court of Appeals found no prejudice because the evidence pertaining to the third overt act was "sufficient."

The Questions Presented are:

1. Whether the Court of Appeals erred in relying on factual sufficiency of the evidence to resolve a question of plain error, where the alleged error related to a legal defect in jurisdiction.
2. Whether instructions focusing "on or about" the charged dates invited a general verdict based on conduct outside of the court-martial's jurisdiction.

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PETITION FOR A WRIT OF CERTIORARI

Lieutenant Colonel James M. Hale, a reserve member of the U.S. Air Force, respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 78 M.J. 268 (C.A.A.F. 2019). It is reprinted in the Appendix at Pet. App. 1a-31a. The opinion of the U.S. Air Force Court of Criminal Appeals is reported at 77 M.J. 598 (A.F. Ct. Crim. App. 2018). It is reprinted in the Appendix at Pet. App. 32a-64a.

JURISDICTION

The Court of Appeals granted Petitioner's petition for review on May 9, 2018, *United States* v. *Hale*, 77 M.J. 420 (C.A.A.F. 2018) (mem.), and issued a final decision on February 6, 2019. This Court therefore has jurisdiction under 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Make Rules Clause authorizes Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8, cl. 14.

The Necessary and Proper Clause grants Congress the power "[t]o make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

Article 2, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 802 (2012), details the "[p]ersons subject to" military law.

Congress authorized court-martial jurisdiction[1] over "[m]embers of a regular component of the armed forces, including . . . persons lawfully called or ordered into, or to duty in or for training in, the armed forces from the dates when they are required by the terms of the call or order to obey it." 10 U.S.C. § 802(a)(1) (2012).

As applicable to Petitioner, Congress also authorized court-martial jurisdiction over "[m]embers of a reserve component while on inactive-duty training." Article 2(a)(3), UCMJ, 10 U.S.C. § 802(a)(3) (2012). Subsequent amendments took effect on January 1, 2019, and extended jurisdiction, pursuant to orders or regulations, to (1) servicemembers

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[1] This pleading uses the term "court-martial jurisdiction" because of the split authorities on whether a military member's status should be deemed personal or subject-matter jurisdiction. The operative statute refers to "[p]ersons subject to" the UCMJ, 10 U.S.C. § 802, and, in this case, the Court of Appeals used the term "personal jurisdiction." Pet. App. 2a; *accord. Hamdan v. Rumsfeld*, 548 U.S. 557, 575 n.16 (2006); *United States v. Nealy*, 71 M.J. 73, 75 (C.A.A.F. 2012); *United States v. Phillips*, 58 M.J. 217, 218 (C.A.A.F. 2003); *United States v. McDonagh*, 14 M.J. 415, 415 (C.M.A. 1983). Other cases have referred to subject-matter jurisdiction. *Solorio v. United States*, 483 U.S. 435, 451 n.18 (1987); *United States v. Morita*, 74 M.J. 116, 117 n.1 (C.A.A.F. 2015); *United States v. Oliver*, 57 M.J. 170, 172 (C.A.A.F. 2002).

traveling to and from the inactive-duty training site, (2) intervals between consecutive periods of inactive-duty training on the same day, and (3) intervals between inactive-duty trainings on consecutive days. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 5102, 5542, 130 Stat. 2000, 2921 (2016).

Through Article 80, UCMJ, Congress proscribed the offense of attempt. 10 U.S.C. § 880 (2012). The four elements of attempt are:

> (1) That the accused did a certain overt act;
>
> (2) That the act was done with the specific intent to commit a certain offense under the code;
>
> (3) That the act amounted to more than mere preparation; and
>
> (4) That the act apparently tended to effect the commission of the intended offense.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 4.b (2012 ed.).

Congress codified the offense of larceny under the UCMJ in 10 U.S.C. § 921 (2012). The offense occurs when a person subject to court-martial jurisdiction "wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person" property "with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use." *Id.* at § 921(a).

On appeal, "[a] finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." 10 U.S.C. § 859(a) (2012).

STATEMENT OF THE CASE

A. Procedural History

Petitioner, a Lieutenant Colonel in the Air Force Reserve, was tried by a general court-martial composed of officer court members.[2] Pet. App. 2a. Contrary to his pleas, Petitioner was convicted of four allegations of attempted larceny of military property, one allegation of making a false official statement, and three allegations of larceny of military property, in violation of Articles 80, 107, and 121 of the UCMJ, 10 U.S.C. §§ 880, 907, 921. *Id.* Only one of those convictions, for attempted larceny on or about November 19, 2013, is the subject of the Questions Presented.

Because Petitioner's sentence included a dismissal, the Judge Advocate General referred the case to the Air Force Court of Criminal Appeals (AFCCA). *Id.*; 10 U.S.C. § 866(b)(1) (2012). Petitioner raised five claims in his appeal to the AFCCA. Relevant to this appeal, Petitioner argued to the

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[2] Though not the same, a court-martial panel composed of court members functions like a civilian jury in those respects relevant to the Questions Presented. *O'Callahan v. Parker*, 395 U.S. 258, 263-64 (1969); *United States v. Hardy*, 46 M.J. 67, 73 (C.A.A.F. 1997); *Allen v. United States*, 603 F.3d 423, 426 (8th Cir. 2010).

AFCCA that his court-martial lacked jurisdiction for some of the convictions because certain acts took place when he was not in a military status, and that the military judge's instructions asking the court-martial panel to base its findings on conduct "on or about" the charged dates constituted plain and materially prejudicial error by inviting the court members to convict Petitioner for conduct that occurred when he was not in a military status.[3] Pet. App. 34a.

Agreeing with some of Petitioner's jurisdictional assertions, a three-judge AFCCA panel granted relief in part. Pet. App. 33a-34a. The AFCCA panel modified two of the findings, affirmed the findings as modified, reassessed the sentence to that adjudged at trial, and affirmed the sentence. Pet. App. 63a.

The Court of Appeals granted review, 10 U.S.C. § 867(a)(3) (2012), of the AFCCA's decision and heard argument about whether the court-martial had jurisdiction to try Petitioner for two of the alleged offenses and whether the "on or about" instructions constituted plain error. Pet. App. 3a n.2.

After full briefing and oral argument on the merits of Petitioner's challenges, the Court of Appeals divided in part and issued an opinion affirming the AFCCA's decision. Pet. App. 1a-31a.

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[3] Before the AFCCA, Petitioner also raised claims relating to the admission of two exhibits, as well as the factual and legal sufficiency of his convictions. Pet. App. 34a. Those claims are not at issue here.

B. Factual Background

The charges stemmed from reimbursement for lodging obtained when Petitioner stayed with his in-laws during seven separate periods of reserve duty performed across 2011 and 2013. Pet. App. 9a. Each taking involved "multiple steps . . . through travel vouchers, duty orders, checks, bank statements, etc." Pet. App. 17a.

The prosecution's charging scheme purported to distinguish charging Petitioner with completed larceny and attempted larceny based on whether Petitioner was subject to court-martial jurisdiction throughout the duration of the taking at issue. Tr. 847.

Attuned to the issue of jurisdiction, the trial judge gave instructions that implicated court-martial jurisdiction at three pertinent junctures.

First, ignoring the statutory distinction between jurisdiction grounded in "active duty" under 10 U.S.C. § 802(a)(1) versus "inactive-duty training" under 10 U.S.C. § 802(a)(3), the trial judge provided an instruction applicable to all offenses advising that jurisdictional matters were already settled:

> You have heard evidence that [Petitioner] was not on active duty when certain vouchers were paid. I have previously found that the Government has established that this court-martial has jurisdiction to try [Petitioner] for the charged offenses. In considering whether [Petitioner] was on active duty, you are not to consider that information for whether this court-martial has

> jurisdiction to try [Petitioner] for the charged offenses.

Tr. 822-23.

Second, the trial judge instructed the court members that a conviction required them to find the charged misconduct occurred "on or about" and "between on or about . . . and on or about" the dates set out in the allegations. Tr. 781, 784, 786, 789, 790, 794, 795, 799, 800, 803, 805, 807, 809, 812.

Third, as raised here, the instructions for the November 19, 2013, attempted larceny advised that any of three actions could satisfy the first element requiring an overt act. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 4.b (2012 ed.). The three actions were that (1) Petitioner stayed at the private residence of his in-laws, (2) wrote a check to his father-in-law, "and/or" (3) created a lodging receipt. Tr. 809-10; *see also* Pet. App. 22a-23a (Ohlson, J. dissenting in part). The instructions went on that "the acts" could then evince the requisite specific intent and substantial step towards the intended offense. *Id*.

Addressing the allegation that Petitioner attempted larceny on or about November 19, 2013, the prosecution argued the court-martial panel should convict based on all three overt acts about which the trial judge instructed. Tr. 849.

During the relevant timeframe, Petitioner worked two four-hour inactive-duty training blocks on November 4 through 8, November 12 through 15, and November 18 through 19, 2013, with a single four-hour inactive-duty training block on the morning of November 20, 2013. Pet. App. 10a. The timing of this

work proved important during the consideration of this conviction in the appellate courts below.

As settled during the course of the appeal, the prosecution could not prove court-martial jurisdiction over two of the three overt acts about which the trial judge instructed—the check to Petitioner's father-in-law and the lodging receipt—because of a dearth of absence these acts occurred during a block of inactive-duty training. Pet. App. 10a, 27a-28a (Ohlson, J., dissenting in part), 45a; *see also infra* p. 13. Before the Court of Appeals, the government's brief appeared even to concede that conclusion, and was followed by a concession at oral argument that the act of staying at the in-laws' residence was insufficient to constitute an attempt without more. Pet. App. 27a, 29a n.4 (Ohlson, J., dissenting in part).

Trial defense counsel had objected to jurisdiction over the November 19, 2013, attempted larceny, but not to the instructions.[4] Appellate Ex. XXIV; Pet. App. 16a. Evaluating for plain error and deciding the case on the absence of material prejudice to a substantial right, *see* 10 U.S.C. § 859(a), the Court of Appeals played down the jurisdictional flaws embedded in the "on or about" instruction. Pet. App. 16a-19a. The Court of Appeals did so because "the charges here

[4] In relevant part, the trial judge found court-martial jurisdiction for this offense by interpreting 10 U.S.C. § 802(a)(3) as establishing jurisdiction for the entire day, a construction that was uniformly rejected on appeal. *Compare* Appellate Ex. XXIV ¶ 15, *with* Pet. App. 11a, 44a-45a n.4. Court-martial jurisdiction over this offense was one of the issues considered by the Court of Appeals. Pet. App. 3a n.2, 10a-14a.

involved concrete acts occurring on concrete dates," resulting in "no reason to suspect the members did not adhere to the admitted evidence when reaching their verdict." Pet. App. 18a.

Ultimately, the Court of Appeals found a lack of prejudice because the sole jurisdictionally viable overt act was "sufficient." *Id.* "Nothing in [Petitioner]'s argument or in the record suggests that members considered other, impermissible evidence" beyond the overt act of Petitioner staying with his in-laws combined with other circumstantial evidence demonstrating his intent. *Id.*

C. Legal Background

In *Griffin v. United States*, 502 U.S. 46, 59 (1991), this Court "establishe[d] a clear line" rendering convictions invalid when jurors "have been left the option of relying upon a legally inadequate theory."

The *Griffin* Court "reasoned that although a jury is unlikely to disregard a theory flawed in law, it is indeed likely to disregard an option simply unsupported by the evidence." *Sochor v. Florida*, 504 U.S. 527, 538 (1992) (citing *Griffin*, 502 U.S. at 59-60 (distinguishing *Turner v. United States*, 396 U.S. 398 (1970), from *Yates v. United States*, 354 U.S. 298 (1957))). But the focus for jurors is whether the codified elements of the charged offense are met by sufficient evidence, not unanimous agreement on "which of several possible means the defendant used to commit an element of the crime." *Richardson v. United States*, 526 U.S. 813, 817 (1999).

To avoid the risk of a conviction that may be based on a legally infirm theory of liability, "it would generally be preferable for the court to give an

instruction removing that theory from the jury's consideration." *Griffin*, 502 U.S. at 60. Heightened specificity in jury verdicts when dealing with multiple means of committing an offense is also advisable, albeit not constitutionally required. *Schad v. Arizona*, 501 U.S. 624, 645 (1991) (plurality opinion).

Erroneous instructions that permit a conviction on a legally impermissible theory are tested for "whether the flaw in instructions 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (per curiam) (quoting *Brecht v. Abrahamson*, 507 U.S. 612, 623 (1993)). In the absence of an objection to such instructions, the instructions are tested for plain error. *United States v. Marcus*, 560 U.S. 258, 266 (2010).

Drawing on Federal Rule of Criminal Procedure 52(b), this Court's test for plain error ordinarily asks whether (1) there is error, (2) the error is plain, (3) the error affected the defendant's substantial rights, and (4) the error implicates the fairness, integrity, or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 732 (1993). In light of legislation unique to military jurisprudence, a modified approach to *Olano* for courts-martial based on 10 U.S.C. § 859(a) considers whether (1) there was error, (2) it was plain or obvious, and (3) the error materially prejudiced a substantial right of the defendant. *United States v. Tunstann*, 72 M.J. 191, 196 n.7 (C.A.A.F. 2013).

In certain instances of plain error, prejudice should be presumed. *Olano*, 507 U.S. at 739. Although a settled test to discern when prejudice should be presumed is lacking, determining the type of error

involved and, in turn, the right affected bears consideration in the circuit courts of appeals. *See United States v. White*, 405 F.3d 208, 218 (4th Cir. 2005) (distinguishing approaches used to assess whether to presume prejudice); *see also United States v. Andrews*, 77 M.J. 393, 402 (C.A.A.F. 2018) ("Before determining whether Appellant was prejudiced, we must ask whether [the prosecutor]'s arguments amounted to plain or obvious error—or whether they were improper arguments—in the first place.").

Instructions involving the consideration of alleged acts outside of a court's jurisdiction have resulted in concerns that the prohibition on a conviction grounded in a legally infirm theory would be violated. *See Gilliam v. United States*, 80 A.3d 192, 209-10 (D.C. 2013) (explaining the proper instruction on remand about conduct in Maryland related to a conspiracy to commit murder allegedly committed in the District of Columbia); *cf. People v. Giordano*, 663 N.E.2d 588, 594-95 (N.Y. 1995) (treating geographical jurisdiction as a factual determination).

Jurisdiction to hear a case is a question of law to be determined by the court, not the fact-finder. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998); *EV v. United States*, 75 M.J. 331, 333 (C.A.A.F. 2016); *but cf. United States v. Gaudin*, 515 U.S. 506, 512-13 (1995) (recognizing jurors in criminal cases regularly resolve mixed questions of law and fact). The prosecution bears the burden of establishing jurisdiction. *See United States v. Denedo*, 556 U.S. 904, 909 (2009).

In the court-martial context, the touchstone of jurisdiction has long been the status of the accused as a military member. Military status was the focus in

"an unbroken line of cases from 1866 until 1960" and was entrenched as the central determination by this Court in 1987. *Solorio v. United States*, 483 U.S. 435, 439, 450 (1987) (citations omitted). As this Court succinctly reiterated last term, "Military courts . . . exercise power over discrete individuals—*i.e.*, members of the armed forces." *Ortiz v. United States*, 138 S. Ct. 2165, 2179 (2018).

Court-martial jurisdiction cannot extend to individuals beyond the "land and naval Forces," U.S. CONST. art. I, § 8, cl. 14, because "[u]nder the grand design of the Constitution civilian courts are the normal repositories of power to try persons charged with crimes against the United States." *Reid v. Covert*, 354 U.S. 1, 20-21 (1957); *see also Kokkonen v. Guardian Life Ins. Of America*, 511 U.S. 375, 377 (1994) (citing the presumption against federal subject-matter jurisdiction). However, judicial deference "'is at its apogee' when reviewing congressional decisionmaking" related to military discipline. *Weiss v. United States*, 510 U.S. 163, 177 (1994) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)).

Congress exercised its discretion in this area by limiting the bounds of court-martial jurisdiction applicable to reserve members of the Armed Forces. *United States v. Morita*, 74 M.J. 116, 120 (C.A.A.F. 2015). Relevant to this appeal, one basis is when the reservist is lawfully called or ordered to active duty. 10 U.S.C. § 802(a)(1). "[T]he [UCMJ] makes no provision for jurisdiction over someone who is 'essentially' on active duty. . . . [A]ctive duty is an all-or-nothing condition." *Duncan v. Usher*, 23 M.J. 29, 34 (C.M.A. 1986).

The other relevant basis limits court-martial jurisdiction to a reserve member "while on inactive-duty training." 10 U.S.C. § 802(a)(3). The governing regulation in Petitioner's case defined inactive-duty training as a block of time: a "four-hour period of training, duty or instruction." Air Force Instruction 36-2254V1, *Reserve Personnel Participation*, ¶ 4.1.1 (May 26, 2010). Though not fully clarified until this appeal, this statute means what its plain language says, limiting court-martial jurisdiction to that block of inactive-duty training. Pet. App. 11a; *Morita*, 74 M.J. at 120 (citing *Robinson v. Shell Oil Company*, 519 U.S. 337, 340 (1997)); *see also United States v. Wolpert*, 75 M.J. 777, 778 (A. Ct. Crim. App. 2018) (finding no jurisdiction between periods of inactive-duty training).

This Court has yet to apply the rule applicable to verdicts grounded in a legally flawed theory to a case where instructions cross jurisdictional lines. This Petition raises the legality of such instructions through the lens of the limited view of court-martial jurisdiction mandated by the Constitution and by Congress through 10 U.S.C. § 802. Moreover, when such instructions are not the subject of an objection at trial, this Petition raises the appropriate framework for applying plain-error review.

REASONS FOR GRANTING THE PETITION

I. This Case Presents an Important Question About the Impact of Jurisdictional Bars on Instructions.

Determining whether a conviction rests on a legally flawed theory has proven difficult to discern. Jessica A. Roth, *The Divisibility of Crime*, 64 Duke

L.J. Online 95, 109-11 (2015). The instructions in this case exacerbated that quandary and illustrate that clarification is warranted to convey to trial judges the precision required in their instructions.

The Court of Appeals' resolution of the challenge to the trial judge's "on or about" instruction demonstrates the importance of the Questions Presented because the Court of Appeals in effect treated what is customarily a question of law—jurisdiction—as a matter of factual sufficiency of the evidence. *See Steel Co.*, 523 U.S. at 94-95; *EV*, 75 M.J. at 333. Depending on the allegation at issue, jurisdiction-related aspects of the case, such as geographic location, may serve as factual elements that must be proved beyond a reasonable doubt. *See Gilliam*, 80 A.3d at 209-10; *Giordano*, 663 N.E.2d at 594-95; *accord. Gaudin*, 515 U.S. at 512-13. As such, this case presents an avenue to draw the line between when jurisdictional matters addressed in instructions should be treated as the source of a legal flaw as opposed to merely the sufficiency of the evidence.

That line should be drawn based on a simple metric: whether the trial judge's instructions correctly addressed jurisdiction. If jurors have been instructed on jurisdiction correctly, then all that is left for them to do is apply the facts to the law, which is well within their capabilities. *See Sochor*, 504 U.S. at 538. But if the instructions related to jurisdiction are wrong, then their consideration of the facts is confounded and the risk of material prejudice is substantial.

In the context of this case, correct instructions based on the limits of court-martial jurisdiction demanded more than just avoiding the "on or about" instructions. Rather, correct instructions would have

delineated exact dates, and, for the inactive-duty training times implicated in the November 19, 2013, allegation, exact times. Such instructions were required because of the deference owed to Congress in setting the bounds of court-martial jurisdiction. *Weiss*, 510 U.S. at 177. Congress set clear starting and stopping points for jurisdiction. 10 U.S.C. § 802(a). While those starts and stops could arise multiple times each day when jurisdiction derived from inactive-duty training, as was the case here, that was the decision Congress made and it had to be respected. Pet. App. 6a, 20a (Ohlson, J., dissenting in part); 10 U.S.C. § 802(a)(3).

Yet the Court of Appeals passed on this error, instead characterizing the trial judge's instructions as something the court members could parse for themselves. Such reasoning holds water when instructions are correct and all that remains are questions of sufficiency of the evidence. But that was not the case here for three reasons.

First, if the timing of the "concrete acts" were as clear as the Court of Appeals indicated, there is little reason to explain why the trial judge did not tailor his instructions accordingly. *See* Pet. App. 18a. Instead, the trial judge muddied the waters, instructing that he had already resolved jurisdictional matters about whether Petitioner was on "active duty," and, in doing so, blurring the codified distinction between active duty under 10 U.S.C. § 802(a)(1) inactive-duty training under 10 U.S.C. § 802(a)(3). *See* Tr. 822-23.

Second, the instructions focused on dates, whereas the exact hours of inactive-duty training were what mattered for the two overt acts outside the court-martial's jurisdiction. The deliberateness with which

the trial judge did so is underscored by the trial judge's erroneous interpretation of 10 U.S.C. § 802(a)(3) as broadly establishing jurisdiction for the whole of November 19, 2013, instead of the limited four-hour blocks of inactive-duty training. Appellate Ex. XXIV ¶ 15. Indeed, this interpretation of the statute at issue was not settled until Petitioner's appeal narrowly construed 10 U.S.C. § 802(a)(3). Pet. App. 11a, 44a-45a n.4.

Third, the prosecution exploited the erroneous "on or about" instruction to ask the court members to convict based on conduct on those surrounding dates, without reference to or focus on time. Tr. 849.

Under the line-drawing test proposed above for assessing on which side of the *Griffin* divide jurisdiction-related instructions fall, the Questions Presented also call attention to the appropriate methodology for appellate courts to assess such error. In this case, the Court of Appeals decided the case based on the absence of prejudice, even though discerning prejudice would vary based on whether the instruction pertained to legal error or sufficiency of the evidence. *See Griffin*, 502 U.S. at 59-60; *Yates*, 354 U.S. at 312; *see also Skilling v. United States*, 561 U.S. 358, 414 (2010) (leaving for remand an issue about constitutional error based on a jury instruction that may have rested on a legally invalid theory).

Prioritizing the type of error when it relates to jurisdiction would impose little burden on lower courts given the already-existing requirement to assure themselves of jurisdiction before reaching the merits of the case. *Steel Co.*, 523 U.S. at 94-95. Moreover, determining the type of error, at least in circumstances such as this where jurisdictional

concerns are implicated, facilitates the consideration of prejudice. *White*, 405 F.3d at 218; *Andrews*, 77 M.J. at 402. If the instruction presented the court members with a legally devoid basis to convict, as it did in this case, the likelihood of prejudice is high. On the other hand, if the instruction offered only another factual basis for a conviction, the risk of prejudice is low as a result of the ability of court members to adequately assess such factual issues. *Sochor*, 504 U.S. at 538. As such, the importance of this case extends to whether the Court of Appeals should have modified the plain error test, *see Tunstann*, 72 M.J. at 196, in order to determine how to appropriately assess prejudice.

II. This Case is a Good Vehicle Crystallizing Issues that Will Continue to Arise.

Though the jurisdictional issue in this case stems from the narrow plain-language construction of the version of 10 U.S.C. § 802(a)(3) applicable at the time of Petitioner's court-martial, the sort of instructional issues implicated in the Questions Presented are not limited to that context. Rather, they stand to persist in courts-martial as well as other criminal proceedings.

Admittedly, the frequency with which the "office light switch" was flipped specific to Petitioner's inactive-duty training will be erased thanks to the recent amendments to 10 U.S.C. § 802(a)(3). Pet. App. 20a (Ohlson, J., dissenting in part); Pub. L. No. 114-328, § 5102. But just because the switch is now flipped less often does not mean that court-martial jurisdiction over military reservists—or, more generally, military members—fails to turn off with a similar degree of specificity. *See Morita*, 74 M.J. at

120; *Duncan*, 23 M.J. at 34. When conduct at issue in a court-martial rests on those jurisdictional edges, the same sort of temporal concerns as those presented here will arise.

Moreover, the confluence of jurisdictional questions and instructions extend beyond the temporal and status-related limits of court-martial jurisdiction. Instructional issues pertaining to geographic jurisdiction questions have arisen at the State level and in the District of Columbia. *See*, *e.g.*, *Gilliam*, 80 A.3d at 209-10; *Giordano*, 663 N.E.2d at 594-95. Even crimes arising in federal prosecutions may implicate matters of geographic jurisdiction depending on the criminal statute charged. *See*, *e.g.*, *United States v. Verbitskaya*, 406 F.3d 1324, 1333-34 (11th Cir. 2005), *cert denied*, 546 U.S. 1095 (2006) (assessing whether instructions in a prosecution under 18 U.S.C. § 1951(a) may have run afoul of the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3).

Certiorari is warranted because Petitioner's case is a good vehicle for setting the rule to govern these issues as they arise in the future. As the Court of Appeals noted, Petitioner's case involved "concrete acts" with dates and times set down in black and white. Pet. App. 18a. The questions of timing inherent in the context of jurisdiction under 10 U.S.C. § 802(a)(3) are therefore settled facts that are neither ambiguous nor subject to interpretation. Accordingly, resolution of the Questions Presented need not turn on quibbles about factual discrepancies, but instead can cleanly resolve these persistent questions of law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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