IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee/Cross-Appellant	)	ANSWER ON BEHALF OF APPELLEE/CROSS-APPELLANT
v.	)	Crim.App. Dkt. No. 201500039
Paul E. COOPER Yeoman Second Class (E-5) U. S. Navy Appellant/Cross-Appellee	)	USCA Dkt. No. 21-0149/NA

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Issues Presented

I.

AN ACCUSED HAS A CONSTITUTIONAL RIGHT TO HAVE HIS COUNSEL MAKE A PROPER ARGUMENT ON THE EVIDENCE AND APPLICABLE LAW IN HIS FAVOR. DID THE MILITARY JUDGE ABUSE HIS DISCRETION WHEN HE ALLOWED THE MEMBERS TO RECALL THE COMPLAINING WITNESS AFTER DELIBERATIONS BUT REFUSED THE DEFENSE REQUEST TO PRESENT A RENEWED CLOSING SUMMATION ON HER NEW TESTIMONY? DID THE LOWER COURT ERR BY REFUSING TO CONSIDER THIS ISSUE?

II.

AN APPELLANT HAS THE RIGHT TO THE EFFECTIVE REPRESENTATION BY APPELLATE COUNSEL. WERE APPELLATE COUNSEL INEFFECTIVE WHERE: (1) COUNSEL FAILED TO ASSIGN AS ERROR THE MILITARY JUDGE'S DENIAL OF A RENEWED CLOSING ARGUMENT DESPITE DEFENSE COUNSEL'S OBJECTION AT TRIAL; (2) THIS COURT DECIDED *UNITED STATES v. BESS*, 75 M.J. 70 (C.A.A.F. 2016), ONE MONTH BEFORE COUNSEL FILED A SUPPLEMENTAL BRIEF RAISING ASSIGNMENTS OF ERROR BEFORE THE LOWER COURT; AND (3) THE LOWER COURT REFUSED TO CONSIDER THE ISSUE WHEN IT WAS RAISED DURING A LATER REMAND TO THAT COURT?

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellant's approved sentence included a dishonorable discharge and

more than one year of confinement. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of sexual assault and abusive sexual contact in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012). The Members sentenced Appellant to five years of confinement, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

After the Parties filed their briefs, the lower court ordered a hearing under *United States v. DuBay*, 17 C.M.A. 147 (C.M.A. 1968), and after redocketing, set aside the Findings and Sentence. *United States v. Cooper*, No. 201500039, 2018 CCA LEXIS 114, at *53 (N-M. Ct. Crim. App. Mar. 7, 2018).

The Judge Advocate General filed a Certificate for Review, on behalf of the United States, at this Court. (Certificate Review, Crim.App. No. 201500039, June 18, 2018). This Court reversed the judgment of the lower court and remanded for further review under Article 66(c), UCMJ. *United States v. Cooper*, 78 M.J. 283, 287 (C.A.A.F. 2019).

On remand, the lower court again set aside the Findings and Sentence. *United States v. Cooper*, 80 M.J. 664, 678 (N-M. Ct. Crim. App. 2020).

On February 8, 2021, Appellant/Cross-Appellee[1] filed a Petition for Grant of Review at this Court. This Court granted Appellant's Petition on June 8, 2021. (Order Granting Review, June 8, 2021.)

On February 8, 2021, the Judge Advocate General certified an issue to this Court for review, and the Parties briefed the issue.

Statement of Facts

A. The United States charged Appellant with, inter alia, sexual assault.

The United States charged Appellant with sexual assault and abusive sexual contact by bodily harm of the Victim and violating a lawful general order by sexually harassing Ms. JJ.[2] (J.A. 321–23.)

B. At trial, the United States presented evidence Appellant sexually assaulted the Victim.

1. The Victim testified she was unable to move while Appellant had sex with her.

The Victim met Appellant the night of the assault at praise band practice at church, and she agreed to give him a ride home. (J.A. 380–82, 384–86.)

[1] The United States will refer to Appellant/Cross-Appellee as "Appellant."
[2] Appellant was acquitted of the charge related to Ms. JJ. (J.A. 577.) For purposes of this brief, references to "the Victim" indicate the Victim of the sexual assault charge of which Appellant was convicted.

At Appellant's invitation, the Victim went into Appellant's room. (J.A. 384.) While they watched a movie together, Appellant touched her thigh, and though the Victim tried to pull his hand away, he continued to touch her. (J.A. 389–90.) Appellant then pulled her on the bed toward him and held her wrists near her waist, tightening his grip as she tried to resist. (J.A. 390.) The Victim was afraid because of how "aggressive" he was, but she felt "helpless" and could not "move at all." (J.A. 391.)

Without her consent, Appellant then touched the Victim's stomach and breasts, performed oral sex on her, twice had sexual intercourse with her, and made her masturbate his penis. (J.A. 391–96.) During these encounters, the Victim felt she could not respond or move on her own. (J.A. 393–95, 397, 416, 419–20, 434.)

Appellant briefly left his room after a knock at the door. (J.A. 137–38.) During cross-examination, the Victim stated Appellant put a blanket over her before he left, but admitted that she originally told law enforcement she had put the blanket on herself. (J.A. 429–33, 439.) When Appellant returned to the room, the Victim had regained the ability to move, so she dressed and left the room. (J.A. 399.) As she left, the Victim told Appellant not to contact her again, but he tried to kiss her, as though "he didn't hear a word" she said. (J.A. 400.)

2. An expert in forensic psychology testified about "tonic immobility."

After the Victim's testimony, an expert forensic psychologist testified about "tonic immobility." (J.A. 441–51.) The expert testified tonic immobility is an "evolved defense strategy to threat or predation" that causes a person to become "immobile" in the face of a threat. (J.A. 447–48.) He opined the Victim's behaviors with Appellant—except her statement about putting a blanket over herself—were consistent with tonic immobility. (J.A. 451.)

On cross-examination, the forensic psychologist admitted he based his opinion on his review of police reports and the Victim's testimony, and that he never reviewed the Victim's medical documents or interviewed or treated the Victim. (J.A. 454–55.)

3. Ms. JJ testified she met the Victim only after their respective encounters with Appellant, when she moved into the Victim's room.

Although the offenses against the Victim and Ms. JJ occurred in the same timeframe, (*see* J.A. 321–23), Ms. JJ testified she did not meet the Victim until after both of their encounters with Appellant, when Ms. JJ's command moved her into the Victim's room, (J.A. 357). Ms. JJ and the Victim worked opposite shifts at the hospital. (J.A. 357.)

C. Appellant presented evidence the Victim consented to all sexual activity.

1. Petty Officer Owens testified the Victim told him the sexual activity was consensual.

The day after the assault, the Victim, accompanied by Hospitalman (HN) Beard, asked to speak privately to Religious Program Specialist Second Class (RP2) Owens. (J.A. 465, 468.) The Victim told him she thought she made a mistake and reported she "may have been assaulted and wanted to file a complaint." (J.A. 465, 468–69.) RP2 Owens asked the Victim whether the sexual activity was "consensual," and she responded, "yes." (J.A. 465.)

2. Appellant testified his sexual encounter with the Victim was consensual.

Appellant's description of the sexual encounter largely agreed with the Victim's recounting, as to the sequence of the sexual activity. (J.A. 482–89, 496–99.) But Appellant claimed that before he started touching the Victim's thigh, she initiated contact, "hump[ed] [his] penis," and they started kissing. (J.A. 481–83, 509.) Appellant testified the Victim actively participated in foreplay and in the sexual activity. (J.A. 480–89.)

Appellant stated he called RP2 Owens when they first got to Appellant's room to ask him to bring Appellant's room key, which he had left in RP2 Owens' car. (J.A. 489, 490.) Appellant had to ask the maintenance office to open his door when they first arrived, because he did not have his key. (J.A. 478.) Appellant

testified that after he had sex with the Victim the second time, RP2 Owens called to tell him he was on his way over with Appellant's key. (J.A. 489.)

During cross-examination, Appellant conceded there were inconsistences between his testimony and his earlier written statement—a personal statement Appellant wrote about the incident shortly after learning he was being investigated for sexual assault. (J.A. 503–08; Prosecution (Pros.) Ex. 1.)

D. The Parties gave closing arguments on findings.

Trial Counsel argued that there was no evidence the Victim had a motive to fabricate:

> If it was consensual, what's her motive to lie about this? If she's the aggressor, if she's humping on him, she's grinding on him, she wants to do all this with him, what reason is there to fabricate this? Who knew about it? There was no testimony that ooh, the rumors were flying, somebody confronted her; none of that, none of that. She went to the chaplain's office to say she'd been assaulted.

(J.A. 522.) Conversely, Trial Counsel argued Appellant had a motive to lie about the encounter because "'[he] heard somebody's accusing [him] of sexual assault.'" (J.A. 522.)

Trial Defense Counsel argued the sexual activity was consensual, based on Appellant's and RP2 Owens' testimony. (J.A. 525.) Trial Defense Counsel argued Appellant had a reasonable belief the Victim consented and challenged evidence that the Victim experienced tonic immobility, (J.A. 525–26, 527–28).

E. The Members submitted questions during deliberations, and the Parties litigated the admissibility of the requested evidence.

The court-martial closed for deliberations at 1100. (J.A. 533.) At 1221, the Military Judge called the court-martial back to order after receiving questions from the Members. (J.A. 534.)

After excusing the Members, the Military Judge discussed the questions with the Parties, noting "what we have is a long list of requests for additional evidence, which the [M]embers are allowed to do. As you'll see . . . some of [the questions] are objectionable . . . but some may not be." (J.A. 537.) The Military Judge stated that R.C.M. 913(c)(1)(F) governs the Members' ability to request evidence, and that the requests are subject to the Rules of Evidence and admissibility. (J.A. 537.)

The Military Judge sustained several objections from the Parties to various questions. (J.A. 539–42.)

The Military Judge agreed to ask Ms. JJ if she "hear[d] any rumors about the alleged sexual assault [of the Victim] between 28 October and 1 November[3]?" and to admit pictures of Appellant's room. (J.A. 540.)

The Members had several questions for the Victim: (1) "Did [the Victim] talk to anyone else after the incident but before she went to the chapel to talk to RP2 Owens? If so, who, and what did they talk about?" (J.A. 540); (2) questions

[3] Appellant was charged with sexually assaulting the Victim on October 27. (J.A. 321–23.)

about the timing of outgoing and incoming phone calls to Appellant, (J.A. 541); and (3) "Has [the Victim] experienced tonic immobility since the event . . . or at any time prior to [the event]?" (J.A. 542).

Appellant objected to the first question on hearsay grounds, and Trial Counsel responded that the testimony would be admissible as a prior consistent statement. (J.A. 540–41.) The Military Judge agreed to hear the Victim's response in voir dire before determining whether the statement was consistent. (J.A. 541.)

F. The Victim testified in voir dire.

In voir dire, the Military Judge asked the Victim if she talked to anyone else after the incident but before talking to RP2 Owens at the chapel, and the Victim said she spoke to HN Beard before going to RP2 Owens' office. (J.A. 546.) The Victim said that, before she told him what happened, HN Beard told her he saw that "[she] had left the night before with someone and had arrived late [the next day]." (J.A. 547.) In response, the Victim said she "advised [HN Beard] of the incident" and was not sure "if [she] should notify [her] chain of command first or go to chaplain's office first." (J.A. 547, 548.)

During cross-examination, the Victim elaborated, testifying that when she spoke to HN Beard, she "did not want to speak to anyone" and "was just telling him because [she] trust[ed] him." (J.A. 548.) In response, HN Beard told her that

if she did not tell anyone else, then Appellant "will continue act in such a way to other females, and that was [the Victim's] main concern." (J.A. 548.)

The Victim also answered the other questions the Members posed, about whether she had experienced tonic immobility before and the timing of Appellant's phone calls. (J.A. 549–51.)

Appellant renewed his objection on hearsay grounds to asking the Victim what she said to HN Beard and further objected to eliciting from the Victim any of HN Beard's statements to her. (J.A. 552.) Trial Counsel responded that the Victim's statement to HN Beard was admissible as a prior consistent statement in that she "confided in him that something happened" and generally agreed she could not testify to HN Beard's statements. (J.A. 552.) The Military Judge stated he would not elicit from the Victim HN Beard's response to her. (J.A. 552–53.)

The Military Judge did not voir dire Ms. JJ regarding the sole question the Members posed to her, and no party requested it. (*See* J.A. 540, 546.)

G. Appellant moved to reopen closing argument on findings to comment on the Victim's alleged motive to fabricate, revealed in the new testimony. The Military Judge denied Appellant's Motion.

Appellant moved to reopen closing argument to the Members following their receipt of the new testimony: "we believe, based on the questions that were asked . . . and the evidence that would be testified to, that it would be reopening argument to the [M]embers on certain points of evidence that will be brought out

based on these questions." (J.A. 555.) Trial Counsel opposed, noting "the answers to the questions . . . don't really change the arguments here." (J.A. 555.) The Military Judge agreed, saying, "You haven't persuaded me yet." (J.A. 555.)

In response, Appellant noted Trial Counsel's point in closing argument that "no one was aware of the event that took place with [the Victim], and she had no motive to lie, no one else knew about this." (J.A. 555.) Appellant argued that "the way that the testimony is going to be elicited, the defense believes that it warrants an argument that there was a motive to fabricate the accusation of sexual assault." (J.A. 555.)

Trial Counsel again opposed, saying the Members "can hold that against the government . . . if the facts show otherwise." (J.A. 556.)

The Military Judge denied the Motion. (J.A. 556.)

H. The Members received pictures of Appellant's room and additional testimony from the Victim and Ms. JJ.

The Military Judge gave the Members the pre-admitted pictures of Appellant's room. (J.A. 557–58.)

The Victim testified she had not experienced tonic immobility since the assault, but prior to it, she experienced tonic immobility during an unspecified traumatic event. (J.A. 558–59.) Prior to this trial, she had never heard the term "tonic immobility," but "was able to describe it as freezing." (J.A. 559.)

The Victim also testified she spoke to HN Beard before going to the chaplain's office. (J.A. 559.) She told him, "Hey, I can trust you, and I can tell you this, so I'm going to disclose it to you," and she generally indicated she told him what happened. (J.A. 559.) The Victim further testified, "[W]hen I spoke to him [sic], he had mentioned how if I do not—" but she was cut off by Appellant's hearsay objection. (J.A. 559.) The Military Judge redirected her testimony and she never completed the statement. (J.A. 559–60.)

The Victim said, "after I had the conversation with [HN Beard], I also asked him whether I should go to chain of command or to chaplain's office to share this." (J.A. 560.)

Finally, the Victim testified she recalled Appellant spoke to someone on the phone before they started the movie and that she could not recall if Appellant received a phone call before the knock on the door. (J.A. 560.)

Ms. JJ testified she heard no rumors about the alleged sexual assault in the days after the incident. (J.A. 561.)

The Members returned to deliberations at 1344. (J.A. 562.) The Military Judge reopened the court-martial at 1502 when the Members submitted more questions. (J.A. 563.) The Military Judge answered these questions with additional instructions. (J.A. 572–74.) The Members returned to deliberations at 1528. (J.A. 575.)

I. The Members returned mixed findings and sentenced Appellant. They found him guilty of sexual assault and abusive sexual contact of the Victim, and not guilty of sexual harassment of Ms. JJ.

The Military Judge reopened the court-martial at 1600. (J.A. 575.) The Members returned mixed findings, convicting Appellant of abusive sexual contact and sexual assault of the Victim and acquitting him of violating a lawful general order by sexually harassing Ms. JJ. (J.A. 577.) The Members sentenced him to forfeit all pay and allowances, reduction to pay grade E-1, five years of confinement, and a dishonorable discharge. (J.A. 578.)

J. In the first review at the lower court, Appellant never raised as error the Military Judge's denial of his Motion to reopen closing argument.

In his first appeal and merits briefing before the lower court, Appellant never raised any error relating to the Military Judge's denial of his Motion to reopen closing argument. (Appellant Br. at 24, Sept. 17, 2015.)

Several months later, this Court decided *United States v. Bess*, 75 M.J. 70 (C.A.A.F. 2016). This Court held the military judge violated the appellant's constitutional rights by refusing to allow the appellant to present evidence and cross-examine witnesses after the military judge admitted additional evidence during deliberations. *Id.* at 72.

The next month, Appellant asked the lower court to permit additional briefing, but raised no errors related to the Military Judge's denial of his Motion to

reopen closing argument. (Appellant's Mot. Leave to File Supp. Error, Feb. 24, 2016.)

K. On remand, the lower court denied Appellant's Motions for supplemental briefing on the Military Judge's denial of his Motion to reopen closing argument.

On remand, Appellant assigned additional errors, but none were related to the Military Judge's denial of his Motion to reopen closing argument. (J.A. 94–96.)

Appellant later moved the lower court for leave to file a supplemental assignment of error under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), alleging the Military Judge erred denying his Motion to reopen closing argument. (J.A. 163–85.) The United States did not oppose. The lower court summarily denied the Motion. (*See* J.A. 163.)

A month later, Appellant again moved the lower court for leave to file a supplemental assignment of error, alleging Appellant received ineffective assistance of appellate counsel for his previous appellate defense counsel's failure to raise the Military Judge's denial of his Motion to reopen closing argument. (J.A. 186–211.) The United States opposed, arguing Appellant failed to justify the untimely filing. (J.A. 212–23.) The lower court summarily denied the Motion. (*See* J.A. 207.)

Finally, Appellant moved the lower court to hear the case en banc, arguing the court should consider the Military Judge's denial of his Motion to reopen closing argument. (J.A. 295–96.) The United States opposed. (J.A. 310–16.) The lower court summarily denied the Motion. (*See* J.A. 295.)

L. The lower court again set aside the Findings and Sentence, purporting to use its authority under Article 66 and *Chin* to decide the issue of ineffective assistance of counsel.

On remand, the lower court purported to use its authority under Article 66, UCMJ, and *United States v. Chin*, 75 M.J. 220 (C.A.A.F. 2016), to disregard Appellant's waiver of the right to individual military counsel and proceed to determine whether counsel's ineffective assistance caused a deprivation of individual military counsel. *Cooper*, 80 M.J. at 668–71.

The lower court found Trial Defense Counsel was constitutionally ineffective, presumed prejudice, and set aside the Findings and Sentence. *Id.* at 672–87. The lower court did not discuss Appellant's preserved objection to the Military Judge's denial of his Motion to reopen closing argument. *See id.*

Argument

I.

AFTER ADMITTING ADDITIONAL EVIDENCE AT THE MEMBERS' REQUEST, THE MILITARY JUDGE DID NOT ERR BY REFUSING TO REOPEN CLOSING ARGUMENT ON FINDINGS. REGARDLESS, ANY ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT, AND THIS COURT CAN ADDRESS THE ISSUE RATHER THAN REMAND.

A. Standard of review.

Appellate courts review a military judge's decision to admit or exclude evidence requested by the members during deliberations for abuse of discretion. *Bess*, 75 M.J. at 73 (citing *United States v. Carter*, 74 M.J. 204, 206 (C.A.A.F. 2015)); *United States v. Lampani*, 14 M.J. 22, 23 (C.M.A. 1982). This standard requires more than the reviewing court's disagreement with the military judge's decision. *Bess*, 75 M.J. at 73. An abuse of discretion occurs "when the military judge's factual findings are clearly erroneous, view of the law is erroneous, or decision is outside of the range of reasonable choices." *United States v. Hutchins*, 78 M.J. 437, 444 (C.A.A.F. 2019) (citing *Bess*, 75 M.J. at 73).

B. Members have a statutory right to request additional evidence during deliberations. The admissibility of the evidence is a separate issue from whether the accused should be permitted to attack the evidence before the factfinder. Appellant does not challenge the admissibility of the evidence here.

During deliberations, "[m]embers may request that the court-martial be

reopened and that portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such request." R.C.M. 921(b) (2012); *see also* R.C.M. 614(a) (2012) (permitting members to call witnesses and stating "all parties are entitled to cross-examine witnesses thus called"); *Lampani*, 14 M.J. at 26 ("[O]ur precedents make clear that, even after the court members have begun their deliberations, they may seek additional evidence.").

The trial counsel, the defense counsel, and the court-martial must have equal opportunity to obtain witnesses and other evidence under regulations prescribed by the President. *United States v. Martinsmith*, 41 M.J. 343, 347 (C.A.A.F. 1995) (citing Art. 46, UCMJ, 10 U.S.C. § 846 (1984)). "On its face, this statute requires that a member's request for evidence be considered in light of presidential rulemaking pertaining to admissibility of evidence at courts-martial." *Id.*; *see also id.* at 348 (judge properly denied member's request, during deliberations, for privileged evidence not subject to compelled discovery); *Bess*, 75 M.J. at 74 (judge properly admitted muster reports during deliberations as business records where no evidence of untrustworthiness); *cf. United States v. Bayer*, 331 U.S. 532, 538–39 (1947) (judge properly denied defendant's mid-deliberations request to admit unverified memorandum, where there was no testimonial foundation and proffer was deficient).

The *Bess* court noted, however, "[t]he question of admissibility is distinct . . . from the question of whether Appellant should have been allowed to attack the reliability of the evidence before the factfinder." 75 M.J. at 74.

Appellant now declines to challenge the admissibility of the evidence the Military Judge admitted in response to the Members' questions. Instead, Appellant claims the Military Judge erred denying his Motion to reopen closing argument. (*See* Appellant's Br. at 30–32, July 26, 2021.)

C. Appellant's Motion to reopen closing argument cited a sole ground: to respond to the Victim's statement to HN Beard. Applying R.C.M. 905, this Court should find Appellant preserved his objection only as to that basis and waived objection on other grounds.

1. Under R.C.M. 905, and the analogous Mil. R. Evid. 103, an accused must enunciate the specific grounds for all motions made at trial to preserve the objection for appeal.

"A motion shall state the grounds upon which it is made and shall set forth the ruling or relief sought. The substance of a motion, not its form or designation, shall control." R.C.M. 905(a) (2012). An accused may make motions for appropriate relief, requesting "a ruling to cure a defect which deprives a party of a right or hinders a party from preparing for trial or presenting its case." R.C.M. 906(a) (2012); *see also* R.C.M. 913(c)(5) (2012) (reopening case after party has rested); R.C.M. 919(a) (2012) (discussing parties' arguments on findings).

Similarly, for objections to rulings admitting evidence, Mil. R. Evid. 103 requires the moving party to "stat[e] the specific ground of objection, if the

specific ground was not apparent from the context." Mil. R. Evid. 103(a)(1); *see also United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005) (finding Mil. R. Evid. 103 does not require moving party to present every argument but requires sufficient argument to make military judge aware of specific ground for objection).

This Court has applied the "specific ground of objection" standard from Mil. R. Evid. 103 in the context of adequately preserving objections to instructions under R.C.M. 920(f). *United States v. Payne*, 73 M.J. 19, 23 (C.A.A.F. 2014). And although the Rules of Evidence do not apply to unsworn victim statements, this Court in *United States v. Tyler*, 81 M.J. 108 (C.A.A.F. 2021), noted an accused's duty to state the "specific ground for objection" to such a statement to preserve objection on appeal. *Id.* at 113.

This Court has repeatedly emphasized the military judge's discretion with respect to handling members' requests for evidence and restrictions on argument. *See Bess*, 75 M.J. at 75; *Lampani*, 14 M.J. at 26. Given the importance of counsel's tactical decisions in closing arguments, a military judge can only evaluate a motion to reopen closing argument based on counsel's enunciated justifications. *See* R.C.M 905(a); *cf. Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (noting "deference to counsel's tactical decisions in closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage"). This Court should find that Appellant preserved for appeal only the

specific grounds for his Motion enunciated at trial.

2. Appellant moved to reopen closing argument to respond to the Victim's statement to HN Beard. Under R.C.M. 905, Appellant preserved his objection only as to that basis and waived any objection based on the Victim's other testimony and Ms. JJ's testimony.

Under the 2012 Rules for Courts-Martial applicable to this case, failure of an accused to raise certain motions before the court-martial is adjourned, unless otherwise provided in the Manual for Courts-Martial, "shall constitute waiver." R.C.M. 905(e) (2012); *see also United States v. Hardy*, 77 M.J. 438, 439 n.2 (C.A.A.F. 2018) (noting that the President amended R.C.M. 905(e) to specify forfeiture of objection absent affirmative waiver and that amendment was effective January 1, 2019).

"Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (citations and quotations omitted). Where an appellant has forfeited a right, appellate courts review for plain error, but when an appellant intentionally waives a known right, it is extinguished and may not be raised on appeal. *Id.* (citations omitted).

In *Hardy*, this Court held that "waiver" in first two sentences of R.C.M. 905(e) (2012) means waiver and not forfeiture. 77 M.J. at 441–42. The *Hardy*

appellant thus permanently waived an objection to unreasonable multiplication of charges by failing to raise it prior to entering an unconditional guilty plea. *Id.*

In *United States v. Bess*, 80 M.J. 1 (C.A.A.F. 2020), this Court applied R.C.M. 905(a) to find that the appellant's limited discovery motion at trial failed to preserve the broader discovery he sought on appeal. *Id.* at 12–14. Noting "the wording of any motion must be understood in the context in which it was made," this Court found that "[l]ooking at the entire exchange, the most reasonable understanding of [the] [a]ppellant's request was that he was seeking only the information he asked for." *Id.* at 12 (citing R.C.M. 905(a)). The appellant thus waived the right to further factfinding on the grounds for discovery he failed to preserve at trial. *Id.* at 13–14; *cf. United States v. Reynoso*, 66 M.J. 208, 209–10 (C.A.A.F. 2008) (applying Mil. R. Evid. 103 and finding appellant's objection based on a lack of foundation insufficient to preserve on appeal a hearsay objection).

Here, like *Bess* and looking at the entire exchange, Appellant preserved only one ground for appellate review. Appellant first made a generalized motion to reopen closing arguments, which the Military Judge found unpersuasive. (J.A. 555.) Elaborating, Appellant argued that reopening closing argument was necessary to address that the Victim had a motive to lie because she had told HN Beard what happened before reporting the assault to RP2 Owens—purportedly

contrary to Trial Counsel's statement in closing that there were no rumors circulating. (J.A. 554–56.) The Military Judge denied the Motion on that ground. (J.A. 556.)

The timing of Appellant's Motion further supports he did not desire, at trial, to address any other point of the Victim's testimony or Ms. JJ's testimony: Appellant moved the court to reopen closing argument after the Victim testified in voir dire but before Ms. JJ testified before the Members. (*See* J.A. 546 (recalling Ms. JJ for testimony before the Members only), 546–55 (voir diring of Victim and moving to reopen closing argument), 557 (recalling Members to receive evidence and testimony).) Appellant already had the Victim's answers to the Members' other questions, but never cited those in his Motion to reopen argument. And after the Members received the testimony, Appellant did not renew his Motion based on any need to address Ms. JJ's testimony. (*See* J.A. 561.)

Because it was his only specific ground of objection—and the single ground the Military Judge ruled on—Appellant preserved his Motion only as to the Victim's statement to HN Beard. *See* R.C.M 905(a); *Bess*, 80 M.J. at 12–14. Appellant waived the right to assign error for not reopening argument based on the Victim's other testimony and Ms. JJ's testimony. *See* R.C.M. 905(e); *Hardy*, 77 M.J. at 441–42. This Court should reject Appellant's invitation to review all his claims as preserved objections. (*See* Appellant's Br. at 30–32.)

D. The Military Judge did not abuse his discretion by denying Appellant's Motion to reopen closing argument to address the Victim's statement to HN Beard.

"It is undeniable that a defendant has a constitutional right to present a defense." *Bess*, 75 M.J. at 74 (quoting *United States v. Dimberio*, 56 M.J. 20, 24 (C.A.A.F. 2001).) Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, as in *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, as in *Washington v. Texas*, 388 U.S. 14, 23 (1967), and *Davis v. Alaska*, 415 U.S. 308 (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *See Crane v. Kentucky*, 476 U.S. 683, 687 (1986) (citing *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

1. Total denial of a closing summation would infringe the Sixth Amendment right to assistance of counsel. But a military judge has "great latitude" to control closing summations and "considerable discretion" to decide if additional evidence requires reopened argument.

"The Constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor." *Herring v. New York*, 422 U.S. 853, 860 (1975).

In *Herring*, the Court found unconstitutional a state statute that permitted trial judges to deny counsel any opportunity to make a closing summation. *Id.* at

865. But the Court noted its holding did not mean that "closing arguments in a criminal case must be uncontrolled or even unrestrained." *Id.* at 862. Rather, the trial judge is given "great latitude" and "broad discretion" in the conduct of summations, "controlling the duration and limiting the scope of closing summations[,] . . . limit[ing] counsel to a reasonable time[,] and . . . terminat[ing] argument when continuation would be repetitive or redundant." *Id.*

The *Lampani* court similarly held a military judge has "considerable discretion" in deciding whether additional testimony requires "reargument, reinstructions, and that type of thing." 14 M.J. at 26. The military judge's decision "would be guided by the nature and scope of the additional evidence presented." *Id.*

2. The Military Judge did not abuse his discretion in refusing Appellant's Motion to respond to the Victim's statement to HN Beard. The Victim's testimony did not reveal a motive to lie.

In *Martinsmith*, the military judge did not abuse his discretion by denying the appellant's motion to reopen his sentencing case to present a sworn statement because the evidence the appellant sought to introduce was cumulative with other admitted evidence. 41 M.J. at 348–49. Agreeing, this Court noted there was ample evidence in the record covering the mitigating evidence the appellant desired to introduce. *Id.*

Conversely, in *Bess*, this Court found, "in the full context of this trial," the

military judge violated the appellant's right to present a defense when he admitted the muster reports as business records without permitting the appellant to challenge the weight of the reports through cross-examining the witness, calling a rebuttal witness, or commenting on the new evidence before the members. 75 M.J. at 75.

Like the cumulative evidence in *Martinsmith*, the Victim's testimony that she told HN Beard what happened before she reported it to RP2 Owens did not put any substantively new evidence before the Members. The Members already heard from RP2 Owens that HN Beard was with the Victim when she came to talk to him. (J.A. 468.) It was immaterial in the context of the trial that the Victim confirmed, in broad terms, that the person she brought with her to report was a confidant to whom she also disclosed the incident. (*See* J.A. 559–60.) Thus, the Victim's testimony was unlike the muster reports in *Bess*, which introduced substantive evidence of the identity of the perpetrator, a central issue in the case. *See Bess*, 75 M.J. at 73.

Appellant takes two statements out of context when he argues that the Victim's testimony about her discussion with HN Beard required reopened argument. (Appellant's Br. at 30.) First, Appellant claims the Victim asked HN Beard "whether" she should report the incident, implying she was deciding whether or not she was sexually assaulted. (*See id.*; *see also id.* at 36.) Not so. The Victim testified she asked HN Beard "whether [she] should go to chain of

command or to chaplain's office to share this"—implying that she believed she was assaulted but only needed advice about how to report it. (J.A. 560.)

Second, Appellant speculates when he asserts the Members might have ascertained from the Victim's cut-off statement—"when I had spoke to him [sic], he had mentioned how if I do not"—that HN Beard warned her about the consequences of not reporting Appellant. (Appellant's Br. at 30.) The Members simply heard no such statement. Appellant's concerns that the Members could somehow have accurately guessed the remainder of the sentence are overblown and unfounded.

Pointing to dicta in *Bayer* that evidence admitted during deliberations "would likely be of distorted importance," Appellant urges this Court to adopt a per se approach based on the timing of the receipt of evidence rather than its importance in relation to the trial. (Appellant's Br. at 32 (citing *Bayer*, 331 U.S. at 538).) Appellant's approach is controverted by *Bess*, in which this Court analyzed the impact to the appellant's right to present a defense based on the evidence at issue, the extent of the rights infringed, and "the full context of this trial." 75 M.J. at 75; *see also Lampani*, 14 M.J. at 36 (finding exercise of discretion to reopen closing argument "guided by the nature and scope of the additional evidence presented"). The Military Judge did not violate Appellant's right to present a defense when he denied his Motion to reopen closing argument to address

testimony that did not actually reveal a motive to lie and that was immaterial in the full context of the trial.

3. Even if Appellant merely forfeited, rather than waived, objection to the Victim's other testimony and Ms. JJ's testimony, there was no plain or obvious error in the Military Judge's decision not to reopen closing arguments sua sponte as to that evidence.

Appellate courts review forfeited issues for plain error. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020). Under plain error review, Appellant carries the burden of showing: (1) error; (2) the error was clear or obvious; and (3) the error materially prejudiced his substantial rights. *United States v Easterly*, 79 M.J. 325, 327 (C.A.A.F. 2020) (citation omitted).

Appellant forfeited the ability to raise legal error related to not presenting closing argument on three additional points of evidence: (1) that the Victim experienced tonic immobility before the assault; (2) the Victim's testimony about incoming and outgoing phone calls; and (3) Ms. JJ's testimony.

First, there was no plain or obvious error in the Military Judge's failure to sua sponte reopen closing argument based on the Victim's testimony she experienced tonic immobility during a traumatic event prior to the assault. Appellant's theory was that, even if the Victim were experiencing tonic immobility, he still held a reasonable mistake of fact that she consented. (J.A. 525–26.) This argument was not impacted by evidence the Victim previously

experienced tonic immobility. *Cf. United States v. Sandoval-Gonzalez*, 95 Fed. App'x 203, 204–05 (9th Cir. 2003) (no error denying defendant's motion to reopen closing argument after jury received new instructions during deliberations because defendant's theory was adequately covered in closing argument).

Second, there was no plain or obvious error in the Military Judge's failure to sua sponte reopen closing argument based on the Victim's testimony about the phone calls. Contrary to Appellant's assertion, the Victim's recollection about Appellant's phone calls did not conflict with his testimony. (Appellant's Br. at 31.) Appellant testified he called RP2 Owens when they first got to his room, (J.A. 489); the Victim testified he made a phone call before the movie, (J.A. 560). The statements are not inconsistent. Further, Appellant testified that after he had sex the second time with the Victim, RP2 Owens called him. (J.A. 489.) That the Victim testified that she "[did]n't believe" Appellant received a call prior to the knock on the door better reflects her lack of memory of such a call rather than a direct dispute of Appellant's testimony, as Appellant now paints it to be. (*See* Appellant's Br. at 30.) Regardless, such a minor inconsistency, even if it were one, was immaterial in the full context of the trial.

Finally, there was no plain or obvious error in the Military Judge failing to sua sponte reopen closing argument to permit a response to Ms. JJ's testimony that she heard no rumors about the sexual assault "between 28 October and 1

November 2013." (J.A. 561.) The timeframe of the alleged sexual harassment was from October 13 to November 1, 2013; the Victim was assaulted on October 27 and reported it the next day. (J.A. 321–23, 464–65.) Thus the question asked whether Ms. JJ heard about the incident between Appellant and the Victim *after* the Victim reported it but *before* Ms. JJ reported Appellant for sexual harassment. This indicates the Members were exploring whether Ms. JJ reported Appellant only after learning of another incident involving him.

The timeframe therefore refutes Appellant's claim that the question "reflect[ed] the [M]embers' desire to investigate [T]rial [C]ounsel's statement in closing argument that there were no 'rumors' floating around" that prompted the Victim to fabricate an assault. (Appellant's Br. at 32.) Rather, the question was aimed at Ms. JJ's motivations for reporting Appellant. Because Appellant was acquitted of sexually harassing Ms. JJ, he was not prejudiced by an inability to respond to her testimony. *See Lampani*, 14 M.J. at 26 (finding no prejudice from denial of member request during deliberations for witness testimony when questions focused on charges of which appellant was acquitted).

Even if the question related to the Victim's allegation, evidence of rumors circulating *after* the Victim reported the assault have no bearing on whether she had a motive to fabricate *before* reporting. Regardless, the lack of additional closing argument was harmless beyond a reasonable doubt. *See infra* Section I.E.

4. This case is unlike the federal cases Appellant cites.

Appellant's reliance on *United States v. Crawford*, 533 F.3d 133 (2d Cir. 2008), and *United States v. Nunez*, 432 F.3d 573 (4th Cir. 2005), is misplaced. (Appellant's Br. at 28–30.) *Crawford* and *Nunez* did not directly address alleged infringement of the right to present a defense, instead focusing on whether the trial court abused its discretion by allowing the government to reopen its case to present additional evidence during deliberations. *Crawford*, 533 F.3d at 137; *Nunez*, 432 F.3d at 579.

That analysis is dissimilar from the issue here, where the members have a statutory right to request evidence during deliberations, separate from a military judge's decision about whether, after acceding to the members' request, to allow the accused to respond to the new evidence. *See Bess*, 75 M.J. at 74.[4]

Regardless, the cases are factually distinguishable. In *Crawford*, where the trial court permitted the government to reopen its case during deliberations to introduce a trace report, the defendant was unable to respond to the prosecutor's

[4] Nor is Appellant's citation to cases from the First and Ninth Circuits persuasive because neither dealt with evidence permissibly introduced during deliberations. *See United States v. Santana*, 175 F.3d 57, 64–65 (1st Cir. 1999) (finding constitutional error in jury's exposure to extrinsic information during deliberations); *Ardoin v. Arnold*, No. 13-15854, 2016 U.S. App. LEXIS 11740, at *6–7 (9th Cir. June 27, 2016) (constitutional error to instruct jury on felony murder theory during deliberations yet refuse to grant motion to reopen closing argument, where defendant's previous closing argument did not address felony murder).

irrelevant and damaging insinuation in redirect that defense counsel had misled the jury in his closing argument. 533 F.3d at 141. No such damaging testimony or insinuation was introduced here.

And *Nunez* dealt with a law enforcement report admitted during deliberations that was not "admissible [or] technically adequate when presented." 432 F.3d at 581 (citation and quotation omitted). Moreover, the improperly admitted report contained a detailed summary of the crimes and was "quite incriminating to both [defendants]." *Id.* at 580. The inconsequential mid-deliberations testimony presented here pales in comparison.

E. Regardless, even if the Military Judge infringed Appellant's right to present a defense, the error was harmless beyond a reasonable doubt.

If the military judge commits constitutional error by depriving an accused of his right to present a defense, appellate courts test for harmlessness beyond a reasonable doubt. *United States v. McAllister*, 64 M.J. 248, 251 (C.A.A.F. 2007) (citation and quotation omitted); *Bess*, 75 M.J. at 75; *cf. Glebe v. Frost*, 574 U.S. 21, 24 (2014) (noting restriction of summation not structural error). That is, whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdicts obtained. *United States v. McDonald*, 73 M.J. 426, 434 (C.A.A.F. 2014) (citations and quotation marks omitted). This Court reviews de novo whether the error is harmless beyond a reasonable doubt. *Id.*

In *Bess*, the appellant's inability to confront the muster reports admitted

during deliberations was not harmless beyond a reasonable doubt. 75 M.J. at 76. The crux of the appellant's defense was that the victims mistook him for a similar looking Sailor. *Id.* Had the appellant been able to challenge the evidentiary weight of the muster reports, he could have shown the reports were not "airtight evidence of [his] identity as the perpetrator." *Id.* Moreover, the appellant could have presented a layered case in response to the muster reports—cross-examination of the foundational witness as to the reports' accuracy, a rebuttal witness to undermine the reports' accuracy, and reopened closing summation to argue the reports should not carry much evidentiary weight. *Id.*

While the *Bess* court could not discern "how effective efforts of this sort might have been," the timing of the members' verdict tipped the balance in favor of finding prejudice: the members convicted the appellant half an hour after receiving the reports and nearly six hours after deliberations began. *Id.* at 77. "Given the interest which the reports clearly provoked among the members, and the timing of the verdict," this Court could not say the error was harmless beyond a reasonable doubt. *Id.*

Appellant's case is fundamentally dissimilar to *Bess*. The crux of Appellant's defense was that either: (1) the Victim consented to the sexual activity and later lied about it; or (2) Appellant reasonably believed she consented. (J.A. 525–29.) Even had Appellant been able to argue the Victim had a motive to lie

because she told HN Beard about the incident before reporting it to RP2 Owens, there can be no doubt the Members would have rejected this faulty argument. As noted above, Appellant exaggerates the impact of this testimony, speculating the Members could have guessed what HN Beard told her in response and incorrectly stating the Victim was conflicted about "whether" she was assaulted. *See supra* Section I.D.2; (Appellant's Br. at 35–36). The Members heard no evidence that HN Beard influenced the content of the Victim's report to RP2 Owens, let alone that her disclosure to him prompted her to lie about the encounter with Appellant.

Nor would Appellant's proposed—and speculative—argument countering the Victim's testimony that she experienced tonic immobility in the past have been persuasive. (Appellant's Br. at 36.) The Members heard no evidence the past traumatic event was even of the same character as her encounter with Appellant. Even were Appellant allowed to argue the Victim was experiencing a "flashback" to this past event, such argument would not have bolstered Appellant's claim that she consented or aided his argument he had a reasonable mistake of fact.

Reopened summation regarding Ms. JJ's testimony would similarly have fallen flat. As noted above, the Members' question for Ms. JJ was not related to the assault of the Victim, so Appellant's proposed argument would have been irrelevant to the Members' exploration of Ms. JJ's motive in reporting Appellant. *See supra* Section I.D.3.; (Appellant's Br. at 36–37). Regardless, the Members

already heard Ms. JJ's testimony that she and the Victim worked different shifts at the hospital and that Ms. JJ did not know the Victim until after their respective encounters with Appellant. (J.A. 357.) Appellant's commonsense argument that Ms. JJ heard no rumors for those reasons would have added nothing of substance to the Members' deliberations.

Nor does the timing of the verdict lend any support to a finding of prejudice.

Time	Action of Members	Cite
1100	Began deliberations	J.A. 533
1221	Submitted first set of questions	J.A. 534
1344	Returned to deliberations after additional testimony	J.A. 562
1502	Submitted second set of questions	J.A. 563
1528	Returned to deliberations after additional instructions	J.A. 575
1600	Verdict	J.A. 575

The Members convicted Appellant an hour and forty-five minutes after receiving the new evidence, and after three total hours of deliberation. Unlike the quick turnaround of the verdict after the members received the muster reports in *Bess*, the timing here reflects the newly admitted evidence had no decisive effect on the Members' Findings.

Also unlike *Bess*, where the appellant had three persuasive ways to counter the muster reports that could have "shaken the Government's case," 75 M.J. at 76, Appellant here sought to counter the new evidence only by arguing weak or unsupported points in reopened summation. This Court should have no doubt that

denial of reopened closing argument had no effect on the verdicts. *See McDonald*, 73 M.J. at 434. Any error was harmless beyond a reasonable doubt.

F. There is insufficient evidence to conclude whether the lower court properly denied Appellant's supplemental briefings or reviewed the issue in its Article 66 review. This Court, for judicial efficiency, should address and dismiss the claim now.

In *United States v. Mitchell*, 20 M.J. 350 (C.M.A. 1985), the court found a Court of Criminal Appeals may reject an appellant's filing of a supplemental assignment of error "because of untimeliness," but the court nevertheless remanded the case because "[t]here was no explanation why the court below denied the motion." *Id.* at 351.

As the United States argued in its Opposition to Appellant's supplemental filing, the lower court could have justified denial of his Motions based on untimeliness. (*See* J.A. 212–23.) However, like in *Mitchell*, the lower court denied Appellant's supplemental filings without explanation. (*See* J.A. 163, 186, 295 (stamping only "motion denied").)

Moreover, nothing supports that the lower court nonetheless addressed the issue in its Article 66, UCMJ, review. *See Cooper*, 80 M.J. at 672–87; *cf. United States v. Adams*, 59 M.J. 367, 370 (C.A.A.F. 2004) (appellant not deprived of fair appellate review at court of criminal appeals, as despite lack of briefing by counsel on issue, court of criminal appeals reviewed entire record under Article 66 for errors in law and fact and affirmed). Indeed, as the United States argues on the

Certified Issue, the lower court failed to complete its Article 66, UCMJ, review when it misapplied *Chin* as a prerequisite for addressing an ineffective assistance of counsel claim. (*See* Appellee/Cross-Appellant's Br., Mar. 22, 2021.)

Thus, insufficient evidence supports that the lower court properly denied Appellant's supplemental filings or addressed the claim in its Article 66, UCMJ, review. Although this Court could remand to the lower court to justify its denials of the supplemental filings or address the issue, for the sake of judicial efficiency, this Court should address and dismiss the claim now.

Finally, because the Court granted Appellant's Petition, the Court has jurisdiction to address the issue. *See* Art. 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012). Application of the cross-appeal doctrine is unnecessary.[5] (*Contra* Appellant's Br. at 37–39.)

[5] It is similarly unnecessary to address the application of the "cause and prejudice standard" from *United States v. Chaffin*, No. 200500513, 2008 CCA LEXIS 94, *7 (N-M. Ct. Crim. App. Mar. 20, 2008), (Appellant's Br. at 42–45), since there is no indication the lower court applied *Chaffin* in denying Appellant's supplemental filings.

II.

APPELLATE COUNSEL WAS NOT INEFFECTIVE. THE FAILURE TO RAISE A MERITLESS ARGUMENT DOES NOT CONSTITUTE INEFFECTIVE ASSISTANCE.[6]

A. Standard of review.

Appellate courts review claims of ineffective assistance of counsel de novo. *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015) (citing *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012)).

B. An appellant must show both deficient performance and prejudice to sustain a claim of ineffective assistance of appellate counsel.

The test for ineffective assistance of appellate defense counsel "places the burden on an appellant to show both deficient performance by appellate defense counsel and prejudice." *Adams*, 59 M.J. at 370. "An appellant meets his burden on deficient performance when he demonstrates that his appellate counsel's performance was so deficient that it fell below an objective standard of reasonableness." *Id.* (citation omitted). To demonstrate prejudice, an appellant must show the errors were so serious as to deprive the appellant of a fair appellate proceeding whose result is reliable. *Id.* (citation and quotation omitted).

[6] Given the United States' position, the Court should address the alleged error directly. *See supra* Section I.F. The Court need not separately determine whether appellate defense counsel was ineffective, as the two are intertwined.

C. Appellate Defense Counsel was not ineffective for failing to raise a meritless issue.

"When a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion . . . an appellant must show that there is a reasonable probability that such a motion would have been meritorious." *United States v. Napoleon*, 46 M.J. 279, 284 (C.A.A.F. 1997) (citations omitted). "Failure to raise a meritless argument does not constitute ineffective assistance." *Id.* (citation and quotation omitted).

The Military Judge did not err denying Appellant's Motion to reopen closing argument. *See supra* Section I. Appellant cannot show his previous Appellate Defense Counsel was ineffective for failing to raise a meritless issue. *See Napoleon*, 46 M.J. at 284.

Even if it was objectively unreasonable for Appellant's previous Appellate Defense Counsel not to raise the issue, Appellant cannot show prejudice because the Military Judge did not err, and regardless, the denial of reopened closing argument was harmless beyond a reasonable doubt. *See supra* Section I; *Adams*, 59 M.J. at 370.

Conclusion

The United States respectfully requests this Court (1) find the Military Judge did not err by denying reopened closing argument on findings; and (2) under the certified issue, find the lower court erred applying *United States v. Chin*, 75 M.J.

220 (C.A.A.F. 2016), vacate the lower court's decision, and remand for further review under Article 66(c), UCMJ.

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I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on September 8, 2021.

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