IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

DENNIS A. GEORGE JR.,
Senior Airman (E-4),
United States Air Force,
Appellant.

USCA Dkt. No. 24-0206/AF

Crim. App. Dkt. No. 40397

REPLY BRIEF ON BEHALF OF APPELLANT

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Table of Contents

Table of Authorities

Service Courts of Criminal Appeals

Other Courts

Statutes and Rules

Other Authorities

Argument

Senior Airman George's conviction for attempted sexual assault is legally insufficient because the Government did not prove the charged overt act.

In Senior Airman (SrA) George's case, the specification of attempted sexual assault expressly alleged that he committed the overt act of "penetrating [WB's] mouth with his penis without her consent." JA at 001. This overt act is expressly alleged because the grammatical construction of the specification demonstrates that "by penetrating her mouth with his penis without her consent" modified "attempt to commit a sexual act." *Id*. Further, the meaning and common usage of "by" signals that "by penetrating her mouth with his penis without her consent" is how this attempt occurred. *Id*.

The plain language of the specification expressed or implied every element of the Article 80, Uniform Code of Military Justice (UCMJ),[1] offense. To charge attempted sexual assault without consent, the Government only needed to express or imply the elements of Article 80, UCMJ, and the nature of the underlying Article 120, UCMJ offense. The Government was not required to expressly allege the overt act or the elements of Article 120, UCMJ.

While not required, the Government chose to charge the overt act of

[1] All references to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the versions in the *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*).

"penetrating [WB's] mouth with his penis without her consent." JA at 001. Because the Government charged this overt act, it was required to prove it. The Government did not prove that SrA George penetrated WB's mouth and concedes that "there was no evidence presented during [SrA George's] trial that he ever actually penetrated [WB's] mouth with his penis." Gov't Br. at 5. Because no rational trier of fact could have found beyond a reasonable doubt that SrA George penetrated WB's mouth with his penis and the specification expressly alleged that he committed this overt act, SrA George's conviction is legally insufficient.

A. The specification's grammatical construction and use of "by" demonstrate that the Government expressly alleged an overt act.

"Words are to be given the meaning that proper grammar and usage would assign them." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 140 (2012). The Government charged that SrA George "did . . . attempt to commit a sexual act upon [WB] by penetrating her mouth with his penis without her consent." JA at 001. The words "by penetrating her mouth with his penis without her consent" modify the entire phrase "attempt to commit a sexual act." *Id*. That is so because neither "attempt to" or "attempt to commit" can be understood completely without reading further; these words are connected to "a sexual act."

Furthermore, examining the applicability of the rule of the last antecedent helps to explain why the modifying language in the specification ("by penetrating

her mouth with his penis without her consent") modifies the entire preceding phrase ("attempt to commit a sexual act"). The rule of the last antecedent explains that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Facebook, Inc. v. Duguid*, 592 U.S. 395, 404 (2021) (citing *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003); *Lockhart v. United States*, 577 U.S. 347, 351 (2016)). This rule parallels the grammar rule that "[a] prepositional phrase with an adverbial or adjectival function should be as close to the word it modifies to avoid awkwardness, ambiguity, or unintended meanings." *United States v. Nader*, 542 F.3d 713, 717-718 (9th Cir. 2008) (quoting THE CHICAGO MANUAL OF STYLE P 5.167 (15th ed. 2003)). However, this rule is "context dependent" and it does not apply here. *Duguid*, 592 U.S. at 404. Instead, like many examples from Article 80, UCMJ, cases (discussed infra) the modifying language in the specification that follows "by" (here, "by penetrating her mouth with his penis without her consent") modifies the entire preceding phrase ("attempt to commit a sexual act") and explains the overt act.

In *Cyan, Inc. v. Beaver Cty. Emples. Ret. Fund*, the Supreme Court explained the applicability of the last antecedent rule, analyzing language within an act that read: "Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be

subject to subsection (b) of this section." 583 U.S. 416, 437 (2018). In *Cyan*, the Government argued that "the words 'as set forth in subsection (b)' do not modify the entire preceding phrase" and instead claimed that "those words modify only the shorter phrase 'involving a covered security.'" *Id*. at 439. The Government, similar to this case, invoked the "rule of last antecedent." *Id*. The Supreme Court explained that under this rule, a "limiting clause is most naturally applied to the thing that comes immediately before it." *Id*. (citing Tr. of Oral Arg. at 36-37). However, the Supreme Court unanimously rejected this argument and found that the modifier applied to the entire preceding clause because that clause—"[a]ny covered class action brought in any State court involving a covered security"—"hangs together as a unified whole, referring to a single thing (a type of class action)." *Id*. at 440.

Here, like *Cyan*, the preceding phrase, attempt to commit a sexual act, operates as a "unified whole, referring to a single thing" (the type of attempt). *Id*. Therefore, like *Cyan*, "the most natural way to view the modifier" is as applying to the entire preceding phrase. *Id*. Moreover, that is especially true here because "attempt to," standing alone, lacks an object to complete its meaning within the specification. Just as "attempt to commit," standing alone, also lacks an object to complete its meaning. Therefore, neither "attempt to" nor "attempt to commit" can be removed from "a sexual act" and have a discernible meaning. Rather, "attempt to commit a sexual act" is a unified phrase. This also makes SrA George's case

distinguishable from cases like *Nader.* In *Nader*, the United States Court of Appeals for the Ninth Circuit found that in the predicate "uses the mail or any facility in interstate or foreign commerce," the prepositional phrase "in interstate or foreign commerce" modifies the noun "facility," and not the verb "uses." 542 F.3d at 717. Unlike *Nader*, SrA George's specification does not have a disjunctive "or." *See United States v. Woods*, 571 U.S. 31, 45 (2013) ("or" is "almost always disjunctive"). Instead, "attempt to commit a sexual act" operates as a unified phrase.

Additionally, the Supreme Court explained that the result in *Cyan* was not to the contrary of the rule of the last antecedent because the Court "ha[s] not applied that rule when the modifier directly follows a concise and 'integrated' clause," as it does in *Cyan*. 583 U.S. at 440. For the same reason, the rule of the last antecedent is inapplicable here. The plain language of the specification demonstrates that "attempt to commit a sexual act" is concise, and as discussed above, is unified. JA at 001. In fact, this language is more concise than the language at issue in *Cyan*. *Compare Cyan,* 583 U.S. at 437 ("Any covered class action brought in any State court involving a covered security") *with* JA at 001 ("attempt to commit a sexual act").

Further, while the Supreme Court has applied the rule of the last antecedent in cases "when the alternative reading would 'stretch[] the modifier too far' by asking it to qualify a remote or otherwise disconnected phrase," "attempt to" is not

remote or otherwise disqualified from "commit a sexual act." *Cyan,* 583 U.S. at 440 (citing *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 342 (2005); *Lockhart*, 577 U.S. at 351. Reading "by penetrating her mouth with his penis without her consent" to modify "attempt to commit a sexual act" does not stretch the modifier too far because it "takes . . . little energy to process" and it is not a heavy lift to "carry the modifier" to "attempt." *Cf. Lockhart*, 577 U.S. at 351 (using the rule of the last antecedent "where it takes more than a little mental energy to process" a statute's component parts, "making it a heavy lift to carry the modifier across them all"). This difference makes SrA George's case different from cases where the Supreme Court has applied the rule of the last antecedent.

For example, in *Jama,* the Supreme Court found the petitioner was attempting to stretch the modifier "too far" when the petitioner argued that the word "another" in one clause of a statute applied to the six clauses that came before it. 543 U.S. at 340-42. The Supreme Court reasoned that each of the preceding six clauses were "distinct" and "end with a period, strongly suggesting that each may be understood completely without reading any further." *Id*. at 344. That reasoning does not apply here because neither "attempt to" or "attempt to commit" can be understood completely without reading further. JA at 001. These words are connected to "a sexual act" and operate as a unified phrase—"attempt to commit a sexual act." *Id*.

SrA George's case is similarly a "far cry" from *Barnhart*, the "classic

example" case of applying the last antecedent rule. *See Cyan,* 583 U.S. at 440 n.6 (citing *Barnhart*, 540 U.S. 20) (explaining that the classic example of applying the last antecedent rule comes from *Barnhart* and that *Cyan* (which had even less concise language than the language in SrA George's specification) was a "far cry" from *Barnhart*). In *Barnhart*, a statute provided that a person is disabled if his impairment is so severe "that *he is not only unable to do his previous work but cannot*, considering his age, education, and work experience, *engage in any other kind of substantial gainful work which exists in the national economy*." 540 U.S. at 23 (quoting 42 U.S.C. §423(d)(1)(A)). The question was whether the phrase—"which exists in the national economy"—qualified "previous work." *Id*. at 24.

The Supreme Court applied the last antecedent rule and held that "'which exists in the national economy' modifies only 'substantial gainful work,' and not the more distant 'previous work.'" *Cyan,* 583 U.S. at 440, n.6 (citing *Barnhart*, 540 U.S. at 26). This was because the statute described two distinct things: (1) an inability to do a previous job and (2) an inability to do any other job. *Barnhart*, 540 U.S. at 23. Unlike *Barnhart*, the language in the specification "attempt to commit a sexual act" describes one thing (the type of attempt). JA at 001. "[A]ttempt to" is not removed from "by penetrating her mouth with his penis without her consent" because "attempt to" is unified with "commit a sexual act." *Id*. Therefore, "by penetrating her mouth with his penis without her consent" modifies the entire unified phrase. *Id*.

This reading of the plain language in the specification is also supported by Article 80, UCMJ, cases that mirror the charging in this case. The Government agrees that in *United States v. Norwood*, 71 M.J. 204 (C.A.A.F. 2012), *United States v. Payne*, 73 M.J. 19 (C.A.A.F. 2014), *United States v. Turner*, 79 M.J. 401 (C.A.A.F. 2020), and *United States v. Wheeler*, 76 M.J. 564 (A.F. Ct. Crim. App. 2017), "the words following the term 'by' were a clearly articulated intermediate step . . . intended to allege an overt act." Gov't Br. at 24-25 (citing App. Br. at 10-13). In each case, the specification alleged an overt act because the modifying language ("by…") modified the preceding phrase ("attempt to…") to explain how the alleged attempt occurred. *See By*, Cambridge Dictionary, available at https://dictionary.cambridge.org/us/grammar/britishgrammar/by (explaining when the word "by" is structured with a "-ing" verb, that structure describes how something is achieved, for example, a specific act taken).

Norwood, 71 M.J. at 206 (alteration in original) (emphasis added)	a married man, on active duty, did, at Okinawa, Japan, on or about 17 April 2009, **attempt** to commit adultery with [the victim], U.S. Marine Corps, a woman not his wife, **by trying to place his penis inside of her vagina and have sexual intercourse with her**.
Payne, 73 M.J. at 24 (alterations in original) (emphasis added)	[Did] wrongfully and knowingly **attempt** to persuade, induce, entice, . . . or coerce "Marley," someone he believed was a female 14 years of age, who was, in fact, Lillian Vedder, an Ulster County

	New York Sheriff's Office undercover detective, to create child pornography **by requesting that "Marley" send nude photos of herself to the said STAFF SERGEANT ROBERT M. PAYNE**, which conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.
Turner, 79 M.J. at 403 (alteration in original) (emphasis added)	did, at or near Clarksville, Tennessee, on or about 1 January 2015, **attempt** to kill with premeditation Specialist [C.S.G.] **by means of shooting her with a loaded firearm**, **causing grievous bodily harm.**
Wheeler, 76 M.J. at 567-68 (alterations in original) (emphasis added)	did, at or near Tampa, Florida, between on or about 11 April 2014 and on or about 12 April 2014," **attempt** to commit a lewd act upon "Gaby," a person [Appellant] believed to be a child who had not yet attained the age of 16 years, **by intentionally communicating to "Gaby" indecent language**, to wit: stating the accused liked to "jack his dick," stating "Gaby" "can finally touch a dick" and asking whether "Gaby" likes to masturbate, or words to that effect, with an intent to arouse or gratify the sexual desire of [Appellant].
SrA George's Specification (JA at 001) (emphasis added)	did, at or near Newport News, Virginia, on or about 4 July 2021, **attempt** to commit a sexual act upon [WB] **by penetrating her mouth with his penis without her consent**.

Each of the above specifications from other Article 80, UCMJ, cases contain essentially the same grammatical construction as SrA George's specification. In each specification, "by" is structured with an -ing verb and this phrase modifies the entire preceding phrase to expressly allege an overt act. In SrA George's specification: "by penetrating her mouth with his penis without her consent" modified "attempt to commit a sexual act" to explain what the overt act was. JA at 001. Therefore, the plain language expressly alleged that SrA George committed the overt act of penetrating WB's mouth with his penis without her consent.

This Court cannot disregard the plain language of the specification based on the Government's intuition about what it intended to charge. The Supreme Court explained in *Cyan* that the Government distorted the text at issue because of what it thought Congress wanted, but that "[the Supreme Court] has no license to 'disregard clear language' based on an intuition that 'Congress must have intended something broader.'" 583 U.S. at 442-43 (quoting *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 794 (2014)).

While the Government might have intended to charge something broader than it did, the question is not what the Government meant to charge in the specification but rather, if it proved what it did charge. *See Garner v. Louisiana*, 368 U.S. 157, 165 (1961) (limiting the court's review to the specific charge contained within the information); *Bay Mills*, 572 U.S. at 794 (citing *CSX Transp., Inc. v. Alabama Dept.*

of Revenue, 562 U.S. 277, 295-296 (2011)) (explaining that even though a statutory anomaly arguably "made 'not a whit of sense' . . . 'Congress wrote the statute it wrote'" and the Supreme Court could not interpret the statute any differently). The plain language of the specification expressly alleged an overt act, and this Court cannot disregard the clear language of the specification. *Bay Mills*, 572 U.S. at 794.

In a similar vein, the Government incorrectly assumes that it is impossible to allege "by penetrating her mouth with his penis without her consent" as an overt act because that would amount to a completed offense instead of an inchoate offense. Gov't Br. at 20-21. But this improperly conflates the Government's burden of proof with the validity of the specification. The Government can charge something that it cannot prove so long as it expressly or implicitly alleges the elements of the offense. If the Government alleged a completed act as an overt act, the Government still alleged an overt act and accepts the risk of that charging. *See United States v. Mader*, 81 M.J. 105, 109 (C.A.A.F. 2021) (the Government has "complete discretion over how to charge [an] [a]ppellant" and "accept[s] the risk" of its charging).

The Government's reliance on *United States v. Cade*, is also incorrect because *Cade* involved reviewing the multiplicity of convictions, explaining that "one cannot be *convicted* of both an attempt and the completed offense." 75 M.J. 923, 931 (A. Ct. Crim. App. 2016) (emphasis added); Gov't Br. at 21. This explanation was not addressing the validity or legal sufficiency of an attempt offense. *See id*. at 931.

Finally, the Government had many Article 80, UCMJ, cases that it could have looked to for guidance in charging the Article 80, UCMJ, offense. *See Turner*, 79 M.J. at 404 n.3 (citing *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007); *United States v. Bryant*, 30 M.J. 72, 74 (C.M.A. 1990)) (explaining how the Government could have charged attempt in a more straightforward way). But the bottom line is the Government had to be attentive to what the plain language alleged. *United States v. Simmons*, 82 M.J. 134, 141 (C.A.A.F. 2022) ("it is the government that has both the opportunity *and the responsibility* to ensure that the . . . specifications align with the facts of the case") (emphasis in original). Once it alleged the offense, the Government had the opportunity to have a preliminary hearing officer review the specification to determine "whether there is probable cause to believe the accused committed the offense or offenses *alleged*." R.C.M. 405(a) (emphasis added). The Government accepted the risk of approving SrA George's waiver of his Article 32, UCMJ, hearing, and chose not to have a preliminary hearing officer review the specification. Supp. JA at 138. Meanwhile, SrA George's waiver of the Article 32 hearing includes no agreement regarding what the specification alleges.[2] Supp. JA at 136-37.

[2]An Article 32, UCMJ, waiver is also not a good source of information for determining an appellant's view on a specification because a preliminary hearing report is "advisory and does not bind the staff judge advocate or convening authority" and changes can be made to specifications after an Article 32 hearing (before referral) so it may not be strategic for an accused to raise a legal sufficiency

B. The specification states an offense.

The Government argues that if this Court were to adopt SrA George's reasoning, "there would be no underlying predicate offense" because "'attempt to commit a sexual act' is not an offense under the UCMJ." Gov't Br. at 21. This is not true because the specification implies that the predicate offense is sexual assault without consent.

For the specification to state the offense of Article 80, UCMJ, the Government needed to allege (1) SrA George did a certain overt act; (2) the act was done with the specific intent to commit a certain offense under the UCMJ; (3) the act amounted to more than mere preparation; and (4) the act apparently tended to effect the commission of the intended offense. *MCM*, pt. IV, ¶ 4.b. Rule for Courts-Martial 307(c)(3) provides a "specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication" (except for the terminal element of Article 134, UCMJ). Therefore, to state an Article 80, UCMJ, offense, the Government could express or imply each of the above elements.

When expressing or implying the second element (intent to commit sexual assault without consent), the Government did not have to expressly allege the elements of sexual assault without consent.[3] *See Norwood*, 71 M.J. at 205 (citing

argument during an Article 32, UCMJ, hearing that could be resolved by changing the act identified in the specification. R.C.M. 405(l)(1); R.C.M. 603(c).

[3] The elements of sexual assault without consent are (1) "That the accused committed

Resendiz-Ponce, 549 U.S. at 102; *Wong Tai v. United States*, 273 U.S. 77 (1927); *Bryant*, 30 M.J. at 72) ("we hold that in order to state the elements of an inchoate offense under Article 80 . . . , UCMJ, a specification is not required to expressly allege each element of the predicate offense"). The specification only needed to "fairly inform" SrA George of the Article 80 offense and "enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Norwood*, 71 M.J. at 206 (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)). The specification does this because it implies that the sexual act would have been without consent, which is a crime under the UCMJ. Article 120, UCMJ, 10 U.S.C. § 920. The specification implies this because logically if you are trying to do something (and you don't have consent to try), that means you don't have consent to do the thing. The lack of consent for the attempt implies that the predicate act is also without consent.

The specification therefore states an offense and SrA George agrees that this Court should decline any "invitation to convert this legal sufficiency issue" into something that it is not. Gov't Br. at 22 (stating "[t]his Court should decline to convert a legal sufficiency argument into a challenge of the validity of the specification itself"). For that reason, this Court should disregard the Government's

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a sexual act upon another person; and" (2) "That the accused did so without the consent of the other person." *MCM*, pt. IV, ¶ 60.b.(2)(d).

contradictory invitation to review this issue under a standard for assessing the validity of a specification. Gov't Br. at 22-23 (citing *Turner*, 79 M.J. at 405-06; *United States v. Watkins,* 21 M.J. 208, 209-10 (C.M.A. 1986)). Instead, this Court's precedent for reviewing legal sufficiency provides the correct lens for review.

C. The Government did not prove the charged overt act.

The plain language of the specification at issue identifies how the Government charged the alleged offense and therefore what it must prove. *See Garner*, 368 U.S. at 165 (limiting the court's review to the specific charge contained within the information: "our task is to determine whether there is any evidence in the records to show that the petitioners . . . violated [the charged criminal code]"). *Garner* cautioned that courts "cannot be concerned with whether the evidence proves the commission of some other crime," and that due process demands asking whether there is evidence to support the conviction for the charge at hand. *Id*. at 164.

Military courts determine the essential elements of a charged offense by looking at "both the statute and the specification." *United States v. Roderick*, 62 M.J. 425, 432 (C.A.A.F. 2006) (citing *United States v. Weymouth*, 43 M.J. 329, 333 (C.A.A.F. 1995)). Correctly, this Court uses the plain language of the specification, as alleged, to determine what the Government has charged and therefore must prove. *See* App. Br. at 7 (citing authorities).

For example, in *United States v. Smith*, 83 M.J. 350, 359 (C.A.A.F. 2023), this Court explained that the Government was required to prove the elements of sexual assault, listing the elements as they were charged:

> (1) That at or near Charlotte, North Carolina, on or about 16 November 2018, [Appellant] committed a sexual act upon [SrA HS], by causing penetration, however slight, of [SrA HS]'s vulva by [Appellant]'s tongue;
>
> (2) That [Appellant] did so when [SrA HS] was incapable of consenting to the sexual act due to impairment by alcohol;
>
> (3) That [Appellant] knew or reasonably should have known [SrA HS] was incapable of consenting to the sexual act due to impairment by alcohol; and
>
> (4) That [Appellant] did so with an intent to gratify his sexual desire.

In SrA George's case, the specification of attempted sexual assault expressly alleged that SrA George committed the overt act of penetrating WB's mouth with his penis without her consent and the Government was therefore required to prove the following elements:

> (1) SrA George did a certain overt act: penetrating WB's mouth his penis without her consent;
>
> (2) the act was done with the specific intent to commit the offense of sexual assault without consent;
>
> (3) the act amounted to more than mere preparation; and
>
> (4) the act apparently tended to effect the commission of the intended offense.

See MCM, pt. IV, ¶ 4.b.

SrA George's constitutional rights "indisputably entitle [him] to a 'determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (citing *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); *In re Winship*, 397 U.S. 358, 364 (1970)). The Government was required to prove that SrA George penetrated WB's mouth with his penis without her consent because the plain language of the specification alleged this overt act. No rational trier of fact could have found the essential element of an overt act as charged because, as the Government conceded, there was no evidence presented that SrA George penetrated WB's mouth with his penis. Gov't Br. at 5 ("there was no evidence presented during [SrA George's] trial that he ever actually penetrated [WB's] mouth with his penis"). Because no rational trier of fact could have found beyond a reasonable doubt that SrA George penetrated WB's mouth with his penis, SrA George's conviction is legally insufficient. *See United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (explaining the "test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.") (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)).

D. This Court's legal sufficiency review is not predicated on an objection being made during trial.

This Court plays a vital role in securing servicemember's rights. The UCMJ established appellate review "to enforce the procedural safeguards which Congress determined [shall be] guarantee[d] to those in the Nation's armed services." *Burns v. Wilson*, 346 U.S. 137, 141 (1953). This Court's power to act "with respect to matters of law,"[4] including the legal sufficiency of a conviction, is part of that "system of review." *Burns*, 346 U.S. at 140.

In conducting legal sufficiency review, this Court has never required that an appellant first raise an R.C.M. 917 motion at trial. Legal sufficiency review is also not predicated on the military judge's instructions at trial or the arguments of counsel. And that makes sense because neither the military judge's instructions[5] nor counsel's arguments change the specification on the charge sheet or the evidence.

Furthermore, in *United States v. Musacchio*, the Supreme Court held that a reviewing court's legal sufficiency review "does not rest on how the jury was instructed." 577 U.S. 237, 243 (2016). The Court reasoned this is so because "[a]ll that the defendant is entitled to on a sufficiency challenge is for the court to make a

[4] Article 67, UCMJ, 10 U.S.C. § 867.

[5] Review of the military judge's instructions in this case also does not change anything for this issue because the military judge instructed the panel of members that the overt act was: "attempt to commit a sexual act upon [WB] by penetrating her mouth with his penis without her consent." Supp. JA at 167.

'legal' determination," that is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id*. at 243-44 (2016) (citing *Jackson v. Virginia*, 443 U.S. 307, 314-19 (1979)). This is the same legal sufficiency standard that this Court applies. *See Robinson*, 77 M.J. at 297-98.

The Illinois Supreme Court has similarly applied the same legal sufficiency test and explicitly found "when a defendant makes a challenge to the sufficiency of the evidence, his or her claim is not subject to the waiver rule and may be raised for the first time on direct appeal" for lack of proof as to the existence of an element. *People v. Woods*, 214 Ill. 2d 455, 470 (2005). Here, SrA George's legal sufficiency review is not waived, and this Court is empowered to and should act on this matter of law.

Conclusion

The Government controlled the charge sheet and chose the plain language of the specification that expressly alleged the overt act. The Government was bound to prove this essential element as alleged, and no rational trier of fact could find that SrA George penetrated WB's mouth with his penis therefore SrA George's conviction is legally insufficient.

SrA George respectfully requests that this Honorable Court set aside the findings and sentence and dismiss the Charge and Specification.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and the Air Force Government Trial and Appellate Operations Division on November 25, 2024.

CERTIFICATE OF COMPLIANCE WITH RULES 24(b) AND 37

This brief complies with the type-volume limitation of Rule 24(b) because it contains 4,831 words.

This brief complies with the typeface and type style requirements of Rule 37.

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