**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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| **UNITED STATES**,<br><br>Appellee<br><br>v.<br><br>**Logan A. MCLEOD**<br>Senior Airman (E-4)<br>U.S. Air Force,<br><br>Appellant | **APPELLANT'S SUPPLEMENT TO PETITION FOR GRANT OF REVIEW**<br><br>Crim. App. Dkt. No. 40374<br><br>USCA Dkt. No. 24-0189/AF |

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

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## Issues Presented[1]

**I.**

**WHETHER SENIOR AIRMAN MCLEOD'S CONVICTION FOR ATTEMPTED MURDER OF "SARAH" AND ATTEMPTED CONSPIRACIES TO RAPE AND KIDNAP AB ARE FACTUALLY AND LEGALLY SUFFICIENT.**

**II.**

**WHETHER THE LOWER COURT ERRONEOUSLY INTERPRETED AND APPLIED THE AMENDED FACTUAL SUFFICIENCY STANDARD UNDER ARTICLE 66(D)(1)(B), UCMJ.**

## Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) exercised jurisdiction over this matter pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d), and issued its decision on May 1, 2024. This Court may exercise jurisdiction pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

## Statement of the Case

A military judge sitting as a general court-martial convicted Senior Airman (SrA) Logan A. McLeod (Appellant), pursuant to his pleas, of attempted wrongful possession of a controlled substance, attempted rape, attempted kidnapping (two

[1] Appellant raises one issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). It is contained in the Appendix.

specifications), attempted rape of a minor, attempted wrongful distribution of child pornography, attempted wrongful production of child pornography, attempted aggravated assault of a minor (three specifications), and obstruction of justice, in violation of Articles 80 and 131b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 880 and 931b. Contrary to his pleas, the military judge convicted SrA McLeod of attempted premeditated murder, attempted conspiracy to rape, attempted conspiracy to kidnap, and attempted aggravated assault of a minor (three specifications), in violation of Article 80, UCMJ, 10 U.S.C. § 880.[2]

The military judge sentenced SrA McLeod to a reprimand, reduction to E-1, 35 years' confinement, and a dishonorable discharge.[3] The military judge credited Appellant with 341 days of pretrial confinement credit toward the sentence to

[2] Entry of Judgment (EOJ).

[3] The military judge sentenced Appellant to confinement for one year for Specification 2 of Charge I; 15 years for Specification 4 of Charge I; 35 years for Specification 5 of Charge I; ten years for Specification 8 of Charge I; ten years for Specification 9 of Charge I; 20 years for Specification 10 of Charge I; six years for Specification 11 of Charge I; nine years for Specification 12 of Charge I; six months for The Specification of Charge II; seven years for Specification 1 of the Additional Charge; four years for Specification 2 of the Additional Charge; three years for Specification 3 of the Additional Charge; three years for Specification 4 of the Additional Charge; four years for Specification 5 of the Additional Charge; five years for Specification 6 of the Additional Charge; three years for Specification 7 of the Additional Charge; and five years for Specification 10 of the Additional Charge, with confinement to run concurrently. R. at 532; EOJ.

confinement.[4] On September 14, 2020, the convening authority took no action on the findings or sentence.[5]

## Statement of Facts

### Background

In 2017, Ms. JO, a sex worker who lived in New York with her husband, became Facebook friends with Ms. BM, who lived in Alabama with her husband, SrA McLeod.[6] Both marriages were open relationships and, in January 2020, JO and BM started dating while still married to their respective spouses.[7]

In June 2020, JO stayed with BM and Appellant for a week.[8] The trio engaged in consensual sexual activity.[9]

In September 2020, BM visited JO in New York for about two weeks.[10] According to JO, this visit was awful because her husband and BM engaged in a sex act that JO disapproved of, BM wanted to share a bed with JO and her husband, and BM talked about these sex acts in public, thereby tarnishing JO's name and professional reputation.[11] Additionally, JO disapproved of BM having

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[4] EOJ.
[5] Convening Authority Decision on Action.
[6] R. at 330, 362.
[7] R. at 330, 355, 356.
[8] R. at 331, 355.
[9] R. at 332, 355.
[10] R. at 332, 356.
[11] R. at 357-58.

consensual sex with JO's ex-boyfriend.[12] When JO confronted BM, BM accused JO's husband of raping her.[13] BM cut JO out of her life.[14] JO felt angry and mistreated.[15]

In October 2020, SrA McLeod and JO started texting each other.[16] JO called SrA McLeod "Ace" in these messages, and he called her "Bunny."[17] Within days, their conversations turned sexual.[18] Senior Airman McLeod was in love with JO, and she knew it.[19]

Appellant's fantasies did not shock JO because her profession routinely involved discussions of bondage, sadomasochism, and other sexual topics.[20] Indeed, she encouraged SrA McLeod to let his mind run free when discussing fantasies.[21] Sometimes JO suggested ideas to him, such as cutting off someone's hands after being handcuffed.[22]

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[12] R. at 358.
[13] R. at 333, 359.
[14] R. at 333, 359-60.
[15] R. at 360.
[16] R. at 333, 360.
[17] R. at 340, 398; Pros. Exs. 1, 2.
[18] R. at 334.
[19] R. at 373.
[20] R. at 362-63.
[21] R. at 364.
[22] R. at 364, 365-66; Pros. Ex. 1.

In late July or early August 2021, SrA McLeod initiated conversations involving kidnapping fantasies.[23] JO testified, "[H]e was asking me questions about kidnap fantasies, would I kidnap my own sister, would I let my own sisters kidnap me, would I do anything with family members."[24] She added, "I thought it was weird, but you know it wasn't illegal. So I just told him I wasn't really interested in that, but I didn't think too much of it honestly."[25]

Allegations Involving AB

AB was JO's "closest friend."[26] In early August 2021, JO suggested to SrA McLeod that AB would be "his ideal kidnap victim."[27] They discussed JO renting an Airbnb in Alabama, bringing AB to the house, drugging AB with Xanax, sexually abusing her, and taking photographs of her.[28] When asked whether Appellant gave her money "for the plan for [AB]," JO testified, "He did. For [AB], I'm not sure. I know he gave money for the drugs to the agent[29] but – and he

[23] R. at 335; Pros. Ex. 1.
[24] R. at 335.
[25] R. at 335.
[26] R. at 348.
[27] R. at 349.
[28] R. at 349, 424.
[29] The military judge acquitted SrA McLeod of attempted wrongful possession of Xanax with the intent to distribute in Specification 1 of Charge I. (EOJ.)

gave money for the going down to Alabama, but I can't remember for her."[30] She clarified that the money was for the bus to Alabama and the Airbnb rental.[31]

JO Contacts Law Enforcement

In early August 2021, SrA McLeod told JO about a kidnapping and rape fantasy involving a fourteen or fifteen-year-old child.[32] This fantasy concerned JO, so she filed an online report with the Air Force Office of Special Investigations (AFOSI) on or about August 4, 2021.[33] At trial, however, JO admitted that she baited SrA McLeod during discussion of this particular fantasy.[34]

A few days later, Special Agent (SA) JP flew to New York and made JO a confidential informant.[35] As part of this arrangement, SA JP installed an app on JO's phone that allowed him to monitor the communications between JO and Appellant and to record phone calls between them.[36] SA JP asked JO to keep talking to SrA McLeod and to "follow [SA JP's] lead and instruction."[37]

[30] R. at 350.
[31] R. at 350.
[32] R. at 336.
[33] R. at 337.
[34] R. at 369.
[35] R. at 338, 389, 417.
[36] R. at 338, 341, 369, 389; Pros. Ex. 3.
[37] R. at 338.

Allegations Involving "Caitlin" and "Sarah"

After SA JP enlisted JO as a confidential informant, they concocted a plan in which SA JP pretended to be a human trafficker known as "Blazer."[38] JO, "Blazer," and SrA McLeod planned for SrA McLeod to purchase "Sarah" and "Caitlin" so that they could be his sex slaves at a rented house in Alabama.[39] "Sarah" and "Caitlin" were not real people; they were characters—a mother and daughter—conjured by "Blazer."[40]

Over text messages and phone calls, JO and SrA McLeod fantasized about tying "Sarah" and "Caitlin" together, "snuffing" "Sarah" by suffocating her to death while having sex with her, videotaping sexual acts with "Caitlin," and assaulting "Caitlin" in various ways.[41] SrA McLeod discussed "the possible killing of [AB], as well as Sarah."[42]

On August 25, 2021, SrA McLeod felt apprehensive about the plan; he felt that it was not "airtight."[43] JO told him that the only thing that was not "airtight" was him and that he kept doubting and second-guessing the plan.[44]

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[38] R. at 366, 390.
[39] R. at 348, 366-67; Pros. Exs. 1, 2, 4.
[40] R. at 420.
[41] R. at 392-93.
[42] R. at 412, 413.
[43] R. at 375; Pros. Ex. 3.
[44] R. at 375.

On September 8, 2021, SrA McLeod expressed apprehension about the plan and feared that it was a set-up.[45] He told JO that he needed to get help and he wanted to back out of the plan because it was one thing to fantasize, but another thing to actually do it.[46] Senior Airman McLeod did not think that he could become someone who would do these things.[47] He told JO that he did not know what he had been thinking, and he feared that "Blazer" would kill him for backing out of the plan.[48]

Senior Airman McLeod texted "Blazer" about abandoning the plan.[49] He asked if "backing out was acceptable."[50] "Blazer" knew that Appellant expressed hesitation about snuffing, or killing, "Sarah" and disposing of her body.[51]

In a September 9, 2021 phone call, JO conveyed her surprise and anger at SrA McLeod's hesitation.[52] Appellant asked her, "Are you sure about going through with this?"[53] She answered, "I mean, I feel really confident, you know. I mean, I'm not trying to pressure you or nothing, you know. It's your – it's your choice as well, but like I did put a lot of money on this. Like I put more than 2

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[45] R. at 345.
[46] R. at 345, 372.
[47] R. at 372.
[48] R. at 371.
[49] R. at 421; Pros. Ex. 4.
[50] *Id*.
[51] R. at 422; Pros. Ex. 2.
[52] R. at 345, 347; Pros. Ex. 3.
[53] R. at 345; Pros. Ex. 3.

grand into this, you know."[54] She continued to express her surprise at SrA McLeod's cold feet.[55] He answered, "Yeah. I was saying that just to have it on the record in case this was a fucking cop set-up basically."[56]

On September 10, 2021, SA BS, of Homeland Security Investigations, played the part of "Blazer" for an in-person meeting with SrA McLeod.[57] Senior Airman McLeod told "Blazer" that he was not interested in the mother and that he was only interested in the daughter.[58] Appellant gave "Blazer" $150.00 in cash.[59] SA BS testified:

> He gave me a hug, and he handed me an envelope. It had three $50 bills in it. We spoke for a few minutes, and then I showed him pictures that I had on my phone. One was of a girl that was underage or he was being told that she was underage. He looked at it. Also, I showed him the mother. He said he wasn't interested in the mother, that he would only be interested in meeting with the girl.[60]

"Blazer" gave SrA McLeod a blue plastic dinosaur.[61] The purpose of the dinosaur was for Appellant to take a photo of it upon "Blazer's" demand as a means of proving his identity.[62]

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[54] R. at 345, 373; Pros. Ex. 3.
[55] R. at 346; Pros. Ex. 3.
[56] *Id*.
[57] R. at 391-92, 428, 429; Pros. Ex. 5.
[58] R. at 430.
[59] R. at 392, 393, 429; Pros. Ex. 16.
[60] R. at 429-30.
[61] R. at 393, 430; Pros. Exs. 5, 16.
[62] R. at 393, 404, 430.

Senior Airman McLeod and JO Abandon the Plan for AB

SA JP testified that, sometime after he assumed "Blazer's" identity, SrA McLeod and JO discussed whether to execute the schemes for AB and "Sarah" and "Caitlin."[63] The following colloquy occurred:

> Defense Counsel [DC]: And at the time in which you came onto the investigation, [JO] had already suggested her friend [AB] as a victim, correct?
>
> SA JP: That is correct.
>
> DC: And that was before you ever became involved?
>
> SA JP: That is correct.
>
> DC: And then you assumed the identity of Blazer, correct, the human trafficker?
>
> SA JP: In September, I did, yes.
>
> DC: And the plan at that point in time for [AB] was canceled, right?
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> SA JP: Senior Airman McLeod discussed with [JO] after I came into the picture, so to speak, if they should try to do both, if they should try to trade or sell [AB] or if they should cancel [AB] altogether. And ultimately, they made the decision to cancel [AB].
>
> DC: So, the answer is, yes?
>
> SA JP: Yes.
>
> DC: Okay, they cancel on [AB]?

[63] R. at 419.

SA JP: Yes, they did.[64]

SA JP testified that the plan regarding AB was abandoned in favor of pursuing the plan regarding "Sarah" and "Caitlin."[65] He maintained that the cash that SrA McLeod gave "Blazer" was initially meant for the plan with AB.[66]

Senior Airman McLeod's Apprehension

On September 18, 2021, JO arrived in Alabama.[67] SA JP took her to the rented Airbnb and then to an unknown location where she called SrA McLeod and pretended that "Caitlin" and "Sarah" had escaped.[68] She told Appellant to go to the Airbnb.[69] He did and was apprehended by AFOSI and local law enforcement officers.[70]

The trunk of SrA McLeod's car contained a number of items, including a balaclava, sunglasses, chains, a straitjacket, noseclips, glue, and tape.[71] SA JP testified, "Blazer informed Senior Airman McLeod that he needed to have a covering of his face any time that he made videos with Caitlin to obscure his identity . . . ."[72] Similarly, the purpose of the sunglasses was "to hide his identity

[64] R. at 419.
[65] R. at 424.
[66] R. at 424.
[67] R. at 350.
[68] R. at 350; Pros. Ex. 2.
[69] R. at 350.
[70] R. at 350, 394; Pros. Ex. 14.
[71] R. at 403, 406, 411; Pros. Exs. 22, 37.
[72] R. at 406.

on video."[73] As for the tape found in the trunk, SA JP testified that Appellant had talked about using it "to permanently suffocate Sarah."[74] Although "Blazer" had instructed SrA McLeod to purchase trash bags to dispose of "Sarah's" body, there were no trash bags in the trunk.[75]

While in custody, SrA McLeod called his wife, BM, and the call was recorded.[76] Appellant informed BM that the charges included attempted rape and attempted murder.[77] He told BM: "One of the charges is attempted murder but I promise I was not going to do that." "But I swear I was not going to kill anyone." "I promise I was not going to kill anyone."[78] BM asked SrA McLeod why he showed up at the rented house and he answered, "When they actually came, I wasn't even sure what I was gonna do."[79]

**Reasons to Grant Review**

This Court should review SrA McLeod's convictions for attempted premeditated murder of "Sarah," attempted conspiracy to rape AB, and attempted conspiracy to kidnap AB for legal and factual sufficiency. The new Article 67, UCMJ, grants this Court the authority to review and act on the findings of records

[73] R. at 411.
[74] R. at 407, 40-10; Pros. Exs. 26, 33.
[75] R. at 422-23; Pros. Exs. 4, 15.
[76] Pros. Ex. 41.
[77] Pros. Ex. 41.
[78] Pros. Ex. 41 at 0:06:59, 0:07:14.
[79] Pros. Ex. 41 at 0:09:10.

of trial that are incorrect in law and in fact. But this Court has not yet conducted a factual sufficiency review under the updated UCMJ. There is insufficient evidence to support the requisite specific intent and overt act for attempted premeditated murder, attempted conspiracy to rape, and attempted conspiracy to kidnap.

At a minimum, SrA McLeod's petition should be granted to review the new factual sufficiency standard. With this Court's interpretation outstanding,[80] it is impossible to know whether the AFCCA applied the proper standard.

## Argument

### I.

### The evidence is legally and factually insufficient to support the findings of guilty for attempted murder of "Sarah" and attempted conspiracies to rape and kidnap AB.

### Standard of Review

This Court reviews the legal sufficiency of convictions *de novo*.[81] This Court has not set forth the standard of review for factual sufficiency for Article 67, UCMJ, 10 U.S.C. § 867 (effective Jan. 1, 2021). SrA McLeod asserts that this

[80] *United States v. Harvey*, 83 M.J. 685 (N.M. Ct. Crim. App. 2023), *rev. granted*, __ M.J. __, No. 23-0239/NA, 2024 CAAF LEXIS 13 (C.A.A.F. Jan. 10, 2024).
[81] *United States v. Smith*, 83 M.J. 350, 359 (C.A.A.F. 2023) (citing *United States v. Robinson*, 77 M.J. 294, 297 (C.A.A.F. 2018)).

Court should conduct a factual sufficiency review using the *de novo* standard of review.[82]

## Law & Analysis

A. This Court can review SrA McLeod's convictions for factual and legal sufficiency.

In addition to reviewing SrA McLeod's convictions for legal sufficiency, this Court has the authority to review his convictions for factual sufficiency.[83] Pursuant to Article 67(c)(1)(C), UCMJ, this Court may act with respect to "the findings set forth in the entry of judgment, as affirmed, dismissed, set aside, or modified by" the Air Force Court of Criminal Appeals "*as incorrect in fact* under section 866(d)(1)(B) of this title (article 66(d)(1)(B))."[84] This is a change from the previous Article 67(c)(1), UCMJ, where this Court could only act with respect to the findings as affirmed or set aside as incorrect in law by Courts of Criminal Appeals.[85]

Congress expanded this Court's ability to review, and act, on findings in records of trial. Section 542(c) of the 2021 NDAA is specifically titled, "Review by United States Court of Appeals for the Armed Forces of Factual Sufficiency

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[82] *Cf. United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted).
[83] 10 U.S.C. § 867 (effective Jan. 1, 2021).
[84] 10 U.S.C. § 867(c)(1)(C) (effective Jan. 1, 2021) (emphasis added).
[85] 10 U.S.C. § 867(c)(1) (2018).

Rulings."[86] This Court may now act to correct any findings that may be incorrect in fact for alleged offenses committed after January 1, 2021.[87]

SrA McLeod's convictions are for offenses that allegedly occurred after January 1, 2021.[88] Therefore, this Court can, and should, review SrA McLeod's convictions for both factual and legal sufficiency.

B. SrA McLeod's conviction for attempted premeditated murder is legally and factually insufficient.

The test for legal sufficiency is "whether, considering the evidence in a light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt."[89]

For cases in which every finding of guilty in the Entry of Judgment is for an offense that occurred on or after January 1, 2021, as here, the amended Article 66(d)(1)(B), 10 U.S.C. § 866(d)(1)(B), applies to a Court of Criminal Appeals' (CCA) factual sufficiency review.[90] The new standard for factual sufficiency is

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[86] Pub. L. 116-283, § 542(c), 134 Stat. 3388, 3612–13 (2021).
[87] *See* Pub. L. 116-283, § 542(c), 134 Stat. 3388, 3612–13 (2021); *but see* 10 U.S.C. § 867(c)(4) (effective Jan. 1, 2021) (limiting this Court to "action only with respect to matters of law").
[88] R. at 597; EOJ.
[89] *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003); *United States v. Pabon*, 42 M.J. 404, 405 (C.A.A.F. 1995) (*quoting Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).
[90] National Defense Authorization Act for Fiscal Year 2021 [FY21 NDAA], Pub. L. No. 116-283, § 542(b), 134 Stat. 3611-12, 3612 (Jan. 1, 2021); *United States v. Scott*, No. 20220450, 2023 CCA LEXIS 456, at *3-4, 83 M.J. 778 (A. Ct. Crim. App. Oct. 27, 2023); *United States v. Harvey*, 83 M.J. 685, 690-92 (N-M. Ct. Crim.

whether, after weighing the evidence in the record and making allowances for not having seen and heard the witnesses and affording appropriate deference to findings of fact entered by the military judge, "this Court is clearly convinced that the finding of guilty was against the weight of the evidence."[91]

This is a case about fantasy and intent and the line between the two. Conversations about specific fantasies, no matter how disturbing they are, are not criminal when the evidence is insufficient to prove intent and the charged overt acts are not substantial steps toward the completion of the offenses.

In *United States v. Valle*, the Second Circuit addressed the line between fantasy and criminal intent when affirming the district court's judgment of acquittal on a count of conspiracy to kidnap:

> Although it is increasingly challenging to identify that line in the Internet age, it still exists and it must be rationally discernible in order to ensure that "a person's inclinations and fantasies are his own and beyond the reach of the government." *Jacobson v. United States*, 503 U.S. 540, 551-52 (1992). We are loath to give the government the power to punish us for our thoughts and not our actions. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). That includes the power to criminalize an individual's expression of sexual fantasies, no matter how perverse or disturbing. Fantasizing about committing a crime, even a crime of violence against a real person whom you know, is not a crime.

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App. May 23, 2023), *rev. granted,* 2024 CAAF LEXIS 13 (C.A.A.F. Jan. 10, 2024); *United States v. Ellard*, No. 202200051, 2023 CCA LEXIS 363 (N-M. Ct. Crim. App. Aug. 31, 2023).

[91] 10 U.S.C. § 866(d)(1)(B) (effective Jan. 1, 2021).

> This does not mean that fantasies are harmless. To the contrary, fantasies of violence against women are both a symptom of and a contributor to a culture of exploitation, a massive social harm that demeans women. Yet we must not forget that in a free and functioning society, not every harm is meant to be addressed with the federal criminal law.[92]

SrA McLeod's convictions for attempted murder of "Sarah" and for attempted conspiracies to rape and kidnap AB should be set aside. The evidence, no matter how disturbing, is legally and factually insufficient.

1. SrA McLeod's conviction for attempted murder of "Sarah" is legally and factually insufficient.

An attempt requires "a specific intent to commit the offense accompanied by an overt act which directly tends to accomplish the unlawful purpose."[93] Here, the Government incorrectly conflated fantasy with intent. Senior Airman McLeod and JO's texts were replete with fantasies about "snuff" and "snuffing someone."[94] Their conversations involved elaborate fantasies about what ideas turned them on. They peppered their texts with emojis, GIFs, and cartoon images.[95] These fantasies, as dark and depraved as other people may find them, consisted of nothing but hypothetical scenarios and wishes. The darker and more depraved the

[92] 807 F.3d 508, 511 (2d Cir. 2015) (citations omitted).
[93] MCM, pt. IV, ¶ 4.c.(1).
[94] Pros. Ex. 1.
[95] Pros. Ex. 1.

fantasies became, the more they complimented each other on their ingenuity. They sought to impress each other with their depravity. Senior Airman McLeod asked JO, "Can I tell you my taboo *fantasy*? . . . . So does this turn you on? And what all are your thoughts about it?"[96] Essentially, their conversations amounted to an effort to out-do each other, to shock each other, and to be more outrageous than the other one.

While SrA McLeod purchased and transported multiple items, including glue, noseclips, tape, a straitjacket, chains, and locks (Pros. Exs. 6-15, 17-39), he did not bring the trash bags that "Blazer" had instructed him to bring as recently as the day before the arranged apprehension for disposal of "Sarah's" body.[97] In all the communication between SrA McLeod and "Blazer," "Blazer" was in charge. He dominated SrA McLeod so much that SrA McLeod feared "Blazer's" reaction if he backed out of the plan.[98] On 6 September 2021, "Blazer" warned SrA McLeod that "if you were trying to really fuck me over . . . well don't try that because you'd regret it I promise.[99] SrA McLeod answered, "Believe me, I

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[96] Pros. Ex. 1 at 379 (emphasis added).
[97] Pros. Ex. 4 at 30, 35, 48; Pros. Ex. 15.
[98] During the providence inquiry, SrA McLeod stated, "I recognized during the planning of this and the on-going communication with Blazer that he was not someone I wanted to have an on-going business partnership with. I feared him and was fearful of making him upset. I feared for my own safety as well as my wife's safety." R. at 243.
[99] Pros. Ex. 4.

definitely don't want to deal with the consequences of that."[100] And yet, even though SrA McLeod feared for his own life should he disobey or disappoint "Blazer," he did not bring the trash bags because he did not intend to kill "Sarah." There was no need for the 55-gallon trash bags because there would be no body to dispose of.

The night before the arranged apprehension, SrA McLeod instructed JO to "[b]all gag the bitch mother immediately when she arrives. And keep her blindfold on. It's really important that she not see you."[101] If SrA McLeod intended to kill "Sarah," then there was no need for "her" to be blindfolded. If he did not intend to kill "her," then he needed to ensure that "she" could not identify him or JO. This text is evidence that SrA McLeod did not intend to kill "Sarah."

SrA McLeod's texts to JO further demonstrates his lack of intent to kill "Sarah": "*Maybe* we could do the thing where we kill the mother and tie her to the daughter." "Do you want to tie her to her daughter and kill her *sometime*?"[102] These texts evinced SrA McLeod's lack of intent, his hesitation, and his doubt that their fantasies would come to fruition. These texts contained wishes, not intent.

Additionally, as the date for the plan got closer, SrA McLeod repeatedly expressed his apprehension and doubts to JO. On September 8, 2021, he told JO

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[100] *Id*.
[101] Pros. Ex. 2 at 222.
[102] R. at 441 (emphasis added).

that he did not think he could do the things they had fantasized about. He risked inflaming "Blazer's" anger when he asked "Blazer" if "backing out was acceptable."[103]

On September 10, 2021, SrA McLeod met "Blazer" and told him that he was not interested in the mother. "Blazer" showed SrA McLeod a photo of only the girl.[104] He did not show SrA McLeod a photo of the mother because SrA McLeod had explicitly abandoned any plan for "Sarah."

Finally, during the recorded call with his wife while he was in jail, SrA McLeod admitted that he had betrayed her trust by communicating with JO even though he knew that JO's husband had violated her. He admitted that he made countless terrible choices and that his fantasies were dark, but he wanted BM to know that he did not intend to kill anyone. He told her, "When ["Sarah" and "Caitlin"] actually came, I wasn't even sure what I was gonna do."[105] The evidence adduced at trial is clear that SrA McLeod did not intend to murder "Sarah."

An overt act "goes beyond preparatory steps and is a direct movement toward the direction of the offense."[106] For an act to amount to more than mere preparation, the accused must take a substantial step toward accomplishing the

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[103] R. at 421; Pros. Ex. 4.
[104] R. at 430.
[105] Pros. Ex. 41 at 0:09:10.
[106] MCM, pt. IV, ¶ 4.c.(2).

completed offense.[107] In addressing the alleged overt acts, trial counsel described SrA McLeod's "first step" as his research to find a rental home and the transfer of money for that home.[108] According to the trial counsel, the next steps involved paying "Blazer" $150.00 and getting a COVID test.[109] The "final step" occurred when SrA McLeod drove to the rental home on the appointed day "with all those items . . . in his trunk[:] bags, duct tape, chains, sponge, leash, collar, padlocks, all of it."[110] But, as discussed, SrA McLeod did not have the trash bags that "Blazer" instructed him to bring because he did not intend to murder "Sarah" and dispose of her body. Senior Airman McLeod demanded that JO wear a mask so that "Sarah" could not identify her or him because he did not intend to murder "Sarah" and dispose of her body.

No reasonable factfinder could conclude beyond a reasonable doubt that SrA McLeod possessed the specific intent to murder "Sarah." Nor could a reasonable factfinder conclude beyond a reasonable doubt that SrA McLeod took a substantial step toward completion of the offense.

Even with the appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence, this Court should be clearly convinced that

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[107] *United States v. Payne*, 73 M.J. 19, 24 (C.A.A.F. 2014).
[108] R. at 442.
[109] R. at 442.
[110] R. at 443.

the finding of guilty for premeditated murder was against the weight of the evidence and SrA McLeod's conviction factually insufficient.

2. SrA McLeod's convictions for attempted conspiracies to rape and kidnap AB are legally and factually insufficient.

The bulk of the Government's evidence for Specifications 1 and 2 of the Additional Charge consisted of texts between SrA McLeod and JO and his payment of $150.00 to JO for the rental of house in Alabama.[111] Senior Airman McLeod and JO's conversations about AB involved a plethora of ideas about what it would be like to bring her to Alabama under the pretense of a visit to SrA McLeod and dark fantasies about intentionally impregnating her.[112] The fantasies amounted to multiple scenarios: "What if we did this?" "What would it be like if we tried that?" "Imagine if we did this." The fantasies—that JO would offer up her "closest friend" to SrA McLeod for the opportunity of impregnating her, or "breed[ing] her,"[113] and keeping her as a sex slave in Alabama—were ridiculous, as was his wish that JO would do what she could "to brainwash [AB] into loving [him]."[114] Senior Airman McLeod knew it would be a longshot to convince AB to

[111] Pros. Exs. 2, 16.
[112] Pros. Exs. 1, 2.
[113] Pros. Ex. 1 at 144, 283.
[114] Pros. Ex. 2 at 27.

"visit such a boring state."[115] Where the alleged co-conspirators plans are so farfetched to be impossible, there is no intent to accomplish the offense.[116]

Senior Airman McLeod doubted that their fantasy would be realized.[117] He asked, "Are you sure I'm not being delusional about trying to have a daughter with [AB]?"[118] Each time SrA McLeod expressed these doubts, he and JO nonetheless continued to create scenarios and make contingency plans if this plan failed or if AB got suspicious. The contingency plans, such as dumping AB in the "mad swamps" of Florida,[119] were utterly unrealistic and not feasible. Both JO and SrA McLeod admitted that their fantasies were disturbing and would shock other people. JO texted SrA McLeod, "That's the fun thing about roleplay and fantasies tho. U can get ur rocks off and not hurt anyone."[120] These texts about sexual fantasies, as depraved as they were, amounted to nothing more than SrA McLeod's desire to engage in these acts.

Next, SA JP confirmed that JO and SrA McLeod cancelled their fantasy to kidnap and rape AB. In other words, SrA McLeod voluntarily abandoned the plan.

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[115] Pros. Ex. 1 at 134.
[116] *Valle*, 807 F.3d at 514.
[117] Pros. Ex. 1 at 135.
[118] Pros. Ex. 2 at 15.
[119] Pros. Ex. 1 at 143.
[120] Pros. Ex. 1 at 10.

The Government alleged that the overt act for both attempted conspiracies was that SrA McLeod provided funding for a lodging rental.[121] While SA JP was confident that SrA McLeod had given JO money for the Airbnb rental, JO was not sure. She knew that Appellant had given money "for the going down to Alabama, but I can't remember for [AB]."[122] Even assuming that SrA McLeod gave JO money to rent a house in Alabama, this did not amount to a substantial step toward completion of the offense. The "substantial step must unequivocally demonstrat[e] that the crime will take place unless interrupted by independent circumstances."[123] The mere provision of money to JO was not a substantial step toward actually kidnapping and raping AB because SrA McLeod and JO abandoned the plan involving her. In other words, the plan was interrupted by the cancellation of the plan.

No reasonable factfinder could conclude beyond a reasonable doubt that SrA McLeod possessed the specific intent to conspire to rape and kidnap AB. Nor could a reasonable factfinder conclude beyond a reasonable doubt that SrA McLeod took a substantial step toward completion of the offenses.

Even with the appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence, this Court should be clearly convinced that

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[121] Charge Sheet.
[122] R. at 350.
[123] *Winckelmann*, 70 M.J. at 407 (citation and internal quotation marks omitted).

the findings of guilty for conspiracy to rape and conspiracy to kidnap were against the weight of the evidence, and SrA McLeod's convictions factually insufficient.

## Conclusion

SrA McLeod respectfully requests that this Court grant his petition for review.

## II.

## The lower court erroneously interpreted and applied the amended factual sufficiency standard under Article 66(d)(1)(B), UCMJ.

### Standard of Review

This Court reviews questions of statutory construction *de novo*.[124]

### Law & Analysis

Congress recently amended the factual sufficiency review standard in Article 66(d)(1)(B), UCMJ.[125] But the changes to Article 66, UCMJ, do not hollow out a CCA's factual sufficiency review. The prior version of Article 66(d), UCMJ, empowered the CCAs to approve findings that are "correct in law and fact and . . . on the basis of the entire record, should be approved."[126] This Court's predecessor interpreted this language to require that members of a CCA "are themselves

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[124] *United States v. Kohlbeck*, 78 M.J. 326, 330-31 (C.A.A.F. 2019) (citing *United States v. Atchak*, 75 M.J. 193, 195 (C.A.A.F. 2016)).
[125] 10 U.S.C. § 866(d)(1)(B) (effective Jan. 1, 2021).
[126] Article 66(d), UCMJ, 10 U.S.C. § 866(d) (2018).

convinced of the accused's guilt beyond a reasonable doubt."[127] Neither the old nor the new statute explicitly requires that the CCAs believe the accused's guilt beyond a reasonable doubt—this flows from case law alone.

Article 66, UCMJ, now requires that CCAs afford "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence."[128] In *United States v. Csiti*, the AFCCA correctly pointed out that the "current statute does not specify what is meant by the term 'appropriate deference.'"[129] But the AFCCA "broadly agree[d]" with the Navy-Marine Corps Court of Criminal Appeals' (NMCCA) conclusion in *United States v. Harvey* that "'appropriate deference' is a more deferential standard than 'recognizing.'"[130] Similar to the NMCCA, the AFCCA did not state how much deference is "appropriate deference," how to measure it, or how to apply it. Further, the AFCCA agrees with the NMCCA that in changing the language of the statute, Congress intended to make it "more difficult" to overturn a conviction for factual sufficiency.[131]

As the service courts are divided in their interpretation of the new standard,

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[127] *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987).
[128] 10 U.S.C. § 866(d)(1)(B)(ii) (effective Jan. 1, 2021).
[129] *United States v. Csiti*, No. ACM 40386, 2024 CCA LEXIS 160, at *19 (A.F. Ct. Crim. App. Apr. 29, 2024).
[130] *Id.*
[131] *United States v. McLeod*, No. ACM 40374, slip op. (A.F. Ct. Crim. App. May 1, 2024) (quoting *United States v. Harvey*, 83 M.J. 685, 691 (N.M. Ct. Crim. App. 2023) *rev. granted*, __ M.J. __, No. 23-0239/NA, 2024 CAAF LEXIS 13 (C.A.A.F. Jan. 10, 2024)).

this Court granted review of this issue in *United States v. Harvey*.[132] SrA McLeod's petition should be granted to review the new factual sufficiency standard because, with this Court's interpretation outstanding, it is impossible to know whether the AFCCA applied the proper standard.

## Conclusion

SrA McLeod respectfully requests that this Court grant his petition for review.

Respectfully Submitted,

/s/

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[132] *United States v. Harvey*, 83 M.J. 685 (N.M. Ct. Crim. App. 2023), *rev. granted,* __ M.J. __, No. 23-0239/NA, 2024 CAAF LEXIS 13 (C.A.A.F. Jan. 10, 2024).

## Certificate of Compliance

The undersigned counsel hereby certifies that: (1) this supplement complies with the type-volume limitation of Rule 21 because it contains fewer than 9000 words; and (2) this supplement complies with the type style requirements of Rule 37.

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**Certificate of Filing and Service**

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered the Appellate Government Division on July 16, 2024.

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# APPENDIX A

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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**No. ACM 40374**

---

**UNITED STATES**
*Appellee*

**v.**

**Logan A. MCLEOD**
Senior Airman (E-4), U.S. Air Force, *Appellant*

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Appeal from the United States Air Force Trial Judiciary

Decided 1 May 2024

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*Military Judge*: Michael A. Schrama.

*Sentence*: Sentence adjudged 24 August 2022 by GCM convened at Maxwell Air Force Base, Alabama. Sentence entered by military judge on 15 September 2022: Dishonorable discharge, confinement for 35 years, reduction to E-1, and a reprimand.

*For Appellant*: Major David L. Bosner, USAF; William E. Cassara, Esquire; Megan P. Marinos, Esquire.

*For Appellee*: Colonel Steven R. Kaufman, USAF; Lieutenant Colonel Thomas J. Alford, USAF; Lieutenant Colonel J. Pete Ferrell, USAF; Major Olivia B. Hoff, USAF; Mary Ellen Payne, Esquire.

JOHNSON, CADOTTE, and MASON, *Appellate Military Judges.*

Judge MASON delivered the opinion of the court, in which Chief Judge JOHNSON and Senior Judge CADOTTE joined.

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MASON, Judge:

Appellant entered mixed pleas at his court-martial. A military judge sitting as a general court-martial convicted Appellant, consistent with his pleas, of: one specification of attempted wrongful possession of a controlled substance (ecstasy) with an intent to distribute; one specification of attempted rape by force; one specification of attempted kidnapping; one specification of attempted kidnapping of a minor; one specification of attempted rape of a child; three specifications of attempted aggravated assault by suffocation upon a person under the age of 16; one specification of attempted production of child pornography; and one specification of attempted distribution of child pornography, all in violation of Article 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880; and one specification of obstruction of justice in violation of Article 131b, UCMJ, 10 U.S.C. § 931b.[1] The military judge convicted Appellant, contrary to his pleas, of: one specification of attempted premeditated murder; one specification of attempted conspiracy to commit rape; one specification of attempted conspiracy to commit kidnapping; one specification of attempted aggravated assault by strangulation upon a person under the age of 16; one specification of attempted aggravated assault by suffocation upon a person under the age of 16; and one specification of attempted assault upon a person under the age of 16, all in violation of Article 80, UCMJ.[2] Appellant was sentenced to a dishonorable discharge, confinement for 35 years, reduction to the grade of E-1, and a reprimand. The convening authority took no action on the findings or sentence.

Appellant raises three issues on appeal: (1) whether the evidence is legally and factually insufficient to support the findings of guilt for attempted murder of "Sarah"[3] and attempted conspiracies to rape and kidnap AB; (2) whether the sentences to confinement are inappropriately severe; and (3) whether the Government violated Appellant's Article 10, UCMJ, 10 U.S.C. § 810, speedy trial right by failing to act with reasonable diligence.[4]

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[1] Unless otherwise noted, references to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] Appellant was acquitted of one specification of attempted wrongful possession of a controlled substance (Xanax) with intent to distribute and two specifications of attempted assault upon a person under the age of 16, all in violation of Article 80, UCMJ.

[3] "Sarah" was a fictional name used by law enforcement as explained in the Background section below.

[4] Appellant raises the third issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

We have carefully considered Appellant's allegation of error that he was denied a speedy trial pursuant to Article 10, UCMJ, and find it does not require discussion or relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

Though not specifically raised by the parties, the court notes that the sentence entered for Specification 10 of the Additional Charge, attempted assault consummated by a battery upon a child under the age of 16, includes a confinement term of five years running concurrent to all charges and specifications. However, the maximum lawful confinement term for this offense was two years. As discussed below, we have reassessed the sentence. Regarding the remaining issues, we find no error that materially prejudiced Appellant's substantial rights, and we affirm the findings and modified sentence.

## I. BACKGROUND

In 2017, JO met BM online and they became friends. In January 2020, the two decided to start dating; BM was Appellant's wife at the time. BM had an open relationship with Appellant, meaning that they both could see other people romantically. JO had a similar relationship with her husband in New York. In June 2020, JO came to visit BM in Montgomery, Alabama. JO met Appellant while staying at his and BM's home. During her week-long visit, JO and Appellant engaged in sexual relations.

In September 2020, BM went to New York to visit JO. The visit did not go well. BM alleged that JO's husband sexually assaulted her and BM stopped talking to JO shortly thereafter. About a month later, Appellant text messaged JO about getting BM's watch returned and JO responded. Within a day or two, their text message conversation turned sexual. They continued to talk through text messages until 27 July 2021, at which time Appellant raised the topics of domination and submissive sex with a particular person. JO responded, "That sounds like a lot of fun honestly." Appellant said, "This is why you need to be my kidnap partner. Lol." Appellant asked JO about kidnapping and whether she would kidnap her own sister. Appellant then stated, "Also, honestly, my ideal kidnap victim would be 14-15." When asked if he would rape them, Appellant said, "Raping them is half the fun[.] The fear in their eyes, their tears, the muffled screams, their useless struggles[.] Taping their mouth and nose shut to watch them panic." After seeing this, JO reported Appellant to the Air Force Office of Special Investigations (OSI).

On 5 August 2021, following a telephone interview, Special Agent JP and another special agent met with JO in New York. Special Agent JP began monitoring JO's and Appellant's text messaging and he advised her to keep talking to Appellant to see where it led.

Appellant and JO continued to exchange messages. They exchanged hundreds of text messages over the next six weeks. During these conversations, Appellant spoke continuously about wanting to kidnap and rape someone. Several of the earlier conversations were focused on determining their victim. JO eventually stated that she knew someone, her friend, AB. JO sent Appellant a picture of AB and after some discussion, Appellant and JO agreed AB would be their targeted victim. They agreed JO would come to Montgomery, Alabama, on 18 September 2021 with AB and they would kidnap and rape her for about ten days before sending AB to JO's home where AB would serve as JO's sex slave.

The planning of AB's kidnapping and rape dominated the conversations between Appellant and JO, and Appellant discussed with extensive detail how he was going to commit these offenses. They also talked about the logistics of where to keep AB while she and JO were in Alabama and how to secure her. They discussed which restraints to use and how to use them. They ultimately decided that they would hold AB captive in an Airbnb lodging house. Appellant instructed JO to make the reservation and paid her $230.00 so she could do so.

As the days moved closer to 18 September 2021, Appellant incessantly detailed how he would rape AB and how excited he was to rape her. While discussing this, he and JO also discussed the possibility of kidnapping a child or a child and mother together so they could rape them. Appellant described with considerable specificity how he wanted to kidnap and rape a child and mother together, and then kill the mother in the presence of the child. Appellant and JO discussed logistics and details about how to make this a reality. JO stated that she had prior contacts. After some exchanges, she put Appellant in touch with a contact whom Appellant believed was a sex trafficker. Appellant and the sex trafficker made a deal where Appellant would pay the trafficker to deliver a mother and a 14-year-old girl to the Airbnb house where they would remain for about two weeks. As it became clear that Appellant and JO were going to be able to kidnap and rape a mother and child and keep them at the Airbnb beginning on 18 September 2021, Appellant decided not to follow through on their initial plan of kidnapping and raping AB.

On 10 September 2021, Appellant met the person he believed was the sex trafficker and paid a down payment of $150.00 for the mother and child, "Sarah" and "Caitlin," respectively.

The conversations continued between Appellant and JO but shifted focus to the logistics and details of how they would commit these crimes against "Sarah" and "Caitlin," the names of the mother and child respectively according to the sex trafficker. All along, this sex trafficker was being portrayed by a law enforcement agent and there never a was real "Sarah" or "Caitlin." Appellant, not aware of the fictitious personas at this time, continued to discuss with

specificity how he would kidnap, restrain, torture, and rape the two. He planned to rape the child, "Caitlin," daily while she was his captive, record each rape, and provide the recordings to the sex trafficker as additional compensation. He also planned to sell the recordings for additional monies to offset what he and JO had already invested in travel and related expenses.[5] Appellant also planned to murder "Sarah." In multiple messages to JO, he expressed a desire to rape and kill a mother in the presence of her child. Specific to "Sarah," Appellant said that he would "snuff" her, meaning suffocate her to death in the presence of "Caitlin."

On 18 September 2021, JO arrived in Montgomery, Alabama, and she met with law enforcement upon arrival. JO was instructed to call Appellant and pretend that "Sarah" and "Caitlin" were escaping after they were dropped off by the sex trafficker. JO made the call to Appellant. Shortly thereafter, Appellant drove to the Airbnb where he was apprehended by law enforcement. In the trunk of Appellant's car, law enforcement found chains, tape, glue, and plastic bags.

## II. DISCUSSION

### A. Legal and Factual Sufficiency

#### 1. Law

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citations omitted).

"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." *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). "The term reasonable doubt, however, does not mean that the evidence must be free from conflict." *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). As a result, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019)

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[5] These expenses included, amongst others, drugs to help keep the victims under control; a camera to record the child rapes; chains, padlocks, and a straitjacket to restrain the mother and child; tape to "mummify" the mother and child; superglue to use on their lips and nose clips to inhibit breathing; and a mask to hide Appellant's identity.

(alteration in original) (citation omitted). The test for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1973)).

The National Defense Authorization Act for Fiscal Year 2021 significantly changed how Courts of Criminal Appeal conduct factual sufficiency reviews. Pub. L. No. 116-283, § 542, 134 Stat. 3388, 3611–13 (1 Jan. 2021). "Congress undoubtedly altered the factual sufficiency standard in amending the statute, making it more difficult for a [C]ourt of [C]riminal [A]ppeals to overturn a conviction for factual sufficiency." *United States v. Harvey*, 83 M.J. 685, 691 (N.M. Ct. Crim. App. 2023), *rev. granted*, ___ M.J.___, No. 23-0239, 2024 CAAF LEXIS 13 (C.A.A.F. 10 Jan. 2024). Previously, the test for factual sufficiency required the court, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, to be convinced of the appellant's guilt beyond a reasonable doubt before it could affirm the finding. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). "In conducting this unique appellate role, we [took] 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *Wheeler*, 76 M.J. at 568 (second alteration in original) (quoting *Washington*, 57 M.J. at 399).[6]

The current version of Article 66(B)(i), UCMJ, states:

> (i) In an appeal of a finding of guilty under subsection (b), the Court may consider whether the finding is correct in fact upon a request of the accused if the accused makes a specific showing of a deficiency of proof.
>
> (ii) After an accused has made a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—

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[6] The court is mindful that there are contours of the new factual sufficiency review standard that arguably could impact applications of the rule as discussed by our sister service courts. *See United States v. Coe*, __ M.J. __, 2024 CCA LEXIS 52, at *15 (A. Ct. Crim. App. 1 Feb. 2024) (en banc); *Harvey*, 83 M.J. at 685. These contours are not dispositive in this particular case as the evidence does not make determination of factual sufficiency a close call for any of the specifications at issue. Even if we applied our previous factual sufficiency review standard, we would not grant relief as we ourselves are convinced of Appellant's guilt of each of the specifications at issue beyond a reasonable doubt.

> (I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
>
> (II) appropriate deference to findings of fact entered into the record by the military judge.
>
> (iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

10 U.S.C. § 866(B)(i) (*Manual for Courts-Martial, United States* (2024 ed.) (2024 *MCM*)).

Appellant was convicted of attempted premeditated murder of "Sarah," which required the Government to prove the following elements beyond a reasonable doubt: (1) that Appellant did a certain overt act; (2) that such act was done with the specific intent to kill "Sarah" by means of suffocating her; that is, to kill without justification or excuse; (3) that such act amounted to more than mere preparation, that is, it was a substantial step and a direct movement toward the unlawful killing of "Sarah;" (4) that such act apparently tended to bring about the commission of the offense of premeditated murder; that is, the act apparently would have resulted in the actual commission of the offense of premeditated murder except for a circumstance unknown to Appellant or an unexpected intervening circumstance which prevented completion of that offense; and (5) that at the time Appellant committed the act alleged, he had the premeditated design to kill "Sarah." *See Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*), pt. IV, ¶¶ 4.b, 56.b.(1)(a); *see also Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 at 1007–08 (29 Feb. 2020).

Appellant was convicted of attempted conspiracy to rape AB, which required the Government to prove the following elements beyond a reasonable doubt: (1) that Appellant did a certain act, that is: provide funding for a lodging rental; (2) that the act was done with specific intent to commit the offense of conspiracy to rape; (3) that the act amounted to more than preparation, that is, it was a substantial step and a direct movement toward the commission of the intended offense; (4) that such act apparently tended to bring about the commission of the offense of conspiracy to rape, that is, the act apparently would have resulted in the actual commission of the offense of conspiracy to rape except for a circumstance unknown to Appellant or an unexpected intervening circumstance which prevented completion of the offense. *See* 2019 *MCM*, pt. IV, ¶¶ 4.b, 5.b.(1); *see also Benchbook*, at 1003–04.

Appellant was convicted of attempted conspiracy to kidnap AB, which required the Government to prove the following elements beyond a reasonable

doubt: (1) that Appellant did a certain act, that is, provide funding for a lodging rental; (2) that the act was done with specific intent to commit the offense of conspiracy to kidnap; (3) that the act amounted to more than preparation, that is, it was a substantial step and a direct movement toward the commission of the intended offense; and (4) that such act apparently tended to bring about the commission of the offense of conspiracy to kidnap, that is, the act apparently would have resulted in the actual commission of the offense of conspiracy to kidnap except for a circumstance unknown to Appellant or an unexpected intervening circumstance which prevented completion of the offense. *See* 2019 *MCM*, pt. IV, ¶¶ 4.b, 5.b.(1); *see also Benchbook*, at 1003–04.

Voluntary abandonment may be applicable in an alleged attempt offense.

> It is a defense to an attempt offense that the person voluntarily and completely abandoned the intended crime, solely because of the person's own sense that it was wrong, prior to the completion of the crime. The voluntary abandonment defense is not allowed if the abandonment results, in whole or in part, from other reasons, for example, the person feared detection or apprehension, decided to await a better opportunity for success, was unable to complete the crime, or encountered unanticipated difficulties or unexpected resistance. . . .

2019 *MCM*, pt. IV, ¶ 4.c.(4).

**2. Attempted Murder of "Sarah"**

Appellant challenges the legal and factual sufficiency of his conviction for attempted premeditated murder of "Sarah." He specifically alleges the evidence was insufficient to prove a specific intent to kill or that he committed an overt act.

***a. Additional Background***

Appellant sent several messages to JO discussing "snuffing"[7] their victim. He wanted to rape two victims together and while doing so, suffocate and kill one of them. He talked about this in terms of two sisters or a mother and daughter. He referred to this desire generally and to various specific individuals. After settling on AB as their victim-to-be, Appellant and JO discussed the possibility of "snuffing" AB when they were done with her. Appellant clarified later that his intention with regard to killing AB was that they would do that "[i]f that's the only option."

[7] The context of the messages makes it abundantly clear that when Appellant said "snuffing" he meant killing someone.

When the plan to kidnap and rape "Sarah" and "Caitlin" became concrete and not just conceptualized, on 4 September 2021 Appellant advised the sex trafficker, "I have something really [messed] up in mind if you need the mother gone. But while I'm up for snuff, just know that I do not have any experience with disposal." The next day, the conversation continued on disposal of a dead body. Appellant clarified that he would take care of "Sarah." Specifically, he would suffocate her as not to "make any kind of mess."

Around 0030 on 8 September 2021, Appellant and JO were discussing specifics about their plans to rape "Sarah" and "Caitlin." Appellant said, "This is their first time sharing a client. And their last."

On 8–9 September 2021, Appellant sent JO the following messages:

> 2351: I can't do this
>
> 2353: I don't know what . . . I've been thinking lately but I think I need to get help. Don't say anything to [the sex trafficker] yet because I'm afraid of what he'll do.
>
> 2357: Is he gonna kill me for backing out?
>
> . . . .
>
> 0000: I think we should back out. Just don't say anything to [the sex trafficker] yet.

After sending these messages to JO, he asked to see the text messages between her and the sex trafficker. After reading their messages, he told JO, "Okay that made me feel a lot better." A few minutes later, he told JO that she sent the sex trafficker the wrong address to the Airbnb house they reserved and added, "[M]ake sure he knows that for the drop."

Later that same day, Appellant and JO talked on the phone. The call was recorded. During that conversation, Appellant told JO that he only sent those messages so he would "have it on the record in case this was a . . . cop setup, basically."

Over the next several days, Appellant and JO continued to discuss the specifics of their plan. On 16 September 2021, Appellant and JO discussed using drugs to subdue "Sarah" and "Caitlin." JO asked Appellant on whom they should use the drugs. Appellant responded, "Mostly the mother. But ['Caitlin'] after we off her mother. She'll probably need it." JO asked, "[A]re we still snuffing her the night before I have to leave?" Appellant said, "Yes. Is that alright[?]" JO then stated, "Yeah just checking! U said ['Caitlin'] woulda need it and I didn't know how long we were planning on keeping her after we kill her mom. . . ."

***b. Analysis***

The record demonstrates that Appellant formed the requisite specific intent to kill "Sarah" no later than 8 September 2021. Appellant claims that he did not have the specific intent to kill her and that all his talk about this was merely fantasy. The context of the text messages with JO simply do not support that conclusion. While it is arguable that there are some specific exchanges that seem to be geared towards sexual gratification of Appellant and JO, there are many exchanges that are just discussions of logistics of their plan to kidnap, rape, and torture these victims and to murder "Sarah." As such, the context of the messages taken together does not support that Appellant was merely engaging in fantasy. Rather, he had the specific intent to kill "Sarah."

Moreover, the recorded phone calls between Appellant and JO were not sexually charged in any way. Rather, the tone, tenor, and pace of the conversations about the logistics of committing these crimes were as innocuous as would be expected in a conversation between to two people planning a Sunday barbeque. There is nothing about these conversations that support a conclusion that Appellant's assertions about killing "Sarah" were merely fantasy.

Further, Appellant's text message exchanges with the sex trafficker regarding killing "Sarah" were also not merely fantasy as he now alleges. In fact, the conversation was not sexually charged at all. Considering all the circumstances of this case, we find no merit in Appellant's argument that the assertions made to the sex trafficker were merely fantasy. Instead, the record conclusively demonstrates that these assertions were manifestations of his criminal, specific intent to kill "Sarah."

Appellant refers to the 8–9 September 2021 text message exchange, quoted *supra*, arguing he did not have the specific intent to kill "Sarah." However, his own words categorically refute this argument. He wanted a "record" of his intent to back out of the endeavor in case it was a "cop setup." Unbeknownst to him, however, he was being recorded on the phone where he admitted that such messages were essentially false.

As late as 16 September 2021, there is clear proof that Appellant intended to kill "Sarah." He directly agreed that they would be "snuffing" her the night before JO returned home. This statement is also consistent with the other references reflected in the messages about what he would do with the mother/victim when he was done with her.

In addition to challenging the sufficiency of the evidence regarding his intent to kill, he also challenges the sufficiency of the evidence that he engaged in an overt act. The Government did not charge a specific overt act or acts for this offense, nor were they required to. *See United States v. Norwood*, 71 M.J. 204, 206–08 (C.A.A.F. 2012) (citing *United States v. Resendiz-Ponce*, 549 U.S.

102, 107 (2007)).[8] However, the record is replete with evidence of Appellant's overt acts, including but not limited to: Appellant's payment for the Airbnb, providing money to JO to help with her travel to Montgomery, as well as the fact that he traveled to the Airbnb where he believed JO, "Sarah," and "Caitlin" were located. Each act amounted to more than mere preparation and apparently tended to effect the commission of the intended offense. *See* 2019 *MCM*, pt. IV, ¶ 4.c.(2). If not for the fact that "Sarah" was not a real person, but a creation of law enforcement, and if not for Appellant being apprehended at the intended crime scene, the evidence demonstrates that the alleged offense was intended to have been completed. *See* 2019 *MCM*, pt. IV, ¶ 4.c.(3).

Viewing the evidence in the light most favorable to the Government, the military judge rationally found Appellant guilty of attempted premeditated murder beyond a reasonable doubt. Therefore, the finding is legally sufficient. *See Robinson*, 77 M.J. at 297–98.

Regarding the factual sufficiency of this offense, Appellant has made a request for a factual sufficiency review and has asserted a specific showing of a deficiency of proof. However, having given appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence, the court is not clearly convinced that the finding of guilty was against the weight of the evidence. Thus, the finding is factually sufficient. Article 66(B)(i), UCMJ (2024 *MCM*).

**3. Attempted Conspiracy to Kidnap and Rape AB**

Appellant challenges the legal and factual sufficiency of his convictions for attempted conspiracies to kidnap and rape AB. He specifically alleges the evidence was insufficient to prove that he intended to commit these offenses, that he committed an overt act, or that he did not voluntarily abandon the attempted conspiracy.

Appellant argues first, as he did regarding the premeditated murder specification, that his statements were merely fantasies and that he did not believe his fantasy would be realized. However, the evidence shows he had more than just mere fantasies about committing these offenses. Rather, he had the specific intent to kidnap and rape AB. Moreover, he took specific steps to make that intent reality. He encouraged JO to make arrangements to get AB to come to Montgomery. When JO did, he saw AB's messages and proceeded to make detailed logistical preparations for her arrival. Throughout hundreds of pages of text messages, Appellant expressed an unwavering intent to commit these

[8] Appellant did not raise at trial or here on appeal any allegation of a deficient specification or lack of notice regarding the nature of this offense, nor did he raise any concern regarding which overt act(s) formed the basis of the offense.

crimes. As noted above, the context of these messages dispels any lack of clarity about this being intent rather than being mere fantasy.

Appellant argues next the record is not clear that Appellant actually paid JO for the Airbnb lodging reservation and therefore the evidence is not sufficient to prove the alleged overt act, that Appellant "provided funding for a lodging rental." The record demonstrates after discussing different locations for committing the offenses against AB, Appellant and JO talked about which Airbnb location to reserve for holding AB captive. Appellant picked one and sent JO a picture with the website link. JO asked, "So do u want me to book this now?" Appellant responded, "As long as you're absolutely sure you can do this." JO stated, "Bet. I'll reserve it now," and asked Appellant to cover the $230.00 downpayment. Appellant said, "Yeah I can send you $230 right now[.] Will you be bringing any restraints?" JO discussed the timing of the reservation payment and told Appellant, "[W]e definitely should book now so it doesn't get snagged." Appellant responded, "Yeah[,] go ahead and book it and then I'll send you the money, if you absolutely need it now. . . ." JO told Appellant, "I just paid the 230. . . ." and gave Appellant her Venmo name so he could send her the money.

On 4 August 2021, Appellant paid JO $230.00 using Venmo and sent JO a screenshot showing the payment. Immediately before and after he sent this screenshot, Appellant sent pictures of the inside of their Airbnb reservation commenting about which room would be the best to keep AB confined.

Our superior court has recognized that in cases of attempt, travel can constitute a substantial step. *United States v. Winckelmann*, 70 M.J. 403, 407 (C.A.A.F. 2011) (citations omitted). In analyzing an attempted larceny conviction, our superior court noted it had "recognized that a substantial step could be comprised of something as benign as travel, arranging a meeting, or making hotel reservations." *United States v. Hale*, 78 M.J. 268, 272 (C.A.A.F. 2019) (footnote omitted) (citing *Winckelmann*, 70 M.J. at 407). Here, Appellant, with the specific, expressed intent to kidnap and rape AB, made lodging arrangements through his co-conspirator to facilitate the commission of these offenses. He specifically paid $230.00 to JO for this purpose. The evidence is legally and factually sufficient to prove an overt act was committed as alleged.

Lastly, Appellant argues that the defense of voluntary abandonment applied to these offenses. We disagree. The defense of voluntary abandonment only applies when,

> the person voluntarily and completely abandoned the intended crime, solely because of the person's own sense that it was wrong, prior to the completion of the crime. The voluntary abandonment defense is not allowed if the abandonment results, in

> whole or in part, from other reasons, for example, the person feared detection or apprehension, decided to await a better opportunity for success, was unable to complete the crime, or encountered unanticipated difficulties or unexpected resistance. . . .

2019 *MCM*, pt. IV, ¶ 4.c.(4); *see also United States v. Feliciano*, 76 M.J. 237, 240 (C.A.A.F. 2017) (reciting the same definition of voluntary abandonment). Here, Appellant's own sense that kidnapping and raping AB was wrong was not the primary or even sole reason he abandoned these offenses. Quite to the contrary, his abandonment was due to his desire to commit those and more severe offenses against others whom he considered to be more appealing victims. After he made the decision to pursue these more appealing victims instead of AB, Appellant noted, AB "will never know the bullet she dodged."[9]

Viewing the evidence in the light most favorable to the Government, the military judge rationally found Appellant guilty of attempted conspiracy to kidnap AB and attempted conspiracy to rape AB beyond a reasonable doubt. Therefore, the findings are legally sufficient. *See Robinson*, 77 M.J. at 297–98.

Regarding the factual sufficiency of attempted conspiracy to kidnap and rape AB, Appellant has made a request for a factual sufficiency review and has asserted a specific showing of a deficiency of proof. However, having given appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence, this court is not clearly convinced that the findings of guilty were against the weight of the evidence. Thus, the findings are factually sufficient. *See* Article 66(B)(i), UCMJ, (2024 *MCM*).

**B. Sentence Appropriateness**

**1. Law**

We review sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 n.8 (C.A.A.F. 2006). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record . . . ." *United States v. Fields*, 74 M.J. 619, 625 (A.F. Ct. Crim. App. 2015) (citations omitted). We must also be sensitive to considerations of uniformity and even-handedness. *United States v. Sothen*, 54. M.J. 294, 296 (C.A.A.F. 2001). While we have significant discretion in determining whether a particular sentence is

[9] Though Appellant abandoned kidnapping and raping AB at that time, he did not foreclose the possibility of kidnapping and selling her to the sex trafficker later, saying, "No [AB] for now. He's not comfortable enough with me yet."

appropriate, we are not authorized to engage in exercises of clemency. *United States v. Nerad*, 69 M.J. 138, 148 (C.A.A.F. 2010).

When conducting our review, we not only consider the appropriateness of the entire sentence, but also "must consider the appropriateness of each segment of a segmented sentence." *United States v. Flores*, __ M.J. __, No. 23-0198, 2024 CAAF LEXIS 162, at *7 (C.A.A.F. 14 Mar. 2024).

The President set forth the maximum punishment for an assault consummated by a battery upon a child under 16 years as: Dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years. *See* 2019 *MCM*, pt. IV, ¶ 77.d.(2)(f). An attempt to commit this offense shared the same maximum punishment. *See* 2019 *MCM*, pt. IV, ¶ 4.d.

Where the imposed sentence exceeded the maximum lawful sentence, it materially prejudiced Appellant's substantial rights. *United States v. Beaty*, 70 M.J. 39, 45 (C.A.A.F. 2011). In those circumstances, this court may authorize a rehearing on sentence or if we can, we may reassess the sentence. *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002).

We have broad discretion first to decide whether to reassess a sentence, and then to arrive at a reassessed sentence. *United States v. Winckelmann*, 73 M.J. 11, 12 (C.A.A.F. 2013). In deciding whether to reassess a sentence or return a case for a rehearing, we consider the totality of the circumstances including the following factors: (1) "Dramatic changes in the penalty landscape and exposure;" (2) "Whether an appellant chose sentencing by members or a military judge alone;" (3) "Whether the nature of the remaining offenses capture[s] the gravamen of criminal conduct included within the original offenses and . . . whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses;" and (4) "Whether the remaining offenses are of the type that judges of the courts of criminal appeals should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial." *Id.* at 15–16 (citations omitted).

If we cannot determine that the sentence would have been at least of a certain magnitude, we must order a rehearing. *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000).

**2. Analysis**

In undertaking analysis of the appropriateness of Appellant's sentence, we revisit the full scope of his criminal endeavors in this case. Appellant attempted to conspire with JO to kidnap and rape AB by baiting her into an all-expense paid trip to Montgomery to visit JO's "friend." Upon arrival, AB would be restrained, held captive inside an Airbnb house modified to make it "soundproof" with blankets and rugs, and repeatedly raped. When discussing these

intended actions, Appellant stated, "I'm really going to enjoy raping her and watching her cry." Later, he said, "I can't wait to hear her muffled screams." He intended to keep AB in this condition for ten days before sending her back with JO to New York where AB was to be in a collar and leash, and serve as a permanent sex slave to JO as well as Appellant when he visited JO.

Appellant's disturbing crimes did not stop with AB. Appellant attempted to kidnap a mother and her 14-year-old daughter with the intent of holding them captive at first separately, then together. He planned to subdue them using ecstasy and rape them repeatedly. With regards to "Caitlin," whom he believed to be a 14-year-old girl, he planned to restrain her using various mechanisms, including a straitjacket, and rape her every day for ten days. He planned to record these offenses and sell them to a person he believed to be a sex trafficker for compensation. He also planned to torture her using a variety of terrible methods centered on impeding her breathing. All the while, he anticipated deriving gratification from her suffering.

In addition to raping "Sarah," who he believed to be the mother of "Caitlin," he planned and attempted to murder her. His plan was to tie "Sarah" and "Caitlin" together, and rape "Sarah" while simultaneously suffocating her. He wanted "Caitlin" to watch as "Sarah" died. He then intended to ejaculate into "Sarah's" "empty husk." After he was finished, Appellant intended for "Sarah's" dead body to remain tied to "Caitlin" for hours to further torment her.

Before arriving on 18 September 2021 at the reserved Airbnb house, Appellant procured several of the items needed to commit these offenses, including restraining mechanisms and a mask. He communicated to JO that she should bring other items. He also told JO to delete her text messages because he knew they were incriminating.

For his crimes, Appellant was sentenced to a dishonorable discharge, 35 years of confinement (consisting of multiple segments that ran concurrent to the segment of 35 years of confinement for attempted premeditated murder), reduction to the grade of E-1, and a reprimand.

The depravity demonstrated by Appellant is rarely seen in the military justice system. He argues there were no real victims because AB was not harmed, and "Sarah" and "Caitlin" were fictitious. While it is true "Sarah" and "Caitlin" were not real people, the salient fact is that Appellant did not know that. As Appellant himself expressed during his guilty plea inquiry, "I was unaware until after my apprehension that 'Sarah' was a fictional person." The evidence demonstrates Appellant attempted to commit these crimes on real people and his sentence is not inappropriately severe regardless of the fact that "Sarah" and "Caitlin" were not real. During the sentencing phase of the trial, Appellant

presented testimony from his parents, a written and verbal unsworn statement, and various photos.

We have assessed the appropriateness of Appellant's sentence, considered this particular appellant, the nature and seriousness of the offenses, his record of service, and all matters contained in the record, including his childhood abuse. As a whole, Appellant's sentence is not inappropriately severe.

This does not end our inquiry, however. We are also charged with reviewing each segment of the sentence to ensure its lawfulness and appropriateness. We note that this review revealed that Appellant's sentence for Specification 10 of the Additional Charge, attempted assault consummated by a battery upon a child under the age of 16, included a confinement term of five years—an unlawful confinement term as the maximum allowable for this offense was two years. As the imposed sentence for this segment exceeded the maximum lawful sentence, it materially prejudiced Appellant's substantial rights. *Beaty*, 70 M.J. at 45. Thus, we may order a rehearing or, if we can, reassess the sentence.

We are able to reassess the sentence. The military judge sentenced Appellant for his various attempted aggravated assaults and the attempted assault consummated by a battery upon a child under the age of 16 offense to be between three and five years of confinement for each. That he sentenced Appellant to the higher end of that range for this offense indicates that he viewed this offense as relatively severe compared to those other offenses. Viewing the evidence in the case, this is unsurprising. The details of Appellant's attempt to assault a 14-year-old child in this manner stands out as particularly aggravating in a case already quite severe in nature. Considering all the matters of record, we are confident that the military judge would have adjudged the maximum term of two years of confinement running concurrently with all charges and specifications. We therefore reassess the sentence to reflect that confinement term.

With the sentence modified, we revisit the appropriateness of the sentence, including each segment of the modified sentence. After carefully considering the particular appellant, the nature and seriousness of the offenses, his record of service, and all matters contained in the record, Appellant's sentence is not inappropriately severe.

## III. CONCLUSION

The findings as entered are correct in law and fact. We reassess the sentence to confinement for Specification 10 of the Additional Charge to two years, to run concurrently with all charges and specifications. The remaining segments of the sentence are unchanged. The findings and sentence, as reassessed, are correct in law and fact, and no additional error materially

prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence, as reassessed, are **AFFIRMED.**

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

# *United States v. Csiti*

United States Air Force Court of Criminal Appeals

April 29, 2024, Decided

No. ACM 40386

**Reporter**
2024 CCA LEXIS 160 *; 2024 WL 1856678

UNITED STATES, Appellee v. Daniel R. ***CSITI*** Staff Sergeant (E-5), U.S. Air Force, Appellant

**Notice:** NOT FOR PUBLICATION

**Subsequent History:** Petition for review filed by *United States v. **Csiti**, 2024 CAAF LEXIS 322 (C.A.A.F., June 11, 2024)*

**Prior History:** **[*1]** Appeal from the United States Air Force Trial Judiciary. Military Judge: Colin P. Eichenberger. Sentence: Sentence adjudged 27 July 2022 by GCM convened at Malmstrom Air Force Base, Montana. Sentence entered by military judge on 23 August 2022: Dishonorable discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1.

**Counsel:** For Appellant: Major Megan R. Crouch, USAF; Major Eshawn R. Rawlley, USAF.

For Appellee: Colonel Zachary T. Eytalis, USAF; Colonel Steven R. Kaufman, USAF; Lieutenant Colonel Thomas J. Alford, USAF; Lieutenant Colonel J. Peter Ferrell, USAF; Major Olivia B. Hoff, USAF; Mary Ellen Payne, Esquire.

**Judges:** Before JOHNSON, RICHARDSON, and WARREN, Appellate Military Judges. Chief Judge JOHNSON delivered the opinion of the court, in which Senior Judge RICHARDSON and Judge WARREN joined.

**Opinion by:** JOHNSON

## Opinion

JOHNSON, Chief Judge:

A general court-martial composed of a military judge alone found Appellant guilty, contrary to his pleas, of one specification of sexual assault in violation of *Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920*.[1],[2] The military judge sentenced Appellant to a dishonorable discharge, confinement for two years, total forfeiture of pay and allowances, and reduction to the grade of E-1. The convening **[*2]** authority took no action on the findings or sentence.

Appellant raises three issues on appeal: (1) whether Appellant's conviction is legally and factually sufficient; (2) whether the military judge abused his discretion by denying the Defense's motion to dismiss for defective preferral of charges and a defective preliminary hearing; and (3) whether Appellant is entitled to relief due to prosecutorial misconduct. We find no error materially prejudicial to Appellant's substantial rights, and we affirm the findings and sentence.

### I. Background [3]

AH arrived at Malmstrom Air Force Base (AFB), Montana, in April 2017.[4] Appellant was a member of AH's squadron and was assigned to train AH on her duties. As time passed, Appellant and AH became close friends who spent an increasing amount of time together off-duty, to the point that AH considered Appellant her "best friend." However, they did not have a sexual or romantic relationship.

AH was married and became pregnant while she was

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[1] Unless otherwise indicated, all references to the UCMJ and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] The military judge found Appellant not guilty of two specifications of abusive sexual contact in violation of *Article 120, UCMJ*.

[3] The following background is drawn primarily from AH's trial testimony, supplemented by other evidence from the record of trial.

[4] AH was an active duty Air Force member at all times relevant to this opinion.

stationed at Malmstrom AFB; however, the marriage did not last. According to AH's testimony, her ex-husband "left" during her pregnancy and at some point they were divorced. During **[*3]** AH's pregnancy, Appellant "ended up being a very good emotional support person" for AH, and also provided financial support by "helping [her] buy things for [her] son because [AH's ex-husband] at the time wasn't helping out." At one point in AH's pregnancy, Appellant told AH he "had feelings for" her and "wanted something more," but she "rejected" him and told him "it wasn't going to happen." Following this rejection, Appellant and AH stopped talking to each other for approximately two months.

Appellant and AH subsequently reconciled and resumed their close platonic friendship. Appellant frequently babysat AH's child and provided other support for AH, and he often spent the night at her house. Appellant and AH also frequently socialized with other friends.

AH regularly became intoxicated from drinking alcohol. On multiple occasions, AH consumed alcohol such that portions of her memory were "blacked out," and she could not recall certain conversations and other activities she engaged in.

In May 2021, AH was in a relationship with Staff Sergeant (SSgt) KI. On 21 May 2021, AH made plans to go out to dinner with two other friends, AS and SSgt NA. Appellant agreed to come to AH's on-base house **[*4]** and watch her son for the evening. Before she drove to the restaurant, AH drank some "homemade mead,"[5] but "[n]ot that much." At the restaurant, AH began drinking wine. She ate pizza at the restaurant, but vomited until her stomach was empty, and then drank two or three more glasses of wine by her estimate. By the end of the dinner AH felt "[t]oo intoxicated to drive on her own." At trial, SSgt NA testified he estimated AH drank three or four glasses of wine at the restaurant and became "[t]ipsy," "laughing and giggling" and "swaying" as she walked, but "coherent."

SSgt NA drove AH home in his car. When they arrived, Appellant came out to the car to help bring AH into the house. AH testified she did not remember getting out of SSgt NA's car, but she remembered being in her kitchen talking to Appellant. She began drinking alcoholic hard seltzer, although she could not remember how much. Appellant later told her she drank between three and five cans of it.

AH's next memory was of waking up in the morning on her bed in her upstairs bedroom. There were no sheets on the bed, which was unusual as she normally would make her bed after washing the sheets, and she was completely naked, which was **[*5]** also unusual as she normally slept with clothes on. In addition, she felt "sore around [her] vaginal area." After AH got dressed and left her bedroom, she found her son was asleep in his room and Appellant was sleeping downstairs. Appellant's presence was not surprising because he had spent the night at her house before. AH and Appellant spent much of that day together. Appellant seemed "a little bit more quiet than usual," but that did not raise any "red flags" for AH at the time.

A week later, AH invited Appellant to have dinner at her house. That night Appellant told AH he performed oral sex on AH during the portion of the night of 21-22 May 2021 that AH could not remember. AH recorded part of their conversation on her phone. Appellant told AH they had talked for a while until AH went upstairs to go to bed. However, AH later came back downstairs and resumed talking with Appellant. At one point while they were talking, AH fell over in the chair on which she was sitting, with the chair making a dent in the wall. According to Appellant, at one point AH complained about her body, to which Appellant responded that he thought she had a perfect body, or words to that effect. AH then said **[*6]** to Appellant, "show me," and removed her pants and underwear. Appellant performed oral sex on AH for approximately a minute, after which AH pushed Appellant away with her leg and said she had to urinate. Appellant helped AH put her underwear back on, after which AH said she did not have to urinate but she was tired, and she lay down to sleep on the sofa. Appellant then lay down on the floor nearby, but later moved to a couch in another room to sleep.

Appellant's admissions "shocked" AH because she had told Appellant that she was not attracted to him, she would not have agreed to such activity, she trusted Appellant, and she had no suspicion during the preceding week that any sexual activity had occurred between them. AH reported the incident to the Air Force Office of Special Investigations (OSI) the following day. At the OSI's request, AH recorded another conversation with Appellant at her house using a device the OSI provided. During this conversation, Appellant repeated a substantially similar version of events as in the prior conversation AH had recorded, but with additional details. Appellant stated he helped AH go upstairs when she initially went to her bedroom after they spoke **[*7]** in the kitchen. Appellant told AH one of the things they

[5] AH explained Appellant "used to make mead" and would "bring some over on occasion."

talked about, after she came back downstairs, was how AH's relationship with SSgt KI was not going well at that time. Appellant again described how AH fell over in her chair, after which he "carried" her. Appellant said AH was drunk and agreed she was "f[**]ked up." Appellant said after AH removed her pants and underwear they kissed before he performed oral sex. Appellant denied that he penetrated her with his penis or ejaculated. On the recording, Appellant apologized to AH for what he had done. As part of his apology, he told her, "And that's where it was my fault for not telling myself, 'No,' and to just back away from it instead." He further told her, "However you deemed it to be. If you were to make a phone call or something, I did what I did."

At trial, the Defense called Dr. EB, who the military judge recognized as an expert in forensic psychology. Dr. EB testified about memory and the effects of alcohol on the brain. She explained, *inter alia*, that alcohol "reduces inhibition so that we act more on our impulses," and that regular heavy drinking "increases a person's tolerance so they could consume greater and greater amounts **[*8]** of alcohol without showing functional impairments." Dr. EB also explained the phenomenon of alcohol-induced blackout, which she described as "where a person is awake, engaged, behaving, but not recording memory." She testified the fact that a person experiences a blackout does not directly indicate how impaired the person is due to alcohol. Dr. EB explained blackout "is related to the speed of the rise" in one's blood alcohol level, rather than how high one's blood alcohol level is, such that a blackout can occur "at different points along th[e] progression of intoxication." According to Dr. EB, someone in a blackout may still be capable of complex activities and making decisions.

## II. Discussion

### A. Legal and Factual Sufficiency

#### 1. Law

We review issues of legal sufficiency de novo. *United States v. Harrington, 83 M.J. 408, 414 (C.A.A.F. 2023)* (citing *United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019)*). "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." *United States v. Robinson, 77 M.J. 294, 297-98 (C.A.A.F. 2018)* (citation omitted). "[T]he term 'reasonable doubt' does not mean that the evidence must be free from any conflict . . . ." *King, 78 M.J. at 221* (citation omitted). The test for legal sufficiency **[*9]** "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011)* (quoting *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1973)*). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001)* (citations omitted). Thus, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." *King, 78 M.J. at 221* (alteration in original) (citation omitted). "The [G]overnment is free to meet its burden of proof with circumstantial evidence." *Id.* (citations omitted).

Historically, the Courts of Criminal Appeals (CCAs) have also conducted a de novo review of the factual sufficiency of the evidence. *See United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)* (citation omitted). The longstanding test for factual sufficiency, rooted in the prior versions of *Articles 66(c)* and *(d), UCMJ*, *10 U.S.C. §§ 866(c)*, *(d)*, required the CCAs to "take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017)* (alteration in original) **[*10]** (quoting *Washington, 57 M.J. at 399*), *aff'd*, *77 M.J. 289 (C.A.A.F. 2018)* (applying the version of *Article 66(c), UCMJ*, in effect prior to 2019); *see also United States v. Rodela, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021)* (citing *Wheeler* and applying the same factual sufficiency test in the context of *Article 66(d), UCMJ*, effective 1 January 2019).

However, the *National Defense Authorization Act for Fiscal Year 2021* amended *Article 66, UCMJ*, to modify our factual sufficiency review as follows:

> (B) FACTUAL SUFFICIENCY REVIEW.
>
> (i) In an appeal of a finding of guilty under *subsection (b)*, the Court may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of

a deficiency in proof.

(ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—

(I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and

(II) appropriate deference to findings of fact entered into the record by the military judge.

(iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

10 U.S.C. § 866(d)(1)(B) (*Manual for Courts-Martial, United States* (2024 ed.) (2024 *MCM*)). The new factual sufficiency standard applies to courts-martial **[*11]** in which every finding of guilty in the entry of judgment is for an offense occurring on or after 1 January 2021. *Pub. L. No. 116-283, § 542(e)(2), 134 Stat. 3611*. This court has not yet had occasion to analyze the new statutory standard for factual sufficiency. However, two of our sister courts issued published opinions addressing the new standard. *See* United States v. Scott, 83 M.J. 778, 779-80 (A. Ct. Crim. App. 2023), *rev'd on other grounds*, ___ M.J. ___, No. 24-0063/AR, 2024 CAAF LEXIS 68 (C.A.A.F. 1 Feb. 2024); United States v. Harvey, 83 M.J. 685, 690-94 (N.M. Ct. Crim. App. 2023), *rev. granted*, ___ M.J. ___, No. 23-0239/NA, 2024 CAAF LEXIS 13 (C.A.A.F. 10 Jan. 2024). Those CCAs agreed the new statute made it more difficult than previously for an appellant to secure relief on appeal for factual insufficiency, but *Scott* disagreed with *Harvey*'s proposition that "Congress has implicitly created a rebuttable presumption that in reviewing a conviction, a [C]ourt of [C]riminal [A]ppeals presumes that an appellant is, in fact, guilty." *Harvey, 83 M.J. at 693*; *see Scott, 83 M.J. at 780*.

"In the absence of a statutory definition, the plain language of a statute will control unless it is ambiguous or leads to an absurd result." United States v. Cabuhat, 83 M.J. 755, 765 (A.F. Ct. Crim. App. 2023) (en banc) (citing United States v. Lewis, 65 M.J. 85, 88 (C.A.A.F. 2007)). Inquiry into the plainness or ambiguity of a statute's meaning "must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" Robinson v. Shell Oil Co., 519 U.S. 337, 340, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997) (quoting United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 240, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989)); *see also Cabuhat, 83 M.J. at 766* (quoting *Robinson*). By contrast, when the text is ambiguous, reviewing courts may apply the statutory canons of construction **[*12]** to resolve those ambiguities. *See Cabuhat, 83 M.J. at 765-66* (citing *Robinson, 519 U.S. at 340*). In construing amended legislation, two canons of construction are particularly applicable. First, we "assume that Congress is aware of existing law when it passes legislation." United States v. McDonald, 78 M.J. 376, 380 (quoting Miles v. Apex Marine Corps, 498 U.S. 19, 32, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990)). Second, "[w]hen Congress acts to amend a statute, [courts] presume it intends its amendment to have real and substantial effect." Stone v. Immigration and Naturalization Serv., 514 U.S. 386, 397, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995) (quoted with approval in United States v. Matthews, 68 M.J. 29, 37 (C.A.A.F. 2009)).

In order to convict Appellant of sexual assault as charged in this case, the Government was required to prove that at or near Malmstrom AFB, on or about 21 May 2021: (1) Appellant committed a sexual act upon AH, specifically by causing contact between his mouth and her vulva; (2) AH was incapable of consenting to the sexual act due to impairment by alcohol; and (3) Appellant knew or reasonably should have known AH was so impaired. *See* 10 U.S.C. § 920(b)(3)(A); *Manual for Courts-Martial, United States* (2019 ed.), pt. IV, ¶ 60.b.(2)(f). The term "[s]exual act" includes, *inter alia*, "contact between the mouth and the . . . vulva." 10 U.S.C. § 920(g)(1)(B). "The term 'incapable of consenting' means the person is[ ] (A) incapable of appraising the nature of the conduct at issue; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act at issue." 10 U.S.C. § 920(g)(8); *see also* United States v. Pease, 75 M.J. 180, 184-86 (C.A.A.F. 2016) (explaining **[*13]** the definition of "incapable of consenting" under the prior version of Article 120, UCMJ, in terms substantially similar to the current statutory definition).

**2. Analysis**

***a. Legal Sufficiency***

The Government introduced sufficient evidence of Appellant's guilt to meet the "very low threshold" for legal sufficiency. *King, 78 M.J. at 221*. Although there was no physical evidence of the sexual act and AH could not remember it, the Government introduced

audio recordings of Appellant twice admitting he performed oral sex on AH after her pants and underwear were removed. A rational finder of fact could reasonably interpret Appellant's statements to mean he placed his mouth on AH's vulva.

Although the Government could not prove AH's blood-alcohol level, it introduced evidence AH consumed a large amount of alcohol on the night in question. The evidence indicated AH consumed some amount of homemade mead, approximately three or four glasses of wine, and some unknown amount of hard seltzer that Appellant later told AH was between three and five cans. Although AH regularly drank alcohol, the record also reflects her body size was relatively small; a rational factfinder applying common sense and knowledgeable of the ways of the world could **[*14]** conclude AH's size rendered her more susceptible to the effects of a given quantity of alcohol than a larger person would have been.

Additional evidence tended to indicate AH was significantly impaired by alcohol, and Appellant knew it or should reasonably have known it. A rational factfinder could conclude Appellant knew AH was too drunk to drive home from the restaurant because SSgt NA drove her home, and Appellant helped AH get inside the house. Appellant then observed AH continue to drink alcohol. He also stated he "helped" her go up the stairs to her bedroom before she came back down. Appellant also told AH that at one point as they were talking, AH fell over in her chair causing the chair to dent the wall; OSI agents found such a dent in the wall and bits of paint on the edge of a chair when they inspected AH's house. Appellant told AH that after she fell over, he "carried" her, presumably to the sofa, before the sexual act occurred. Appellant agreed that AH was drunk and "f[**]ked up" at that point.

We recognize Appellant's version of events, if entirely true, suggests AH was not so impaired by alcohol that she was incapable of consenting. According to Appellant, immediately prior **[*15]** to the sexual act AH was still holding a conversation with him; she removed her own pants and underwear; and after approximately a minute of oral sex she pushed Appellant away with her leg and told him she needed to urinate. These actions, if true, suggest AH was able to appreciate the nature of the sexual act and that AH was capable of declining participation.

However, the trier of fact could properly believe one part of Appellant's statement while disbelieving another part. *Cf.* *United States v. Nicola, 78 M.J. 223, 227-28 (C.A.A.F. 2019)* ("[T]he trier of fact may disbelieve the accused's testimony and then use the accused's statements as substantive evidence of guilt . . . ." (Citation omitted)); *United States v. Bare, 63 M.J. 707, 713 (A.F. Ct. Crim. App. 2006)* ("Court members may believe one portion of a witness's testimony but disbelieve others." (Citation omitted)). Appellant's version of events failed to explain certain other evidence, including AH awakening naked on a sheetless bed upstairs "sore around [her] vaginal area," rather than sleeping clothed on the downstairs sofa where Appellant purportedly left her—creating a reasonable inference Appellant was being less than entirely candid about what had happened.

Moreover, the trier of fact could reasonably interpret other evidence as indicating AH would **[*16]** not have consented or behaved in the manner Appellant claimed. AH testified she had previously flatly rejected Appellant when he expressed a desire for a more intimate relationship. AH reacted with shock and anger when Appellant told her he had performed oral sex on her. At trial, she testified that she—drunk or sober—would never have allowed Appellant to kiss her or allowed him to perform oral sex on her on 21 May 2021. A rational factfinder could have credited AH's testimony and found it implausible that she removed her pants and underwear and consensually engaged in such behavior with Appellant—*i.e.*, that the exculpatory aspects of Appellant's account were true. Such a rational factfinder could attribute Appellant's implausible account to consciousness of guilt, and could also consider his somewhat incriminating statements to the effect that he knew he should have just "back[ed] away," that he "did what [he] did," and he would understand if AH were to "make a phone call" and report him. A rational trier of fact could find these statements suggest that, at the time, Appellant knew what he did was wrong, knew AH would not actually consent to sexual activity with him, and knew he had **[*17]** taken advantage of her incapacitation by alcohol.

Therefore, viewing the evidence in the light most favorable to the Government, a rational trier of fact could find the elements of the offense proven beyond a reasonable doubt.

***b. Factual Sufficiency***

Although the question is a close one, applying the new statutory standard, we also find the evidence factually

sufficient to sustain Appellant's conviction.

***i) Specific showing of a deficiency of proof***

In contrast to earlier versions of *Article 66, UCMJ*, which required this court to assess the factual sufficiency of the evidence in every case, *see Washington, 57 M.J. at 399*, under the current version of *Article 66(d)(1)(B), UCMJ* (2024 *MCM*), the initial question is whether Appellant has requested factual sufficiency review and has made "a specific showing of a deficiency of proof." We agree with our Navy-Marine Corps counterparts that this provision does not require Appellant to demonstrate the entire absence of evidence supporting an element of the offense, a requirement which would be redundant with legal sufficiency review. *See Harvey, 83 M.J. at 691*. Rather, the statute requires Appellant "identify a weakness in the evidence admitted at trial to support an element (or more than one element) and explain why, on balance, the evidence **[*18]** (or lack thereof) admitted at trial contradicts a guilty finding." *Id.*

Appellant has made the requisite showing of a deficiency of proof. Among other points, Appellant contends that the version of events he related in the two recorded conversations indicate AH was not incapable of consenting to sexual activity, and even if she was incapable, the evidence does not prove Appellant knew or reasonably should have known she was incapable of consenting. If either contention were true, Appellant would not be guilty of the sexual assault specification for which he was convicted.

We note that once an appellant makes the requisite showing, the statute provides we "*may* consider whether the finding is correct in fact." *10 U.S.C. § 866(d)(1)(B)(i) (2024 MCM)* (emphasis added). We note the permissive term "may," on its face, might be read to indicate that progressing further with factual sufficiency analysis is not required, but rather up to the discretion of the CCA. The term might also be read to simply signal that once an appellant has satisfied the initial specific showing required by *10 U.S.C. § 866(d)(1)(B)(i) (2024 MCM)*, the CCA is then empowered to conduct the factual sufficiency review without implying the CCA has discretion not to do so. We leave **[*19]** for another day the question of whether a CCA might properly decline to proceed further with factual sufficiency analysis at this stage; in Appellant's case, we have proceeded with the analysis. *Cf. Scott, 83 M.J. at 780* ("Once appellant makes a specific showing of a deficiency in proof, we *will* conduct a de novo review of the controverted questions of fact.") (Emphasis added).).

***ii) Weighing the evidence and determining controverted questions of fact***

When weighing the evidence and determining controverted questions of fact, *Article 66(d)(1)(B)(ii), UCMJ* (2024 *MCM*), requires that we afford "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence." This is a change from the prior version of *Article 66(d)(1), UCMJ*, which required CCAs to "recogniz[e] that the trial court saw and heard the witnesses." *10 U.S.C. § 866(d)(1)*. The current statute does not specify what is meant by the term "appropriate deference." Our Navy-Marine Corps counterparts concluded that "appropriate deference" is a more deferential standard than "recognizing," but not one which deprives the CCA of the power to determine the credibility of witnesses. *Harvey, 83 M.J. at 692*. We broadly agree, with the additional observation that the significance of the credibility of particular witnesses **[*20]** or testimony will vary depending on the circumstances of the case.

Accordingly, we have given appropriate deference to the fact that the military judge saw and heard the witness testimony and other evidence. We appreciate that in a case such as the instant one, where the victim cannot remember the charged offense, the victim's credibility is arguably less vital than in a case where the victim was the key witness to the offense itself or where her testimony was in substantial conflict with other evidence. We also appreciate that the critical proof of the charged sexual act in this case comes from audio recordings that are contained in the record of trial, and therefore available to us in the same form in which they were provided to the military judge. Nevertheless, affording appropriate deference to the military judge, in light of the findings, we presume AH generally—to the extent not contradicted by the record[6]—testified credibly

[6] For example, we recognize that after the Government rested, AH's Special Victims' Counsel (SVC) alerted the military judge and parties to an issue with AH's testimony. The Defense subsequently called AH as a witness. AH admitted that during her initial testimony, in response to a question from the military judge, she had falsely claimed she did not remember what happened after she awakened Appellant on the morning of 22 May 2021. AH explained she did so because she "did not want to get in trouble" because Appellant had driven her to the restaurant that morning to pick up her car, and her child had been in the house alone. After her testimony, AH informed her

with respect to the convicted sexual assault, including her shock at what Appellant admitted doing to her and her certainty that she would not have consensually engaged in sexual activity with Appellant.

***iii) "Clearly convinced that the finding of guilty was [*21] against the weight of the evidence"***

Having weighed the evidence, the ultimate statutory test for factual insufficiency is whether we are "clearly convinced that the finding of guilty was against the weight of the evidence." *10 U.S.C. § 866(d)(1)(B)(iii) (2024 MCM)*. We agree with our CCA counterparts to the extent that Congress intended this new statutory standard to "make[ ] it more difficult for [an appellant] to prevail on appeal." *Scott, 83 M.J. 780*; *see also Harvey, 83 M.J. at 693* ("[T]his [c]ourt will weigh the evidence in a deferential manner to the result at trial."). However, like our Army counterparts, we decline to apply *Harvey*'s "rebuttable presumption . . . that an appellant is, in fact, guilty." *83 M.J. at 693*; *see Scott, 83 M.J. at 780* (quoting and disagreeing with *Harvey*).

The statute does not further define what Congress meant by the terms "clearly convinced" and "against the weight of the evidence" in this context. We note Congress did not expressly refer to either the clear and convincing evidence standard, nor the preponderance of the evidence standard. In general, a finding of guilty would be against the weight of the evidence if the legal and competent evidence admitted at trial failed to establish the accused's guilt beyond a reasonable doubt. *See 10 U.S.C. § 851(c)(1)* (setting forth required court **[*22]** member instructions as to the burden of proof); Rule for Courts-Martial (R.C.M.) 920(e)(5) (same). This familiar standard of proof has long been applied to questions of legal and factual sufficiency of the evidence under *Article 66, UCMJ*. *See United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)* ("For factual sufficiency, the test is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the Court of Military Review are themselves convinced of the accused's guilt beyond a reasonable doubt."); *see also Washington, 57 M.J. at 399* (citing *Turner, 25 M.J. at 325*); *United States v. Sills, 56 M.J. 239, 240-41 (C.A.A.F. 2002)* (declining to find references to "weight of the evidence" in the legislative history of the UCMJ evinced congressional intent that factual sufficiency review apply less than the "traditional criminal law standard" of proof beyond a reasonable doubt). In the current version of *Article 66, UCMJ (2024 MCM)*, Congress has expressly retained CCA factual sufficiency review, albeit in a modified form. In the absence of clearer guidance, we infer Congress intended the beyond reasonable doubt standard to continue to apply in questions of factual sufficiency.

However, we also recognize Congress has overlaid the requirement that the CCA be "clearly convinced" the evidence is insufficient before granting relief. In this context, the **[*23]** term "clearly convinced" is capable of an unambiguous plain-language interpretation—independent of legal terms of art—consonant with a coherent and consistent statutory scheme that does not lead to absurd results. *See Robinson, 519 U.S. at 340*; *Cabuhat, 83 M.J. at 766*. Accordingly, in order to set aside a finding of guilty, we must not only find the weight of the evidence does not support the conviction; we must be clearly convinced this is the case. Put another way, in order to set aside a finding of guilty we must be clearly convinced that the weight of the evidence does not support the conviction beyond a reasonable doubt.

Cognizant that the Government may prove its case by circumstantial evidence, and giving appropriate deference to the fact that the military judge saw and heard the testimony and other evidence, we are not clearly convinced the military judge's findings of guilty were against the weight of the evidence. Accordingly, we find the findings of guilty as to the Charge and Specification factually sufficient.

**B. Ruling on Motion to Dismiss**

**1. Additional Background**

The Air Force Judge Advocate General (TJAG) designated Captain (Capt) CP an Air Force judge advocate in September 2020. Capt CP was assigned to Malmstrom AFB **[*24]** as an assistant staff judge advocate. On 29 November 2021, Capt CP administered the oath to Appellant's squadron commander, Lieutenant Colonel (Lt Col) P, when Lt Col P preferred the Charge and its three specifications against Appellant. Capt CP subsequently represented the Government at the preliminary hearing pursuant to *Article 32, UCMJ, 10 U.S.C. § 832*, held on 19 January 2022.

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SVC of what she had done, leading to the disclosure and her subsequent additional testimony.

In early March 2022, the Malmstrom AFB staff judge advocate became aware that Capt CP's license to practice law had been suspended by his state bar on 15 March 2021. Capt CP was removed from performing legal duties, but his designation as a judge advocate was not removed and he remained on active duty at the time of Appellant's trial.

On 21 July 2022, at the outset of Appellant's court-martial, the Defense submitted a motion to dismiss the Charge and specifications for a defective preferral and defective preliminary hearing. The Defense contended an attorney "must be both qualified and designated" as a judge advocate in order to perform judge advocate functions, and when Capt CP had lost his standing to practice law in March 2021 he was no longer qualified to serve as a judge advocate. Therefore, the Defense reasoned, Capt CP was not eligible **[*25]** to administer the oath to Lt Col P in November 2021, nor to represent the Government at the preliminary hearing in January 2022, and the Charge and specifications should be dismissed. In response, the Government contended that because Capt CP's designation as a judge advocate had not been withdrawn, he remained eligible both to administer the oath to Lt Col P and to represent the Government at the preliminary hearing.

After conducting a hearing, the military judge issued a written ruling denying the Defense's motion to dismiss. The military judge explained that although Capt CP may "be subject to other disciplinary consequences," the suspension of his license did not "automatically strip him of his status as a 'judge advocate' for purposes of the UCMJ." Because Capt CP's designation as a judge advocate had not been removed, the Defense had failed to demonstrate a defect with either the preferral or preliminary hearing.

**2. Law**

Both parties assert this court reviews a military judge's ruling on a motion to dismiss for an abuse of discretion, citing *United States v. Douglas, No. ACM 38935, 2017 CCA LEXIS 407, at *19 (A.F. Ct. Crim. App. 15 Jun. 2017)* (unpub. op.) (citing *United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004)*). *See also United States v. Floyd, 82 M.J. 821, 828 (N.M. Ct. Crim. App. 2022)* ("We review a military judge's ruling to dismiss charges and specifications for an abuse of discretion." **[*26]** (Citing *Gore, 60 M.J. at 187*)). "An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact." *United States v. Smith, 83 M.J. 350, 355 (C.A.A.F. 2023)* (quoting *United States v. Donaldson, 58 M.J. 477, 482 (C.A.A.F. 2003)*), *cert. denied*, *144 S. Ct. 696, 217 L. Ed. 2d 390 (2024)*.

Charges and specifications "shall be preferred by presentment in writing, signed under oath before a commissioned officer of the armed forces who is authorized to administer oaths." *10 U.S.C. § 830(a)(2)*; *see also* R.C.M. 307(b)(1) ("The person preferring the charges and specifications must sign them under oath before a commissioned officer of the armed forces authorized to administer oaths."). Officers authorized to administer oaths for military justice purposes include, *inter alia*, "[a]ll judge advocates" and "[a]ll . . . assistant staff judge advocates and legal officers." *10 U.S.C. §§ 936(a)(1)*, *(5)*.

"A judge advocate, not the accuser, shall serve as counsel to represent the Government" at the preliminary hearing held pursuant to *Article 32, UCMJ*. R.C.M. 405(d)(2).

"The term 'judge advocate' means . . . an officer of the Judge Advocate General's Corps of the . . . Air Force." *10 U.S.C. § 801(13)(A)*. "Judge advocate functions in the Air Force and the Space Force shall be performed by commissioned officers of the Air Force who are qualified under regulations prescribed by the Secretary, and who are designated as judge **[*27]** advocates." *10 U.S.C. § 9063(g)*.

"Only TJAG is authorized to designate [Regular Air Force] . . . officers as judge advocates and remove that designation." Air Forc.e Instruction (AFI) 51-101, *The Air Force Judge Advocate General's Corps (AFJAGC) Operations, Accessions, and Professional Development*, ¶ 6.2.1 (29 Nov. 2018).*10 U.S.C. § 9063*

> To be designated as a judge advocate, officers must . . . [b]e a graduate of a law school that was accredited or provisionally accredited by the American Bar Association at the time of graduation; and . . . [b]e in active (or equivalent) status, in good standing, and admitted to practice before the highest court of a United States (US) state, commonwealth or territory, or the District of Columbia.

*Id.* at ¶¶ 6.2.2, 6.2.2.1, 6.2.2.2. "Once designated, a judge advocate must maintain current eligibility to actively practice law before the highest court of the jurisdiction where they are licensed." *Id.* at ¶ 6.3.1.

A judge advocate's designation or certification or both may be withdrawn for good cause, including *inter alia* "fail[ure] to maintain professional licensing standards." *Id.* at ¶¶ 7.3, 7.3.1. A staff judge advocate or other AFJAGC supervisor "submit[s] recommendations to withdraw a judge **[*28]** advocate's designation, certification, or both through judge advocate supervisory channels to [TJAG]." *Id.* at ¶ 7.5.

> When TJAG receives a recommendation or has sufficient basis to consider withdrawal, the judge advocate is notified of the proposed action and is afforded an opportunity to present information to show cause why the action should not be taken. The judge advocate will be given at least three duty days to respond. TJAG makes the final decision on withdrawal of designation or certification.

*Id.* "An officer whose designation has been withdrawn is not authorized to perform the duties of a judge advocate . . . unless authorized by TJAG." *Id.* at ¶ 7.6.

**3. Analysis**

Appellant's argument on appeal is substantially similar to the one he made at trial. The essential facts are not in dispute. Appellant acknowledges that at the time Capt CP administered the oath to Lt Col P and then served as the Government representative at the preliminary hearing, TJAG had not withdrawn Capt CP's designation as a judge advocate. Nevertheless, Appellant asserts that because Capt CP failed to maintain an active license to practice law, after 15 March 2021 he was no longer "qualified" to be a judge advocate **[*29]** and could not legitimately perform judge advocate functions. Therefore, he reasons, both the preferral of the Charge and specifications and the preliminary hearing were defective, and this court should set aside the findings of guilty and the sentence.

However, we agree with the military judge's conclusion. Although Capt CP evidently put his status as a judge advocate at risk by failing to maintain an active law license, the withdrawal of his designation as a judge advocate was not an automatic consequence of the suspension. The applicable regulation provides a process whereby a judge advocate's designation may be withdrawn for good cause, which culminates in TJAG making the final decision on the matter. Because TJAG had not withdrawn Capt CP's designation, he remained a judge advocate and therefore eligible to administer the oath at preferral and to represent the Government at the preliminary hearing.

**C. Prosecutorial Misconduct**

**1. Additional Background**

As described in relation to the preceding issue, Capt CP was an assistant staff judge advocate at Malmstrom AFB who represented the Government at Appellant's preliminary hearing in January 2022, after his state bar suspended his law license **[*30]** in March 2021. During the hearing, Capt CP announced he had "not acted in any way that might tend to disqualify [him]" from the hearing. In March 2022, Capt CP's staff judge advocate learned of the suspension.

**2. Law**

We review prosecutorial misconduct de novo. *United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019)* (citing *United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018)*). "Prosecutorial misconduct occurs when trial counsel 'over-step[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" *United States v. Hornback, 73 M.J. 155, 159 (C.A.A.F. 2014)* (alteration in original) (quoting *United States v. Fletcher, 62 M.J. 175, 178 (C.A.A.F. 2005)*). Such conduct "can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, [for example] a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *Andrews, 77 M.J. at 402* (quoting *United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996)*). "[T]he prosecutorial misconduct inquiry is an objective one, requiring no showing of malicious intent on behalf of the prosecutor." *Hornback, 73 M.J. at 160*.

A judge advocate "shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . . ." AFI 51-110, *Professional Responsibility Program*, Atch 2, Rules 3.3(a), 3.3(a)(1) (11 Dec. 2018). "It is professional **[*31]** misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." *Id.* at Rule 8.4(c).

"A finding or sentence of a 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." *Article 59(a), UCMJ, 10 U.S.C. § 859(a)*. "In

assessing prejudice, we look at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." *Fletcher, 62 M.J. at 184* (citation omitted).

**3. Analysis**

Appellant contends Capt CP engaged in prosecutorial misconduct when he asserted he had not acted in any way that would tend to disqualify him from participating in the preliminary hearing, approximately ten months after Capt CP's law license had been suspended.

The parties recognize this court addressed a substantially similar issue involving Capt CP in *United States v. Brissa, No. ACM 40206, 2023 CCA LEXIS 97, at *13-17 (A.F. Ct. Crim. App. 27 Feb. 2023) (unpub. op.)*, *rev. denied*, *83 M.J. 388 (C.A.A.F. 2023)*. Capt CP served as assistant trial counsel at Brissa's court-martial in July 2021, approximately four months after the suspension took effect and eight months before his staff judge advocate learned of the suspension. *Id. at *2-5*. Similar to the instant case, at Brissa's court-martial Capt CP announced he had not acted in any **[*32]** manner that *might tend* to disqualify him. *Id. at *13*. We noted that this was "evidently not true" because by failing to maintain his license Capt CP subjected himself to potential withdrawal of his designation as a judge advocate. *Id.* We acknowledged the record was unclear whether, at the time of the court-martial, Capt CP knew his license had been suspended, but we assumed for purposes of analysis the appellant had demonstrated prosecutorial misconduct. *Id. at *14*. However, we found the appellant could not demonstrate prejudice because, *inter alia*, the Government was also represented by a fully qualified senior trial counsel, the appellant had pleaded guilty, and on appeal he alleged no other error at his court-martial.

Similar to our approach in *Brissa*, in the instant case we assume for purposes of analysis that Appellant has demonstrated prosecutorial misconduct on Capt CP's part when Capt CP asserted he had not acted in any manner that might tend to disqualify him in the preliminary hearing. However, as in *Brissa*, we find Appellant has not demonstrated material prejudice to his substantial rights. Appellant attempts to distinguish *Brissa* on the basis that there, the Government was also represented **[*33]** by a senior trial counsel, whereas Capt CP was the sole Government representative at Appellant's preliminary hearing. We are not persuaded. Appellant fails to identify any manner in which Capt CP's participation resulted in substantial errors at the preliminary hearing, much less compromised the fairness and integrity of Appellant's court-martial where Capt CP did not participate at all. Accordingly, we find Appellant has not demonstrated he is entitled to relief.

**III. CONCLUSION**

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to Appellant's substantial rights occurred.[7] *Articles 59(a)* and *66(d), UCMJ*, *10 U.S.C. §§ 859(a)*, *866(d)*.

Accordingly, the findings and sentence are **AFFIRMED**.

End of Document

[7] We note that Preliminary Hearing Officer Exhibit 9—the sealed portion of the audio recording of the preliminary hearing—is not attached to the preliminary hearing report, which is required to be attached to the record of trial for appellate review. R.C.M. 1112(f)(1)(A). Appellant has not raised the omission as an issue nor alleged it resulted in material prejudice to his substantial rights, and we find no such prejudice. *See 10 U.S.C. § 859(a)*.

# United States v. Ellard

United States Navy-Marine Corps Court of Criminal Appeals

August 31, 2023, Decided

No. 202200051

**Reporter**
2023 CCA LEXIS 363 *; 2023 WL 5624725

UNITED STATES, Appellee v. Justin T. ELLARD, Lance Corporal (E-3), U.S. Marine Corps, Appellant

**Notice:** THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF APPELLATE PROCEDURE 30.2.

**Subsequent History:** Petition for review filed by *United States v. Ellard, 2023 CAAF LEXIS 759, 2023 WL 7920132 (C.A.A.F., Oct. 30, 2023)*

Motion granted by *United States v. Ellard, 2023 CAAF LEXIS 762 (C.A.A.F., Oct. 30, 2023)*

Motion granted by *United States v. Ellard, 2023 CAAF LEXIS 829, 2023 WL 8589764 (C.A.A.F., Nov. 20, 2023)*

Review denied by *United States v. Ellard, 2024 CAAF LEXIS 57, 2024 WL 648644 (C.A.A.F., Jan. 29, 2024)*

**Prior History:** Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judges: Nicholas S. Henry (arraignment), Eric A. Catto (trial). Sentence adjudged 18 November 2021 by a general court-martial convened at Marine Corps Base Camp Lejeune, North Carolina, consisting of officer and enlisted members. Sentence in the Entry of Judgment: reduction to E-1, confinement for nine months, forfeiture of all pay and allowances, and a bad-conduct discharge. **[*1]** [1]

**Counsel:** For Appellant: Mr. William E. Cassara, Esq., Lieutenant Christopher B. Dempsey, JAGC, USN.

For Appellee: Lieutenant James P. Wu Zhu, JAGC, USN, Captain Tyler W. Blair, USMC.

**Judges:** Before HOLIFIELD, HACKEL, and KISOR, Appellate Military Judges. Senior Judge HACKEL delivered the opinion of the Court, in which Chief Judge HOLIFIELD and Senior Judge KISOR joined.

**Opinion by:** HACKEL

## Opinion

HACKEL, Senior Judge:

A panel of officer and enlisted members convicted Appellant, contrary to his pleas, of three specifications of violating a lawful general order, one specification of aggravated assault by inflicting substantial bodily harm, and one specification of negligently discharging a firearm, in violation of *Articles 92*, *128*, and *134, Uniform Code of Military Justice [UCMJ]*.[2] Specifically, he negligently shot another Marine, Corporal **[*2]** [Cpl] Bravo.[3] Appellant also failed to register his personal firearm as required, wrongfully stored ammunition with his firearm while residing in the barracks, and wrongfully transported a loaded firearm aboard the installation.

Appellant asserts five assignments of error (AOEs), which we reorder as follows: (1) his convictions for violating a lawful general order in violation of *Art. 92, UCMJ*, are legally insufficient; (2) his conviction for aggravated assault is legally and factually insufficient; (3) his convictions for Charge III (aggravated assault), Charge IV (negligent discharge), and the three specifications of Charge II (violating a lawful general

[1] Appellant received credit for 216 days of pretrial confinement.

[2] *10 U.S.C. §§ 892*, *928*, *934*. Upon the motion of trial defense counsel, which was unopposed by the Government, the military judge merged Charge IV (discharging of a firearm through negligence) with Charge III (aggravated assault inflicting substantial bodily harm) for the purposes of sentencing.

[3] All names in this opinion, other than those of Appellant, the judges, and appellate counsel, are pseudonyms. We note that some of the witnesses in this case were active duty Marines at the time of the incident but were no longer on active duty at the time of trial. For the sake of clarity, we will refer to the witnesses by their ranks at the time of the incident.

order) are an unreasonable multiplication of charges; (4) trial counsel committed plain error by misstating the law and evidence in his opening statement, closing argument, and sentencing argument; and (5) the commanding officer who issued the order at issue in Charge I (willfully disobeying a superior commissioned officer, in violation of *Art 90, UCMJ*—of which Appellant was acquitted) was an accuser and his actions in ordering the preliminary hearing and recommending trial by general court-martial created an improper referral process.[4] We find no prejudicial **[*3]** error and affirm.

## I. Background

"He was lucky. He was very lucky."[5]

The basic facts are not in dispute. On 15 April 2021, while practicing drawing his pistol from his new holster, Appellant accidentally shot Cpl Bravo in the abdomen. Corporal Bravo survived the gunshot wound, which fortunately did not pierce any internal organs. However, the injury did require Cpl Bravo to receive emergency medical treatment and spend a few days in the hospital.

On the evening in question, Appellant and his fellow Marines had just returned from an exercise in Norway. Appellant, Cpl Bravo, Lance Corporal [LCpl] Delta, and LCpl Alpha had picked up dinner and were eating in LCpl Delta's barracks room. While they were still eating and relaxing, Appellant retrieved his new holster and practiced drawing his 9-millimeter pistol, presenting it, and dry firing.

After practicing with the weapon unloaded, Appellant loaded the weapon, and chambered a round. He continued to practice removing the pistol from the holster and putting it back. While doing this, Appellant pulled the trigger and accidentally shot Cpl Bravo.

The Marines in LCpl Delta's room immediately took action to help Cpl Bravo, applying pressure to **[*4]** the wound and calling for emergency services. Corporal Bravo was taken to the hospital where he received treatment. Corporal Bravo's trauma surgeon cauterized the wound and prescribed pain medication. The bullet entered a few inches above his belly button and exited approximately seven inches across on his right side. The bullet did not pierce the peritoneal cavity, but passed through the skin, fat, and muscle layers of the abdominal wall before exiting. Corporal Bravo remained in the hospital for several days before being released. He suffered scarring from the bullet wound, but no other long-term physical effects.

The subsequent investigation revealed that Appellant possessed multiple firearms, which he kept in his barracks room and personal vehicle, and also kept hundreds of rounds of rifle and pistol ammunition in his barracks room. He admitted to possessing the firearms and ammunition and to transporting a loaded personal firearm aboard the installation.

Additional facts will be set forth as necessary to address Appellant's AOEs.

## II. Discussion

### A. Appellant's Convictions are Legally and Factually Sufficient

Appellant argues that his convictions for violations of a general order are **[*5]** legally insufficient, and his conviction for aggravated assault is both legally and factually insufficient. We review such questions de novo.[6]

To determine legal sufficiency, we ask whether, "considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt."[7] In conducting this analysis, we must "draw every reasonable inference from the evidence of record in favor of the prosecution."[8] In doing so, we are mindful

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[4] We have reviewed Appellant's fifth AOE and find it to be without merit. *United States v. Matias, 25 M.J. 356, 363 (C.M.A. 1987)*; *See United States v. Tittel, 53 M.J. 313 (C.A.A.F. 2000)* (finding that a convening authority did not become an accuser despite having given the order the accused was alleged to have disobeyed because there was no evidence the convening authority became personally involved).

[5] Dr. Uniform—the trauma surgeon who treated the victim. R. at 251.

[6] *Article 66(d)(1), UCMJ*; *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*.

[7] *United States v. Turner, 25 M.J. 324, 324 (C.M.A. 1987)* (citing *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*).

[8] *United States v. Gutierrez, 74 M.J. 61, 65 (C.A.A.F. 2015)*

that "[f]indings may be based on direct or circumstantial evidence."[9]

In evaluating factual sufficiency arguments raised by Appellant, we first determine whether Appellant has made a specific showing of a deficiency of proof.[10] To do so, Appellant "must identify a weakness in the evidence admitted at trial to support an element (or more than one element) and explain why, on balance, the evidence (or lack thereof) admitted at trial contradicts a guilty finding."[11] After Appellant has made a specific showing, "the Court may weigh the evidence and determine controverted questions of fact."[12] When evaluating the evidence, we must give appropriate deference both "to the fact that the trial **[*6]** court saw and heard the witnesses and other evidence," and "to findings of fact entered into the record by the military judge."[13] We may only set aside (or modify) a guilty finding "[i]f, as a result of the review conducted [after the appellant makes a specific showing of a deficiency of proof], [we are] clearly convinced that the finding of guilty was against the weight of the evidence."[14]

*1. Violation of a lawful general order*

Appellant was found guilty of three specifications of violating a lawful general order for failing to register his personal firearms, wrongfully storing ammunition with his firearm while residing in the barracks, and wrongfully transporting a loaded firearm aboard the installation. He challenges the legal sufficiency of these convictions.

To convict Appellant of violating a lawful general order, the Government was required to prove: (1) that there was in effect a certain lawful general order or regulation; (2) that the accused had a duty to obey it; and (3) that the accused violated or failed to obey the order or regulation.[15] "Knowledge of a general order or regulation need not be alleged or proved as knowledge is not an element of this offense and a lack of knowledge **[*7]** does not constitute a defense."[16]

Appellant does not argue that the order in question—Marine Corps Installations East-Marine Corps Base Camp Lejeune Order 5500.1 w/ Ch 1, *Possession Registration, Use, and Sale of Privately Owned Firearms, Weapons, Ammunition, Explosives, Fireworks, and Pyrotechnics*, dated 8 May 2015 [MCIEAST-MCB CAMLEJO 5500.1 w/ CH 1]—was not a lawful general order. Rather, he argues that his convictions for the three specifications are legally insufficient because, although knowledge is not generally an element of this offense, this specific order requires knowledge in that it tasks commanding officers to ensure new personnel are informed of the provisions of the order.[17] Specifically, the order states that commanding officers shall "[e]nsure all newly assigned personnel are informed of the provision of this Order, during initial orientation, and as often thereafter as deemed necessary."[18] Appellant relies on *United States v. Nardell*, in which the Court of Military Appeals explained that, "[i]f [an] order requires implementation by subordinate commanders to give it effect as a code of conduct, it will not qualify as a general order for the purpose of an *Article 92* prosecution."[19]

"No single characteristic of a general order determines whether it applies punitively to members of a command."[20] To be punitive, "[t]he order in its entirety must demonstrate that **[*8]** rather than providing general guidelines for the conduct of military functions it is basically intended to regulate conduct of individual members and that its direct application of sanctions for its violation is self-evident."[21]

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(citation and internal quotation marks omitted).

[9] *United States v. Long, 81 M.J. 362, 368 (C.A.A.F. 2021)*.

[10] *Art. 66(d)(1)(B)*.

[11] *United States v. Harvey, 83 M.J. 685, 2023 CCA LEXIS 220, *11 (N-M Ct. Crim. App. 2023)*.

[12] *Art. 66(d)(1)(B)(ii)*.

[13] *Art. 66(d)(1)(B)(ii)*.

[14] *Art. 66(d)(1)(B)(iii)*.

[15] *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*], pt. IV, para. 18.b.(1) at IV-27.

[16] *MCM*, pt. IV, para. 18.c.(1)(d) at IV-27.

[17] Appellant's Brief, at 25.

[18] MCIEAST-MCB CAMLEJO 5500.1 w/ CH 1, para. 15.

[19] *United States v. Nardell, 21 U.S.C.M.A. 327, 329, 45 C.M.R. 101, 103 (C.M.R. 1972)*.

[20] *Id.*

[21] *Id.*

We decline to adopt Appellant's argument, which conflates the publication of the order with its implementation and punitive nature. The Court in *Nardell* reviewed the conviction of a Marine who had played slot machines while serving as the manager for the staff noncommissioned officer club in DaNang, Vietnam, in violation of a general order. In its analysis, the Court found that the order provided for the operation of messes, clubs, and miscellaneous nonappropriated fund activities within the command—none of which suggested a purpose other than advisory or instructional.[22] The Court of Military Appeals considered the order to be predominantly instructional and directory rather than a code of conduct, with a requirement for subordinate commanders to provide specific notice of the prohibition leading to the charged misconduct.[23]

Here we have no concerns about the clarity or punitive nature of MCIEAST-MCB CAMLEJO 5500.1 w/ CH 1. The order regulates the behavior of **[*9]** on-installation activities to "ensure the security and safety of our community, which is essential to preserve the good order and discipline aboard MCIEAST-MCB CAMLEJ."[24] Additionally, on its very first page, the order provides for a "punitive effect" in that [v]iolations of this Order by military personnel are punishable as violations of *Article 92 of the Uniform Code of Military Justice* and can subject the violator to court-martial or other judicial or administrative action."[25] The order is clear on its face with regard to the proscribed conduct and requires no implementation by subordinate commanders.

With regard to the order's publication, the military judge considered the Government's request to take judicial notice of the fact that the order was properly published. After hearing evidence on the matter, the military judge found that the legal requirements of publication had been met and took judicial notice of the fact that the order was a lawful order, properly published and promulgated, and in effect on 15 April 2021, the date Appellant shot Cpl Bravo.[26] Notably, the military judge heard the testimony of the Marine Corps Installations East deputy adjutant, who testified that once signed, orders are posted on the unit website and accessible **[*10]** to everyone on the world wide web, and that this process occurred for MCIEAST-MCB CAMLEJO 5500.1 w/ CH 1.[27] We see nothing wrong with the military judge's reasoning or decision to take judicial notice, particularly after civilian defense counsel admitted having no reason to doubt the testimony of the deputy adjutant.[28] We also note that Appellant himself has not challenged this decision.

Next, we find that the language directing commanding officers to ensure their personnel are informed of the order does not impose an additional step in the publication of MCIEAST-MCB CAMLEJO 5500.1 w/ CH 1. Rather, we consider it as emphasis by the Commander to guarantee the safety of the installation, particularly given the potential for serious injury that can be caused by the regulated items (firearms, ammunition, explosives, etc.).[29] As such, the requirement that commanding officers ensure new personnel are aware of the general order and its provisions does not constitute an additional implementation step necessary to give the order punitive effect.

Moving to the substantive elements of Charge II, through Appellant's actions and admissions to NCIS agents, we find ample evidence that Appellant was a **[*11]** member of a unit located on board Camp Lejeune and therefore subject to the order, and that he failed to register his personal firearms, wrongfully stored ammunition with his firearm while residing in the barracks, and wrongfully transported a loaded firearm aboard the installation. Each of these discrete actions violated the order.

We are therefore convinced that a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt to conclude that Appellant violated a lawful general order for each of the three specifications. Accordingly, Appellant's convictions for violating a lawful general order are legally sufficient.

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[22] *Id. at 329-30*.

[23] *Id. at 330*.

[24] MCIEAST-MCB CAMLEJO 5500.1 w/ CH 1, para. 4.a(1).

[25] MCIEAST-MCB CAMLEJO 5500.1 w/ CH 1, para. 3.a.

[26] R. at 133-46; App. Ex. XXIX; R. at 397.

[27] R. at 136-37.

[28] R. at 145.

[29] *See United States v. Joseph, No. 201300460, 2015 CCA LEXIS 54, *10-11 (N-M. Ct. Crim. App. Feb. 19, 2015)* (finding that a general order requiring "that commanding officers must 'ensure that the provisions of this Order are widely publicized and that newly joined personnel are fully briefed on the responsibilities, prohibitions and restrictions contained' therein" was a punitive order because "it was intended to regulate the conduct of service members living in barracks and was specifically implemented for the purpose of discipline.")

*2. Aggravated Assault*

Appellant was acquitted of aggravated assault by grievous bodily harm, but found guilty of the lesser included offense of aggravated assault by inflicting substantial bodily harm for shooting Cpl Bravo in the abdomen.

For Appellant to be found guilty of aggravated assault causing substantial bodily harm by a loaded firearm, the Government was required to prove: (1) that the accused assaulted Cpl Bravo; (2) that substantial bodily harm was thereby inflicted upon Cpl Bravo; and (3) that the injury was inflicted with a loaded **[*12]** firearm.[30] "Substantial bodily harm" means "(i) a temporary but substantial disfigurement, or (ii) a temporary but substantial loss or impairment of function of any bodily member, organ, or mental faculty."[31]

Appellant does not dispute that he shot Cpl Bravo. He acknowledges that his actions were culpably negligent and Cpl Bravo was injured as a result.[32] Nonetheless, he argues that the injury Cpl Bravo sustained does not qualify as substantial bodily harm. Specifically, Appellant argues that Cpl Bravo did not suffer a temporary but substantial disfigurement.

In *United States v. Spearman*, the Court of Military Appeals affirmed the conviction of a Soldier found guilty of assault in which grievous bodily harm was inflicted when he stabbed another Soldier four times with a steak knife, leading the victim to require transportation to the hospital for his wounds and to be stitched up after "not too much" blood loss.[33] The victim returned to duty shortly thereafter. Like here, the appellant in *Spearman* argued that "grievous bodily harm was not visited on the victim because he suffered only superficial cuts, none of which were disfiguring or disabling."[34] The Court disagreed with this characterization **[*13]** of the victim's injuries, finding that "the record reflects that his wounds required hospital treatment, had to be stitched up, were 'stab' wounds, and that at least three of them were in an area of the body containing the vital organs."[35]

The losing argument put forth in *Spearman* carries even less weight here. Appellant was found guilty of assault in which substantial bodily harm is inflicted, a lesser included offense of that charged in *Spearman*. Here the Government presented evidence that the bullet wound left a hole through Cpl Bravo's abdomen and left two scars on his torso. We find that the threshold for "substantial bodily harm" is met here in Appellant's act of shooting Cpl Bravo in the torso, "five or six centimeters above his belly button," with the bullet penetrating skin, fat, and abdominal muscles, traveling through his body, and leaving an exit wound on Cpl Bravo's right side on the same plane as his belly button.[36] The injury required expert medical intervention followed by several days of recovery at the hospital for proper monitoring and wound care. Similar to the Court in *Spearman*, we refuse to adopt Appellant's contention that the injury needed to be more severe—to have damaged internal **[*14]** organs or penetrated the peritoneal cavity, for example—to constitute substantial bodily harm.

We are convinced that a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt and conclude that Cpl Bravo's injury constitutes substantial bodily harm. Appellant's conviction for aggravated assault causing substantial bodily harm is therefore legally sufficient.

Turning to factual sufficiency, we first look at whether Appellant has identified a specific deficiency in proof by identifying a weakness in the evidence admitted at trial.[37] Appellant concedes that his actions were culpably negligent and that Cpl Bravo suffered a gunshot wound as a result of his actions.[38] Nonetheless, Appellant argues that as a matter of definition, the gunshot wound suffered by Cpl Bravo does "not rise to the level of substantial bodily harm."[39] We note that nothing in Appellant's briefs specify any deficiencies in the evidence; rather, Appellant reiterates his argument of legal insufficiency of the evidence using the term, "factual sufficiency," and attempts to import

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[30] *MCM*, pt. IV, para. 77.b.(4)(b) at IV-118.

[31] *MCM, pt. IV, para. 77.c.(1)(b)* at IV-118.

[32] Appellant's Brief, at 15.

[33] *United States v. Spearman, 23 U.S.C.M.A. 31, 32, 48 C.M.R. 405, 406 (C.M.A. 1974)*.

[34] *Id. at 33*.

[35] *Id.*

[36] R. at 233-36.

[37] *Harvey, 83 M.J. 685, 2023 CCA LEXIS 220, at *11*.

[38] Appellant's Brief at 15.

[39] Appellant's Brief at 15.

definitions from *Article 128a* (maiming) into *Article 128*.[40] We disagree with Appellant and see no meaningful argument that there was a specific **[*15]** deficiency of proof in this case. Regardless, we are also not convinced that the finding of guilty is against the weight of the evidence. Thus, Appellant's conviction for aggravated assault is factually sufficient.

*3. Negligent Discharge of a Firearm*

Appellant does not specifically challenge the legal sufficiency of his conviction for negligent discharge of a firearm. Nonetheless, we have reviewed the evidence in this case and are satisfied that Appellant's conviction for that offense is legally sufficient. As Appellant does not challenge the factual sufficiency for the conviction for Charge IV, we will not address that.[41]

**B. The Charges against Appellant were not Unreasonably Multiplied**

At trial, Appellant moved to have the three specifications of Charge II (violation of lawful general order) merged for sentencing. He also moved to have the sole specification of Charge III (aggravated assault) and the sole specification of Charge IV (negligent discharge of a firearm) merged for sentencing. He did not seek to have the charges merged for findings. The military judge merged Charges III and IV for sentencing, but denied Appellant's request regarding the three specifications of Charge II. Appellant **[*16]** now asserts the military judge erred in not merging Charges III and IV for findings (as opposed to sentencing), and in not merging specifications 1 and 2 of Charge II for findings and sentencing based on an unreasonable multiplication of charges.

We review a military judge's decision to deny relief for the unreasonable multiplication of charges for an abuse of discretion.[42] "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous."[43] When an appellant fails to raise a claim of unreasonable multiplication of charges at trial the issue is reviewed on appeal for plain error.[44] "For an appellant to prevail under plain error review, there must be an error, that was clear or obvious, and which prejudiced a substantial right of the accused."[45]

"What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges."[46] Military courts review the non-exclusive factors set forth in *United States v. Quiroz* to determine whether there is an unreasonable multiplication of charges.[47] Those factors include: (1) whether the appellant **[*17]** objected at trial; (2) whether each charge and specification is aimed at distinctly separate criminal acts; (3) whether the number of charges and specifications misrepresent or exaggerate the appellant's criminality; (4) whether the number of charges and specifications unreasonably increase the appellant's punitive exposure; and (5) whether there is any evidence of prosecutorial overreach or abuse in the drafting of the charges.[48]

First, we review Appellant's assertion that the military judge should have merged Specifications 1 and 2 of Charge II for findings for plain error. We look to the *Quiroz* factors to determine if there was error. As explained above, Appellant did not move for merger of these specifications for findings at trial. We find that the charges and specifications are aimed at distinctly separate criminal acts—(1) failing to register his firearms as required by the instruction; and (2) wrongfully storing ammunition with his firearm while residing in the barracks—and do not misrepresent or exaggerate Appellant's criminality. One clearly could commit either offense while not committing the other. By facing two specifications rather than one, Appellant's punitive exposure increased **[*18]** by two years. We do not find this increase to be unreasonable. Finally, we find no evidence of prosecutorial overreach. Thus, we find Appellant has failed to demonstrate that there was

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[40] Appellant's Brief at 12-17; Appellant's Reply Brief at 11-14.

[41] *Art 66(d)(1)(B)(i)*.

[42] *United States v. Campbell, 71 M.J. 19 (C.A.A.F. 2012)*.

[43] *United States v. White, 69 M.J. 236, 239 (C.A.A.F. 2010)*.

[44] *United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 20009)*.

[45] *United States v. Coleman, 79 M.J. 100, 103 (C.A.A.F. 2019)* (quoting *United States v. Tovarchavez, 78 M.J. 458, 462 (C.A.A.F. 2019)*).

[46] R.C.M. 307(c)(4).

[47] *United States v. Quiroz, 55 M.J. 334 (C.A.A.F. 2001)*.

[48] *Id. at 338*.

error, plain or otherwise.

Second, we review the military judge's denial of Appellant's motion to merge for sentencing the three specifications under Charge II for an abuse of discretion. In denying Appellant's motion for merger, the military judge reviewed the *Quiroz* factors and found "the violations in the specifications to be aimed at distinctly separate acts. The number of the charges does not misrepresent or exaggerate the accused criminality, and the Court does not find prosecutorial overreaching in the drafting and does not find that the number [of] charges [and] specifications unreasonably increase[s] the punitive exposure to the accused. So that portion of the defense UMC motion is denied."[49]

While Appellant did object at trial, we agree with the military judge's analysis regarding the other *Quiroz* factors. Thus, we find that the military judge did not abuse his discretion in denying Appellant's motion to merge the three specifications under Charge II for sentencing.

Finally, we review Appellant's argument that **[*19]** the military judge should have merged Charges III (aggravated assault) and IV (negligent discharge of a firearm) for findings for plain error. We find that the charges and specifications are aimed at distinctly separate criminal acts: (1) assaulting Cpl Bravo by shooting him; and (2) negligently discharging a firearm. These offenses require distinctly different elements of proof, and they do not misrepresent or exaggerate Appellant's criminality. By facing two charges rather than one, Appellant's potential punitive exposure increased by three months.[50] We do not find this increase to be unreasonable. Finally, we find no evidence of prosecutorial overreach. Thus, we find Appellant has failed to demonstrate that there was error, plain or otherwise.

### C. Trial Counsel did not Commit Plain Error

Appellant argues that trial counsel committed plain error when he misstated the law and evidence during his opening statement, closing argument, and sentencing argument.

Prosecutorial misconduct occurs when a prosecutor "oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense."[51] It is "defined as action or inaction **[*20]** by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon."[52] The conduct of the "trial counsel must be viewed within the context of the entire court-martial . . . not [just] on words in isolation."[53]

We review prosecutorial misconduct and improper argument de novo.[54] When properly objected to at trial, we review for prejudicial error to an appellant's substantial rights.[55] "Challenged argument is reviewed not based on 'words in isolation, but on the argument viewed in context,' and 'within the context of the entire court-martial.'"[56]

If no objection for improper argument is made at trial, "we review for plain error."[57] "The plain error doctrine is invoked to rectify those errors that seriously affect the fairness, integrity or public reputation of judicial proceedings. As a consequence, it is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result."[58] "Under plain error review, Appellant bears the burden of demonstrating that: '(1) there was error, (2) the error was clear and obvious, and (3) the error materially

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[49] R. at 511.

[50] As previously noted, the military judge merged Charges III and IV for the purposes of sentencing.

[51] *United States v. Fletcher, 62 M.J. 175, 178 (C.A.A.F. 2005)* (quoting *Berger v. United States, 295 U.S. 78, 84, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)*).

[52] *United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996)* (citing *Berger, 295 U.S. at 88*)).

[53] *United States v. Baer, 53 M.J. 235, 238 (C.A.A.F. 2000)* (quoting *United States v. Young, 470 U.S. 1, 16, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985)*).

[54] *United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018)* (citing *United States v. Sewell, 76 M.J. 14, 18 (C.A.A.F. 2017)*).

[55] *Id.* (citing *Fletcher, 62 M.J. at 179*); *United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019)*.

[56] *United States v. Causey, 82 M.J. 574, 581 (N-M Ct. Crim. App. 2022)* (citing *Baer, 53 M.J. at 238* (citation and internal quotation marks omitted)).

[57] *Id.*

[58] *United States v. Fisher, 21 M.J. 327, 328-29 (C.M.A. 1986)*.

prejudiced a substantial **[*21]** right of the accused.'"[59] "Thus, we must determine: (1) whether trial counsel's arguments amounted to clear, obvious error; and (2) if so, whether there was a reasonable probability that, but for the error, the outcome of the proceeding would have been different."[60]

*1. Opening Statement and Closing Argument*

During his opening statement trial counsel claimed that HM3 Mike "happened to be close by luckily. Luckily, all these Marines were trained in combat lifesaving and were able to save Corporal [Bravo's] life."[61] He also claimed that the actions of Cpl Delta and LCpl Alpha "helped save Corporal [Bravo]."[62] The Defense did not object to trial counsel's statements, but instead argued during opening statement that Cpl Bravo was never in risk of losing his life.

During trial, the trauma surgeon who treated Cpl Bravo testified that the injury was not life-threatening and did not involve a substantial risk of death because the bullet did not pierce the peritoneal cavity and instead was only a soft tissue injury.

During rebuttal closing argument, trial counsel attempted to quote the instruction on reasonable doubt:

> "I would remind you to look at the Military Judge's instruction. Beyond a reasonable **[*22]** doubt does not by any — or I'm sorry, all reasonable doubt. That's not the standard. The government doesn't have to rule out all reasonable doubt. The government — the proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt, that's the standard of reasonable doubt, members."[63]

Immediately after the Government's rebuttal—on the same page of the transcribed record—the military judge instructed the members, "counsel have referred to the instructions that I gave you, if there is any inconsistency between what counsel have said about the instructions and the instructions which I gave you, you must accept my statement as being correct."[64]

Because Appellant did not object at trial we review trial counsel's argument for plain error. The Government argues that trial counsel's statements about saving Appellant's life were a reasonable characterization of the evidence. Regarding trial counsel's misstatement of the burden of proof, the Government concedes error, but argues that Appellant was not prejudiced by the error.[65] We agree with the Government that trial counsel's misstatement of the burden of proof was error.

Appellant was charged with aggravated assault **[*23]** inflicting grievous bodily harm. The Government attempted to prove that the injury suffered by Cpl Bravo involved a substantial risk of death. Appellant's entire defense at trial focused on the argument that Cpl Bravo's life was never in jeopardy. The members apparently agreed with Appellant; rather than convict him of aggravated assault by grievous bodily harm, they convicted Appellant of aggravated assault by substantial bodily harm. As explained above, substantial bodily harm required the Government to prove temporary but substantial disfigurement, while grievous bodily harm would have required the government to prove a substantial risk of death.[66]

We are confident that Appellant has not demonstrated that trial counsel's comments about the "life-saving" actions taken by Appellant and his fellow Marines were not a fair argument based on the evidence. Even assuming plain and obvious error, we do not find that Appellant has demonstrated that but for counsel's argument there is a reasonable probability that the outcome of the proceeding would have been different.[67]

Similarly, we find that Appellant has not demonstrated a reasonable probability that the outcome of the proceeding would have **[*24]** been different but for trial counsel's misstatement of the burden of proof. We do not evaluate trial counsel's comments in a vacuum, but instead review them within the context of the court-martial as a whole. The military judge properly instructed the members on reasonable doubt before trial

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[59] *United States v. Cueto, 82 M.J. 323, 334 (C.A.A.F. 2022)* (quoting *United States v. Jones, 78 M.J. 37, 44 (C.A.A.F. 2018)*).

[60] *Voorhees, 79 M.J. at 9* (internal citation and quotation omitted).

[61] R. at 168-69.

[62] R. at 170.

[63] R. at 437.

[64] R. at 437.

[65] Appellee's Brief at 24.

[66] *MCM, pt IV, para. 77.c.(1)(c)* at IV-118.

[67] *Voorhees, 79 M.J. at 9*.

counsel's argument:

> Lastly, the burden of proof to establish the guilty of the accused beyond a reasonable doubt is on the government. The burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of each offense. By reasonable doubt is intended, not fanciful, speculative or ingenuous doubt or conjecture, but an honest and actual doubt suggested by the material evidence of lack of it in the case.
>
> It is a genuine misgiving caused by insufficiency of proof of guilt. Reasonable doubt is a fair and rational doubt based upon reason and common sense, and arising from the state of the evidence. Proof beyond a reasonable doubt if proof that leaves you firmly convinced of the accused guilt.[68]

After trial counsel's misstatement, the military judge immediately instructed the members that if anything counsel said differed from the instructions already **[*25]** provided the members must apply the law as instructed by the military judge.

"We presume, absent contrary indications, that the panel followed the military judge's instructions."[69] Here, the military judge correctly instructed the members regarding reasonable doubt. After trial counsel's misstatement, the military judge immediately instructed the members that they were to follow the instructions as given by him. We are satisfied that the members applied the law as instructed by the military judge. Indeed, as already explained, the members found Appellant not guilty of inflicting grievous bodily harm and instead convicted him of the lesser included offense of inflicting substantial bodily harm.

*2. Sentencing Argument*

During sentencing argument trial counsel reiterated aspects of his earlier argument on findings that Cpl Bravo "suffered a brush with death,"[70] that Appellant "almost killed one of his best friends,"[71] and that Cpl Bravo was in "unbearable pain"[72]. Because Appellant did not object to these statements at trial we review for plain error.

Appellant's argument is rooted in the fact that the evidence at trial revealed the gunshot wound suffered by Cpl Bravo did not result in a life-threatening **[*26]** injury. The members agreed with Appellant, finding him not guilty of aggravated assault by grievous bodily harm. However, they did find that he had committed an aggravated assault in which substantial bodily harm is inflicted, which requires a temporary but substantial disfigurement, or a temporary but substantial loss or impairment of function of any bodily member, organ, or mental faculty.[73] In contrast, grievous bodily harm means a bodily injury that involves a substantial risk of death, extreme physical pain, protracted or obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.[74]

We find that trial counsel's argument was largely supported by the evidence and did not rise to the level of plain error. Corporal Bravo suffered a gunshot wound to the abdomen from very close range. Corporal Bravo's trauma surgeon testified that he was incredibly lucky that the bullet did not pierce any of his internal organs. Additionally, trial counsel's argument that Cpl Bravo suffered unbearable pain was a reasonable characterization of the evidence. Witnesses present shortly after Cpl Bravo was shot testified about his reactions. One stated **[*27]** that "[h]e had a facial grimace, he was breathing in and out very quickly, like labored breathing, wincing with pain, his eyes were closed, and he was saying that it hurts."[75] Another stated that "[Cpl Bravo] was just screaming for help, screaming my name."[76] That same witness stated that Cpl Bravo also said "don't let [me] die."[77] Additionally, Cpl Bravo's trauma surgeon testified that when he tried to stop the bleeding in the emergency room, Cpl Bravo "wasn't tolerating the pain well."[78] Thus, Appellant has not demonstrated the trial counsel's argument amounted

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[68] R. at 413-14.

[69] *United States v. Norwood, 81 M.J. 12, 20 (C.A.A.F. 2021)* (quoting *United States v. Short, 77 M.J. 148, 151 (C.A.A.F. 2018)*).

[70] R. at 514.

[71] R. at 515.

[72] R. at 517.

[73] *MCM, pt. IV, para. 77.c.(1)(b)* at IV-118.

[74] *MCM, pt. IV, para. 77.c.(1)(c)* at IV-118.

[75] R. at 264.

[76] R. at 283.

[77] R. at 283.

[78] R. at 240.

to clear or obvious error.

Even had Appellant met the threshold for plain error, we do not find that Appellant has demonstrated that there was a reasonable probability that, but for the error, the outcome of the proceeding would have been different. As explained above, the members disagreed with trial counsel's characterization of the evidence, as shown through their finding Appellant guilty of the lesser included offense. We are confident that the members were not influenced by trial counsel's restatement of his closing argument when they determined Appellant's sentence. In his sentencing argument, trial counsel asked the members **[*28]** to award a 19-month sentence of confinement, while defense counsel argued for a sentence of time served (seven months). The members sentenced Appellant to nine months of confinement. Considering this in view of Appellant's convictions for negligently shooting another Marine and committing violations of a general order, we do not find merit in Appellant's argument that but for trial counsel's alleged error, the outcome of the proceeding would have been different.

## III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred.[79]

The findings and sentence are **AFFIRMED**.

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End of Document

[79] *Articles 59* & *66, UCMJ*.

# *United States v. Scott*

United States Army Court of Criminal Appeals

October 27, 2023, Decided

ARMY 20220450

**Reporter**
83 M.J. 778 *; 2023 CCA LEXIS 456 **

UNITED STATES, Appellee v. Private First Class JUSTIN M. SCOTT, United States Army, Appellant

**Subsequent History:** Petition for review filed by *United States v. Scott, 2023 CAAF LEXIS 884, 2023 WL 9232540 (C.A.A.F., Dec. 20, 2023)*

Motion granted by *United States v. Scott, 2023 CAAF LEXIS 887, 2023 WL 9232926 (C.A.A.F., Dec. 21, 2023)*

Vacated by, Remanded by, Review granted by *United States v. Scott, 2024 CAAF LEXIS 68, 2024 WL 1059182 (C.A.A.F., Feb. 1, 2024)*

On remand at, Decision reached on appeal by *United States v. Scott, 2024 CCA LEXIS 126 (A.C.C.A., Mar. 14, 2024)*

**Prior History:** **[**1]** Headquarters, III Corps and Fort Cavazos. Tiffany D. Pond and Joseph T. Marcee, Military Judges, Colonel Runo C. Richardson, Staff Judge Advocate.

**Counsel:** For Appellant: Lieutenant Colonel Dale C. McFeatters, JA; Major Mitchell D. Herniak, JA (on brief); Colonel Philip M. Staten, JA; Major Mitchell D. Herniak, JA (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Major Justin L. Talley, JA; Captain Lisa Limb, JA; Ms. Julianna Battaglia (on brief).

**Judges:** Before PENLAND, HAYES, and MORRIS, Appellate Military Judges. Senior Judge PENLAND and Judge HAYES concur.

**Opinion by:** MORRIS

## Opinion

**[*778]** OPINION OF THE COURT

MORRIS, Judge:

Appellant asserts the evidence is factually insufficient to support a finding of guilty where appellant raised the affirmative defense of mistake of fact as to age. We disagree.

**BACKGROUND**

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual abuse of a child in violation of *Article 120b, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920b*. The military judge sentenced appellant to a reprimand, reduction to the grade of E-1, sixty days restriction, sixty days hard labor without confinement, and a dishonorable discharge. The convening authority took no action on the findings or sentence. **[**2]**

There is little dispute about the incident which formed the basis of the offense. After several months of playing on-line video games with the 15-year old female victim, appellant first sent the victim a private Snapchat message saying "So if I 'accidentally' send you a dic[k] pic, would that be ok?" and then subsequently sent her a picture of his **[*779]** clothed groin area. Appellant and the victim disagree about the contents of the picture. The victim testified that the photograph appellant sent showed an outline of his erect penis. Appellant's friend, Private First Class (PFC) [TEXT REDACTED BY THE COURT] testified that when he confronted appellant about the picture, appellant stated the contents were "insinuating." Appellant testified that while the picture he sent did not depict an erection, he was "horny" and "testing the waters."

Appellant asserted the affirmative defense of mistake of fact as to age. Both the victim and PFC [TEXT REDACTED BY THE COURT], who had introduced appellant to the victim for the purpose of the group playing online video games together, testified they had

each told appellant the victim's specific age of 15 and reiterated her youth many times. To the contrary, appellant insisted, they only ever described her as **[**3]** underage and that if accurate, the birthdate listed on the victim's Facebook profile, would have meant she was 18.

## LAW AND DISCUSSION

This court reviews questions of factual sufficiency de novo. *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*. Additionally, the *National Defense Authorization Act for Fiscal Year 2021* amended *Article 66(d)(1)(B)* regarding our factual sufficiency review reads as follows:

> (B) FACTUAL SUFFICIENCY REVIEW
>
> (i) In an appeal of a finding of guilty under *subsection (b)*, the Court of Criminal Appeals may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.
> (ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to —
> (1) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
> (2) appropriate deference to findings of fact entered into the record by the military judge.
> (iii) If, as a result of the review conducted under clause (ii), the court is clearly convinced that the finding of guilty was against the weight of the evidence the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

*Pub. L. No. 116-283, § 542(b), 134 Stat. 3611-12*. The amendment to *Article 66(d)(1)(B)* applies only to courts-martial, as here, where every finding **[**4]** of guilty in the Entry of Judgment is for an offense that occurred on or after 1 January 2021. *Id.* at 3612.

Vital to appellant's factual insufficiency claim is his assertion of the mistake of fact as to age defense. Mistake of fact is available to a military accused if he honestly and reasonably, but mistakenly, believed the victim was at least 16 and if the acts would otherwise be lawful if the victim were at least 16. *United States v. Zachary, 63 M.J. 438, 442 (C.A.A.F. 2006)*; *see also United States v. Strode, 43 M.J. 29, 33 (C.A.A.F. 1995)*. Further, the ignorance or mistake could "not be based on negligent failure to discover true facts." Dep't of Army, Pam. 27-9, Legal Services: Military Judge's Benchbook, para. 3-45b-2, note 3 (15 August 2023) [Benchbook].

Given the testimony on the record credibly establishing the victim was at the very least underage, it was negligent for appellant not to inquire as to her specific age before engaging in conduct that would be unlawful if the victim had not attained the age of at least 16. The testimony on the record established appellant had been told the victim was between 14-15 years old. No one told appellant the victim was 16. A reasonable person observing conflicting information between the birthdate listed on social media and statements from the victim and PFC [TEXT REDACTED BY THE COURT] would have been on notice that he needed to confirm her age. Because he negligently failed to **[**5]** discover true facts about the victim's age, appellant's mistake of fact defense fails. Since we are not clearly convinced the finding of guilty was against the weight of the evidence, we find the trial court's findings in this case to be factually sufficient.

The government cites to a recent published opinion from the Navy-Marine Corps Court of Criminal Appeals for the **[*780]** proposition the new *Article 66* creates a presumption of guilt in our factual sufficiency review. We find no support for that conclusion. While we agree with much of our sister court's analysis in *United States v. Harvey*, we disagree that "Congress has implicitly created a rebuttable presumption that in reviewing a conviction, a court of criminal appeals presumes that an appellant is, in fact, guilty." *United States v. Harvey, 83 M.J 685, 693 (N.M. Ct. Crim. App. 23 May 2023)*. Once appellant makes a specific showing of a deficiency in proof, we will conduct a de novo review of the controverted questions of fact. While we hold the new burden of persuasion with its required deference makes it more difficult for one to prevail on appeal, we stop short of finding an implicit creation of a rebuttable presumption of guilt and will continue to adhere to the de novo standard of review articulated by our superior **[**6]** court.

## CONCLUSION

On consideration of the entire record, the findings of guilty and sentence are AFFIRMED.

Senior Judge PENLAND and Judge HAYES concur.

# APPENDIX B

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), SrA McLeod, through appellate defense counsel, personally requests that this Court consider the following matters:

**DID THE GOVERNMENT VIOLATE SENIOR AIRMAN LOGAN MCLEOD'S ARTICLE 10, UNIFORM CODE OF MILITARY JUSTICE, SPEEDY-TRIAL RIGHT BY FAILING TO ACT WITH REASONABLE DILIGENCE?**

## Statement of Facts

A. Pretrial confinement day 1: After being interrogated by two AFOSI agents, SrA McLeod was arrested and confined in county jail.

On 18 September 2021, SrA McLeod was arrested in Montgomery, Alabama.[133] Pursuant to a warrant, agents executed a search of SrA McLeod's residence and seized a variety of electronic evidence.[134] That evening, two AFOSI agents interviewed SrA McLeod.[135] This interrogation carried over into the following morning.[136] On 19 September 2021, SrA McLeod was placed in pretrial confinement.[137] In the immediate days following SrA McLeod's arrest, AFOSI followed-up with his family and friends and collected receipts for items found in SrA McLeod's car when he was arrested.[138]

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[133] App. Ex. XX at 20, 24.
[134] App. Ex. XX at 408-27.
[135] App. Ex. XX at 395.
[136] App. Ex. XX at 395.
[137] App. Ex. XX at 20, 25.
[138] App. Ex. XX at 448-65.

B. Pretrial confinement day 5: A pretrial confinement hearing was held.

On 23 September 2021, a pretrial confinement hearing was held, and SrA McLeod was kept in confinement.[139]

C. Pretrial confinement day 20: AFOSI requests Defense Cyber Crime Center (DC3) analyze the seized electronics.

On 8 October 2021, 21 days after SrA McLeod's arrest and the seizure of his property, AFOSI routed a request to Department of Defense Cyber Crime Center (DC3) requesting that they examine the seized electronic devices.[140]

D. Pretrial confinement day 62: SrA McLeod was charged with violating Articles 80 and 131b, UCMJ.

On 19 November 2021, the Government preferred one charge and 12 specifications of attempt, in violation of Article 80, UCMJ, and one charge and specification of obstruction, in violation of Article 131b, UCMJ, against SrA McLeod.[141] The attempt specifications included two specifications of attempted murder, three specifications of attempted rape, three specifications of attempted kidnapping, two specifications of attempted drug distribution, one specification of producing child pornography, and one specification of distributing child pornography.[142]

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[139] App. Ex. II at 20-21.
[140] App. Ex. XX at 434-47.
[141] Charge Sheet.
[142] Charge Sheet.

E. Pretrial confinement day 80: An Article 32, UCMJ, preliminary hearing was held on 6 December 2021.

A Preliminary Hearing Officer (PHO) was appointed on 23 November 2021.[143] The Article 32, UCMJ, preliminary hearing was conducted via video teleconference on 6 December 2021.[144] The parties submitted supplemental matters to the PHO on 7-8 December 2021.[145] The PHO issued his report on 15 December 2021.[146]

F. Pretrial confinement day 94: DC3 issues report on seized electronic devices.

DC3 did not complete its report until 21 December 2021—74 days after AFOSI routed its request for review and 95 days after the devices were seized—noting that only two items provided anything of evidentiary value.[147]

G. Pretrial confinement day 95: The Government preferred an additional charge and 10 specifications on 22 December 2021.

After the Article 32 hearing, an additional charge and 10 specifications were preferred against SrA McLeod, including two specifications of attempted conspiracy and eight specifications of attempted assault.[148]

[143] App. Ex. XX at 24, 51.
[144] App. Ex. XX at 24-25, 51.
[145] App. Ex. XX at 51.
[146] App. Ex. XX at 24-51.
[147] App. Ex. XX at 434-47.
[148] Charge Sheet.

H. Pretrial confinement day 102: The Government referred charges on 29 December 2021.

The Convening Authority referred all charges and specifications on 29 December 2021. SrA McLeod was served with the referred Charges on 4 January 2022.[149] During docketing, the Government said that its ready date for trial was 13 January 2022.[150] The defense ready date was 22 August 2022.[151]

I. Pretrial confinement day 128: SrA McLeod was arraigned.

The Government proposed 13 January 2022 for arraignment, but Defense Counsel was unavailable.[152] SrA McLeod was arraigned on 24 January 2022.[153] Defense agreed to exclude the time between 13 January 2022 and 24 January 2022 for purposes of R.C.M. 707.[154]

J. Pretrial confinement day 186: The Government withdrew and dismissed three specifications.

On 23 March 2022, the Government withdrew and dismissed Specifications 3, 6, and 7 of Charge I.[155]

[149] Charge Sheet.
[150] App. Ex. XX at 470.
[151] App. Ex. XX at 470.
[152] App. Ex. XX at 52-59.
[153] R. at 1-12.
[154] App. Ex. XX at 52-58.
[155] App. Ex. XX at 59.

K. Pretrial confinement day 306: Military judge denies Defense motion to dismiss for violating SrA McLeod's speedy-trial rights under Article 10, UCMJ.

On 11 April 2022, Defense filed a motion to dismiss for violating Article 10, UCMJ.[156] On 19 April 2022, the Government files a response to Defense's motion.[157] On 21 July 2022, the military judge denied Defense's motion.[158]

L. Pretrial confinement day 338: SrA McLeod was convicted and sentenced.

SrA McLeod entered mixed pleas. (R. at 191-92.) His guilty plea inquiry was conducted on 22-23 August 2022, and his guilty pleas were accepted on 23 August 2022.[159] SrA McLeod's contested case began on 23 August 2022, and he was convicted and sentenced on 24 August 2022.[160]

## Argument

**SrA McLeod's findings and sentence should be set aside because the Government failed to act with reasonable diligence in bringing SrA McLeod to trial, violating his right to speedy trial under Article 10, UCMJ.**

### Standard of Review

Whether an accused received a speedy trial is a question of law that is

[156] App. Ex. XX.
[157] App. Ex. XXI.
[158] App. Ex. XXVI.
[159] R. at 192-300.
[160] R. at 465, 532.

reviewed *de novo*.[161] A military judge's findings of fact will be given "substantial deference" and will only be reversed if "clearly erroneous."[162] "[L]ess deference will be accorded" a military judge who "fails to place his findings and analysis on the record."[163]

## Law & Analysis

A. The military judge made a clearly erroneous finding of fact.

The military judge issued a written ruling on the speedy-trial issue.[164] And while the military judge primarily adopted the facts from the Defense's motion,[165] he erred when he found that SrA McLeod was placed in pretrial confinement on October 6, 2021.[166] The Defense and Government agree—and documentation supports—that SrA McLeod entered pretrial confinement on September 19, 2021.[167] The military judge's finding of fact is clearly erroneous.

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[161] *United States v. Cooley*, 75 M.J. 247, 259 (C.A.A.F. 2016) (quoting *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007)).
[162] *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005) (citing *United States v. Cooper*, 58 M.J. 54, 57-59 (C.A.A.F. 2003); *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999)).
[163] *United States v. Flesher*, 73 M.J. 303, 312 (C.A.A.F. 2014).
[164] App. Ex. XXIV.
[165] App. Ex. XXIV at 1.
[166] App. Ex. XXIV at 1.
[167] The Charge Sheet listed September 18, 2021 as the start of pretrial confinement, but the confinement paperwork states September 19, 2021. App. Ex. XX at 2-3, 20, 25; App. Ex. XXI at 1.

B. The speedy-trial rights afforded under Article 10, UCMJ, are broader than R.C.M. 707 and more stringent than the Sixth Amendment.

"In the military justice system, an accused's right to a speedy trial flows from various sources, including the Sixth Amendment, Article 10 of the Uniform Code of Military Justice, and R.C.M. 707 of the Manual for Courts-Martial."[168] These three sources "provide a cohesive and sometimes overlapping framework for the protection of an accused's speedy trial rights."[169]

Article 10, UCMJ, provides in pertinent part: "When any person subject to this chapter is placed in . . . confinement prior to trial, *immediate steps shall be taken* to inform him of the specific wrong of which he is accused and *to try him* or *to dismiss the charges and release him*."[170] Article 10 "imposes [on the Government] a more stringent speedy-trial standard than that of the Sixth Amendment."[171] The standard of diligence under which Article 10 violations are reviewed "is not constant motion, but reasonable diligence in bringing the charges to trial."[172]

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[168] *Cooper*, 58 M.J. at 57.
[169] *United States v. Wilder*, 75 M.J. 135 (C.A.A.F. 2016) (citing *United States v. Tippit*, 65 M.J. 69, 72-73 (C.A.A.F. 2007)).
[170] 10 U.S.C. § 810 (emphasis added).
[171] *United States v. Kossman*, 38 M.J. 258, 259 (C.M.A. 1993).
[172] *Mizgala*, 61 M.J. at 127 (quoting *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965)).

Article 10, unlike R.C.M. 707, does not limit its protection to the period extending up to arraignment, "it imposes an open-ended duty on the Government and the military judge immediately to 'try' the accused, a task that is by no means complete at arraignment."[173] Article 10 "protections continue until the actual trial commences."[174]

"A change in the speedy-trial landscape" occurs at arraignment[175]—"the power of the military judge to process the case increases, and the power of the [Government] to affect the case decreases."[176] "[O]nce an accused is arraigned, . . . [t]he military judge has the power and responsibility to force the Government to proceed with its case if justice so requires."[177] Despite this shift in authority, "the mandate of Article 10 imposing an affirmative obligation of reasonable diligence upon the Government does not change."[178]

C. The *Barker* factors weigh in favor of SrA McLeod.

The factors outlined in *Barker v. Wingo* "are an apt structure for examining the facts and circumstances surrounding an alleged Article 10 violation."[179] Courts must analyze the following four factors when determining whether the

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[173] *Cooper*, 58 M.J. at 59.
[174] *Id.* at 60.
[175] *Id.*
[176] *Doty*, 51 M.J. at 465-66.
[177] *Cooper*, 58 M.J. at 60.
[178] *Id.*
[179] *Mizgala*, 61 M.J. at 127 (citations omitted).

Government proceeded with "reasonable diligence": (1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant."[180] The Supreme Court provided the following test for prejudice:

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.[181]

The *Barker* factors are not "talismanic" and "must be considered together with such other circumstances as may be relevant."[182]

1. The length of delay was substantial.

The length of delay "is to some extent a triggering mechanism"—"unless there is a period of delay that appears, on its face, to be unreasonable under the circumstances, 'there is no necessity for inquiry into the other factors that go into the balance.'"[183] In *United States v. Cossio*, the Court of Appeals for the Armed

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[180] *Id.* at 129 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)) (additional citations omitted).
[181] *Barker*, 407 U.S. at 532.
[182] *United States v. Wilson*, 72 M.J. 347, 351 (C.A.A.F. 2013) (quoting *Barker*, 407 U.S. at 533).
[183] *Cossio*, 64 M.J. at 257 (quoting *United States v. Smith*, 94 F.3d 204, 208-09 (6th Cir. 1996) (quoting *Barker*, 407 U.S. at 530))).

Forces (CAAF) held that a 117-day period of pretrial confinement was sufficient to trigger the full *Barker* inquiry.[184]

Here, SrA McLeod was placed in pretrial confinement on September 19, 2021.[185] He was in pretrial confinement for 128 days by the time he was finally arraigned on January 24, 2022.[186] He remained in pretrial confinement for 338 days before his trial began on August 22, 2022.[187] In accordance with CAAF precedent, this length of delay is more than sufficient to trigger the full *Barker* inquiry.

2. The Government provided inadequate reasons for the substantial delay.

a. *Confinement to preferral.*

First, 62 days elapsed between the day SrA McLeod entered pretrial confinement and the preferral of charges—even though all substantive evidence had already been collected and SrA McLeod had made incriminating statements during a recorded interrogation and in a written statement.[188] AFOSI's

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[184] *Id*. *See also, United States v. Thompson*, 68 M.J. 308, 312 (C.A.A.F. 2010) (finding 145 days in pretrial confinement "is sufficient to trigger an Article 10 inquiry); *Simmons*, No. 20070486, 2009 CCA LEXIS 301 at *12 (A. Ct. Crim. App. Aug. 12, 2009) (finding 107 days in pretrial confinement was sufficient to trigger full *Barker* analysis); *Mizgala*, 61 M.J. at 123 (finding 109 days in pretrial confinement attributable to the Government was sufficient to trigger full *Barker* analysis).
[185] App. Ex. XX at 20, 25.
[186] R. at 1-12.
[187] R. at 303.
[188] App. Ex. XX at 394-407.

investigation was effectively complete when SrA McLeod entered pretrial confinement.

AFOSI casually followed-up with SRA McLeod's wife and two friends in late September and October 2021.[189] AFOSI also collected two receipts for items found in SrA McLeod's car on the day of his arrest.[190] This kind of *de minimus* investigative word does not necessitate delay.

As to the digital evidence, AFOSI had forensic professionals available to collect and forensically extract electronic devices on September 18, 2021. But for some unknown reason, AFOSI waited 21 days to send the seized electronics to DC3 for review. Even if the DC3 report was necessary, that report was completed on October 21, 2021—day 33 of pretrial confinement.[191] There were no complicating factors to justify a 62-day delay. Regardless, the Government did not wait until these devices were analyzed—they proceeded to prefer charges 32 days before the report was released.[192] Accordingly, there is no credibility to the assertion that the examination of digital evidence prevented the Government from moving forward and bringing SrA McLeod to trial. This carelessness demonstrates that the delays were not due to reasonable forensic analysis, but instead to a failure

[189] App. Ex. XX at 448-65.
[190] App. Ex. XX at 448-65.
[191] App. Ex. XX at 434-47.
[192] Charge Sheet, Nov. 19, 2021.

of the Government to promptly provide the evidence and information needed to marshal the analysis with reasonable diligence.

b. *Article 32 Report to Referral*

In the Article 32 Report, the PHO recommended the dismissal of one specification, the alteration of two others, and the addition of battery charges. In its subsequent preferral on December 22, 2021, the Government did not follow these recommendations. Instead, the Government added two specifications of attempted conspiracy and eight specifications of attempted assault.[193] Fifteen days elapsed between the PHO Report and the referral of charges on 29 December 2021. In total, SrA McLeod spent 102 days in pretrial confinement before charges were referred. One-hundred-twenty-eight days elapsed before arraignment. While Defense conceded that its availability impacted the date of arraignment by 11 days, the Government's availability of January 13, 2022 would still have resulted in an unreasonably delay of 117 days.

c. *Total time in confinement prior to being brought to trial.*

Finally, SrA McLeod's trial did not commence until August 22, 2022—after he languished in pretrial confinement for 338 days.

The Government did not move SrA McLeod's case forward with reasonable diligence. The case lagged without explanation or justification. The investigation

[193] Charge Sheet, Dec. 22, 2021.

was straightforward and essentially complete at the time of SrA McLeod's arrest and confinement—the Government had admissions, physical evidence, messages, recordings, corroborating statements, and prior investigative steps. "[F]actors such as staffing issues, responsibilities for other cases, and coordination with civilian officials reflect the realities of military criminal practice that typically can be addressed by adequate attention and supervision, consistent with the Government's Article 10 responsibility."[194] The second *Barker* factor weighs in favor of SrA McLeod.

3. SrA McLeod did not demand a speedy trial prior to filing an Article 10 motion.

SrA McLeod had not made a formal demand for speedy trial when he filed his motion to dismiss for Article 10 violations. During an Article 39 hearing, defense counsel explained that Defense thought the speedy trial request was included in a discovery request, but it was not.[195] Defense counsel elaborated, "This was an administrative error on our part."[196] But this *Barker* factor should not count against SrA McLeod.

While the Government contended their "ready date" was January 13, 2022, only 16 days after SrA McLeod was served with the referred charges, this begs the

[194] *Thompson*, 68 M.J. at 313.
[195] R. at 165.
[196] R. at 165.

question: What took so long? It is unclear what necessary investigative or procedural steps took place between imposition of pretrial confinement and arraignment to justify 128 days of delay. And it is unclear what the Government can point to, to show that a 62-day delay between pretrial confinement and preferral was warranted.

4. SrA McLeod was prejudiced by the delay.

a. *Anxiety from oppressive pretrial confinement.*

SrA McLeod's pretrial confinement became oppressive and caused above-average amounts of stress and anxiety. While in pretrial confinement, SrA McLeod was assaulted and had to deal with severe and persistent anxiety.[197] The assault involved another inmate jumping on SrA McLeod and repeatedly striking him in the head and face.[198] This goes above-and-beyond the anxiety one must feel when confronted with these kinds of charges. Additionally, other inmates had become aware of the charges SrA McLeod was facing.[199] He was left living in constant fear.

b. *Impaired defense.*

SrA McLeod's pretrial confinement restricted his ability to communicate with his Defense Counsel and assist in his own defense. While the confinement

[197] App. Ex. XX at 17.
[198] *Id.*
[199] *Id.*

facility took inbound phone call for inmates, having a client locked away in a cell makes communication difficult.[200] SrA McLeod's incarceration at the Lowndes County Jail—located more than 30 minutes away by car for local Defense Counsel—made it more difficult for Defense to prepare for SrA McLeod's court-martial.[201]

D. Conclusion.

SrA McLeod respectfully requests that this Court grant review of his case on this issue.

[200] App. Ex. XX at 17.
[201] App. Ex. XX at 17.