

21 September 2026

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

UNITED STATES,	) UNITED STATES'
<i>Appellant</i>	) BRIEF IN SUPPORT OF
	) THE CERTIFIED ISSUE
v.	)
	) Crim. App. Misc. Dkt. No. 2026-01
Staff Sergeant (E-5)	)
JENNIFER Y. GALVIN,	)
United States Air Force	) USCA Dkt. No. 26-0300/AF
<i>Appellee</i>	)

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

ISSUE CERTIFIED

**WHETHER THE AIR FORCE COURT OF
CRIMINAL APPEALS ERRED BY FINDING THAT
THE CONVENING AUTHORITY REFERRED
SPECIFICATION 1 OF THE CHARGE, A
VIOLATION OF ARTICLE 92, UCMJ, TO
APPELLEE'S COURT-MARTIAL WITHOUT
AUTHORITY, BECAUSE THE OFFICE OF
SPECIAL TRIAL COUNSEL HAD PREVIOUSLY
DEFERRED PROSECUTING THE UNDERLYING
CONDUCT AS A COVERED OFFENSE?**

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 62, UCMJ, 10 U.S.C § 862 (2024). This Court has jurisdiction to review this case under Article 67(a)(2), UCMJ, 10 U.S.C § 867(a)(2) (2024).

RELEVANT AUTHORITIES

Article 24a, UCMJ, 10 U.S.C. § 824a (2024) states in relevant part:

(c) DUTIES AND AUTHORITIES. –

(2) DETERMINATION OF COVERED OFFENSE; RELATED CHARGES. –

(A) AUTHORITY. – A special trial counsel shall have exclusive authority to determine if a reported offense is a covered offense and shall exercise authority over any such offense in accordance with this chapter. Any determination to prefer or refer charges shall not act to disqualify the special trial counsel as an accuser.

(5) DEFERRAL TO COMMANDER OR CONVENING AUTHORITY –
Deferral to commander or convening authority. If a special trial counsel exercises authority over an offense and elects not to prefer charges and specifications for such offense or, with respect to charges and specifications for such offense preferred by a person other than a special trial counsel, elects not to refer such charges and specifications, a commander or convening authority may exercise any of the authorities of such commander or convening authority under this chapter with respect to such offense, except that such commander or convening authority may not refer charges and specifications for a covered offense for trial by special or general court-martial.

Article 1(17)(A), UCMJ, 10 U.S.C. §801(17)(A) (2025), states:

(17) The term “covered offense” means—

(A) an offense under section 917a (article 117a), section 918 (article 118), section 919 (article 119), section 919a (article 119a), section 920 (article 120), section 920a (article 120a), section 920b (article 120b), section 920c (article 120c), section 925 (article 125), section 928b (article 128b), section 930 (article 130), section 932 (article 132), the standalone offense of child pornography punishable under section 934 (article 134), or the standalone offense of sexual harassment punishable under section 934 (article 134) of this title in each instance in which a formal complaint is made and such formal

complaint is substantiated in accordance with regulations prescribed by the Secretary concerned;

STATEMENT OF THE CASE AND RELEVANT FACTS

As relevant to this appeal, the Office of Special Trial Counsel (OSTC) originally exercised authority over a sexual harassment offense allegedly perpetrated by Appellee, because the allegation appeared to be a covered offense under the provisions of Article 24a, UCMJ. (Govt. Motion to Attach, dtd 26 Feb 2026, Attach 1.) A few weeks later, the OSTC deferred the case to command, as prescribed under Article 24a(c)(5). (Id. at Attach 2.) Appellee was offered nonjudicial punishment for the sexual harassment conduct but turned it down and demanded trial by court-martial. (Id. at Attach 3.) The OSTC again deferred resolution of the case to command. (Id. at Attach 4.)

The special court-martial convening authority referred one charge and two specifications against Appellee in violation of Article 92, UCMJ, 10 U.S.C. § 892 (2024). United States v. Galvin, 2026 CCA LEXIS 266 at *1. (A.F. Ct. Crim. App. 5 June 2026). Specification 1 of the Charge alleged:

In that [Appellee], United States Air Force, who knew of her duties at or near Okinawa, Japan, between on or about 1 October 2024 and on or about 30 January 2025, was derelict in the performance of those duties in that she willfully failed to refrain from harassing conduct that was sexual in nature which created an offensive environment, in violation of Department of Defense Instruction 1020.03, paragraph 1.2., as it was her duty to do.

(Charge Sheet, ROT, Vol. 1).

At trial, the defense moved to dismiss Specification 1 of The Charge claiming that it was preempted by Article 134, Sexual Harassment. 10 U.S.C. § 934 (2024). Galvin, at *1-2. The military judge granted the motion based on preemption and dismissed Specification 1 of The Charge. Id. at *2. The United States timely appealed the military judge's ruling under Article 62, UCMJ.

For the first time on appeal, Appellee challenged the jurisdiction of the court-martial on the apparent and mistaken belief that the OSTC had never been involved with the case. (App. Br. at 4-8.) Appellee asserted that there was no jurisdiction because OSTC, rather than command, *should* have exercised authority over the sexual harassment offense. (Id.) In response, the United States moved to attach several documents that demonstrated that the OSTC had initially exercised authority over the case but had then deferred the case to command. (Govt. Motion to Attach. dtd 26 Feb 2026.)

In granting the United States' motion for oral argument, AFCCA specified a different issue for argument:

WHETHER A SPECIAL TRIAL COUNSEL HAD
EXCLUSIVE AUTHORITY TO DETERMINE IF THE
REPORTED OFFENSE IS A COVERED OFFENSE
SUCH THAT DEFERRAL TO THE COMMANDER OR
CONVENING AUTHORITY PRECLUDED THE

COMMANDER OR CONVENING AUTHORITY
FROM REFERRING CHARGES AND
SPECIFICATIONS FOR A COVERED OFFENSE?

Galvin, 2026 CCA LEXIS 266 at *9.

AFCCA decided the Article 62 appeal based on the issue it specified for oral argument concerning the convening authority's authority to refer the charge and specification to a court-martial after the OSTC deferral. Id. at *15-16.

AFCCA found that even though the government had drafted the charge as a "dereliction of duty, they actually charged the covered offense of sexual harassment," and "[t]he authority to charge sexual harassment as a crime lies exclusively with the OSTC." Id. Because AFCCA found that "Specification 1 of the Charge was referred to the court-martial without authority," it denied the Government's Article 62 appeal. Id. AFCCA denied the Government's motion for reconsideration.

The Judge Advocate General timely certified this case to this Court under Article 67(a)(2), UCMJ, for review.

ARGUMENT

THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY RULING THAT THE CONVENING AUTHORITY HAD NO AUTHORITY TO REFER SPECIFICATION 1 OF THE CHARGE, A VIOLATION OF ARTICLE 92, UCMJ, TO APPELLEE’S COURT-MARTIAL.

Resolution of this issue is governed by this Court’s recent decision in United States v. Kruse, ___ M.J. ___, Dkt. No. 26-0156/MC, 2026 CAAF LEXIS 727 (C.A.A.F. 1 September 2026). In Kruse, this Court observed that nothing in Article 24a or its implementing rules “precludes a convening authority from referring to court-martial a non-covered offense for underlying conduct that the OSTC could have referred as a covered offense.” Id. at *8. This Court said that “[t]he OSTC’s deferral of action on the covered offense, coupled with the convening authority’s decision to charge the conduct under a provision of the UCMJ not considered a ‘covered offense’ under Article 1(17), UCMJ, is precisely the procedure contemplated by Congress in Article 24a(c)(5), UCMJ, and the President’s implementing rules.” Id. at *9.

Contrary to AFCCA’s analysis, it did not matter that the OSTC could have charged Appellee with sexual harassment under Article 134, UCMJ. The fact that the OSTC initially determined that the reported conduct was a covered offense does not convert the offense charged under Article 92, UCMJ, to a covered

offense. Id. at *10. In other words, the charged Article 92 offense did not count as a covered offense, even if the OSTC *could* have charged it as Article 134, sexual harassment, a covered offense. Id.

This Court summed up its holding in Kruse by saying, “if the OSTC declined to charge conduct as a covered offense, the plain language [of Article 24a] does not preclude a convening authority from charging the conduct as a non-covered offense.” Id. at *12-13. That is exactly what happened in this case. The OSTC declined to pursue a charge against Appellee for sexual harassment under Article 134, UCMJ – a covered offense. Then, the convening authority charged and referred the underlying conduct as dereliction of duty under Article 92 – a non-covered offense. The convening authority’s referral action was entirely within his authority. In light of Kruse, AFCCA erred in denying the United States’ Article 62 appeal on the ground that the convening authority in Appellee’s case lacked the authority to refer Specification 1 of the Charge to a court-martial.

CONCLUSION

AFCCA erred in denying the United States’ Article 62 appeal on jurisdictional grounds. This Court should vacate AFCCA’s decision and remand this case back to the lower court for resolution of the Article 62 appeal on the grounds originally asserted by the United States.



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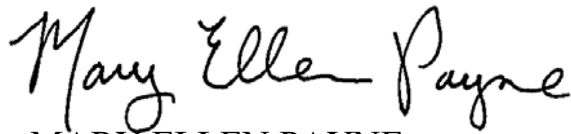
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, civilian appellate defense counsel, and the Air Force Appellate Defense Division on 21 September 2026.

A handwritten signature in black ink that reads "Mary Ellen Payne". The signature is written in a cursive, flowing style.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b)

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