IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. MARVIN B. GUZMAN Hospital Corpsman Chief Petty Officer (E-7) United States Navy, Appellant	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim. App. Dkt. No. 202200266 USCA Dkt. No. 26-0132/NA

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

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Issues Presented

I.

Whether the lower court misapplied *United States v. Sager* in its factual and legal sufficiency analysis by holding that Article 131b, UCMJ, creates a single theory of criminal liability for intent to "influence, impede, or otherwise obstruct the due administration of justice."

II.

Whether under RCM 920(f) and *United States v. Davis*, Appellant waived, or merely forfeited, instructional error when he failed to object to the Military Judge's instruction that the members could convict upon intent to "influence" or "impede," both of which were not charged.

III.

Whether Appellant's Trial Defense Counsel committed ineffective assistance of counsel by failing to object to the Military Judge's instruction that the members could convict upon intent to "influence" or "impede," both of which were not charged.

Introduction

During Appellant's oral argument at the lower court, the Chief Judge stated, "Well, you know how our Court thinks of *Mendoza*."[1] It then published an opinion that holds Article 131b creates a single theory of liability, contradicting the canon against surplusage and this Court's precedent in *United States v. Sager*, which interpreted an analogous sentence structure. This holding also contradicts the Manual for Courts-Martial (MCM) and the Army Court of Criminal Appeals (ACCA)'s decision about another article in the Code, and this Court should resolve the disparate conclusions. This case presents a crucial and unresolved question that warrants review: whether Article 131b sets forth one theory of criminal liability or three.[2]

The lower court then held that under *United States v. Davis*, Appellant waived any instructional error, even though the issue was never contemplated, discussed, or mentioned on the record. The Court should grant review to reconcile *Davis* with prior opinions of this Court and its predecessor. These opinions hold

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[1] *United States v. Guzman*, No. 202200266, slip op. (N-M. Ct. Crim. App. Dec. 19, 2025) (oral argument at 22:14); *see also United States v. Grafton*, No. 202400055, 2025 CCA LEXIS 375, at *31 (N-M Ct. Crim. App. Aug. 11, 2025) (Harrell, J., concurring and dissenting) ("*Mendoza* compels this result, though I am equally compelled to write separately to entreat our superior court to clarify its holding therein."). Judge Harrell sat on the panel for Appellant's case, participated in oral argument, and both he and the Chief Judge joined the lower court's opinion.

[2] C.A.A.F. Rule 21(b)(5)(A), (B)(i), (B)(iii), (D).

that there is *no waiver* of "essential element" instructions—even where the defense states no objection—or when instructing the members that they can convict on a crime not charged.[3]

Statement of Statutory Jurisdiction

Appellant filed a timely Notice of Appeal with the Navy-Marine Corps Court of Criminal Appeals (NMCCA). The lower court reviewed this case under Article 66(b)(1)(A), UCMJ. Appellant invokes this Court's Article 67(a)(3), UCMJ, jurisdiction.

Statement of the Case

A general court-martial with enlisted members convicted Appellant of violating Art. 92, UCMJ (violating a lawful general order), Art. 93a, UCMJ (engaging in a prohibited act with an applicant for military service), and Art. 131b, UCMJ (obstruction of justice).[4] The Military Judge conditionally dismissed Charge I and its sole specification (Art. 92), effective upon final appellate review, for unreasonable multiplication of charges.[5] Appellant elected sentencing by the Military Judge, who awarded no punishment.[6] Appellant waived his right to submit clemency matters and the Convening Authority took no action on the

[3] C.A.A.F. Rule 21(b)(5)(B)(i).
[4] R. at 783-84; Entry of Judgment (Sept. 9, 2022).
[5] R. at 790.
[6] R. at 848; Entry of Judgment.

findings or sentence.[7] The Military Judge signed the Entry of Judgment.[8] The lower court affirmed the findings and sentence.[9]

Statement of Facts

A. The Government charged Appellant with violating Article 131b "with intent to obstruct."

Appellant was a recruiter accused of having a romantic relationship with a former recruit, Ms. Hotel, in violation of UCMJ Articles 92 and 93a.[10] He was also charged with violating Article 131b for sending a text message to Ms. Hotel to "intimidate" her by threatening her civilian license as a registered nurse.[11]

Article 131b's specific intent element has three operative words, with the word "otherwise" preceding the third word: "with intent to *influence*, *impede*, or *otherwise obstruct* the due administration of justice[.]"[12] The Government charged Appellant "with intent to obstruct the due administration of justice."[13]

At trial, Appellant's defense to the Article 131b charge was that he sent the text message in response to Ms. Hotel's escalating harassment.[14] He argued the

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[7] Convening Authority Action (Aug. 8, 2022).
[8] Entry of Judgment (Sept. 9, 2022).
[9] *Guzman*, slip op. at 17.
[10] Charge Sheet.
[11] Charge Sheet.
[12] Art. 131b, UCMJ, 10 U.S.C. § 931b (2018) (emphasis added). The three operative words are "influence," "impede," and "obstruct."
[13] Charge Sheet.
[14] R. at 766-70.

message was not about, and did not reference, any potential Navy investigation.[15] Rather, he argued, the message referred to an internal affairs complaint he planned on filing with Ms. Hotel's employer, a local police department, regarding her harassment and misuse of law enforcement resources to uncover his wife's personal phone number (a complaint that he did, in fact, file).[16]

Appellant raised this argument on appeal for factual insufficiency.[17] He argued that he initiated the command investigation and that Ms. Hotel never complained or reported any relationship.[18] He argued he did not intend to obstruct an investigation he initiated, rather, his intent in sending the message was to stop Ms. Hotel's harassment.[19]

B. At trial, the words "influence" and "impede" were never used by the Government or Ms. Hotel and did not appear on the Record until the Military Judge instructed the members.

Neither the Government's opening statement nor its evidence throughout its case-in-chief used the words "influence" or "impede."[20] Rather, the focus was on

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[15] *Id*.; Pros. Ex. 9.
[16] *Id*.; R. at 632.
[17] Appellant's Br. at 12-24, Appellant's Reply at 1-7.
[18] *Id*.
[19] *Id*.
[20] The word "influence" appears seven times in the Record but is always in reference to a separate issue: it appears six times during voir dire for unrelated issues, R. at 146, 237, 283, 308, 320; and once during Ms. Hotel's testimony for an unrelated issue, R. at 358. The word "impede" does not appear at all prior to the instructions.

Appellant's alleged intent to obstruct by "threaten[ing]" Ms. Hotel by way of the text message.[21] Similarly, on cross-examination of Government witnesses, the Defense never crossed or confronted on "influence" or "impede.[22] The first time those words appear on the Record are when the Military Judge instructed on them, and then in the Government's closing argument.[23]

C. The Military Judge instructed the members that the specific intent was "impede" and that the element of the offense was "influence, impede, or otherwise obstruct."

The Military Judge's instruction refers to specific intent twice: first during the general element portion, and second during an explanation of specific intent.[24] In the first portion, the Military Judge instructed the members that they could convict Appellant on all three words in the Article 131b element: "influence, impede, or otherwise obstruct."[25] In the second, specific intent portion, the Military Judge instructed the members that the specific intent required was to "impede" the due administration of justice.[26]

There was no litigation on the record about this instruction. The Military

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[21] R. at 348.
[22] *See* note 20, *supra*.
[23] *Id*.
[24] R. at 729-30.
[25] R. at 729.
[26] R. at 730.

Judge drafted proposed instructions, and the topic never came up.[27] The Defense did not object to the instruction.[28] The Government argued all three theories in closing argument, including on its Power Point slides.[29]

D. The lower court found that Article 131b's specific intent language creates a single theory of liability and found that Appellant waived any issue regarding the instruction.

In *United States v. Sager*, this Court held that similar language in then-Article 120(d) [now Article 120(b)(2)(B)] created three separate theories of liability: "asleep, unconscious, or otherwise unaware."[30] The lower court distinguished *Sager* and held it did not apply.[31] The lower court also held that Article 131b creates a single theory of liability because "influence" and "impede" are "synonym[s]," "interchangeable," and "almost entirely overlapping terms" that "fall under the general umbrella of types of obstruction."[32] It further held that "proof of the intent to do either inherently satisfies the requisite proof of intent to do the other (and to obstruct generally)."[33] The lower court found no due process

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[27] R. at 707, 711-30.
[28] R. at 716, 723.
[29] R. at 748, 751, Appellate Exhibit LII at p. 11.
[30] *United States v. Sager*, 76 M.J. 158, 161-62 (C.A.A.F. 2017).
[31] *Guzman*, No. 202200266, slip op. at 8-10.
[32] *Guzman*, No. 202200266, slip op. at 8-10.
[33] *Id*. at 9.

violation and that any instructional error was waived, relying on *United States v. Davis*.[34]

Reasons to Grant Review

I.

The lower court's conclusion that Article 131b, UCMJ creates a single theory of liability conflicts with the plain language, *Sager*, *Mendoza*, the ACCA, and the MCM.

Article 131b's sentence structure is analogous to the statutory language in *Sager* that compelled this Court to find three theories of liability, instead of one. But the lower court concluded that Article 131b is different; that "influence" and "impede" are surplusage and that all three operative words (influence, impede, and obstruct) refer to the same theory of liability. No military court has previously addressed this issue, and this Court can, and should, settle this question.[35] Therefore, this Court should grant review.[36]

A. Article 131b is identical in structure to the statute in *Sager*, yet the lower court found that "influence" and "impede" are surplusage.

The specific intent portion of Article 131b reads:

> "with intent to influence, impede, or otherwise obstruct the due administration of justice[.]"[37]

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[34] *Id*. at 11-14.
[35] C.A.A.F. Rule 21(b)(5)(A).
[36] C.A.A.F. Rule 21(b)(5)(B)(i), (B)(iii), (D).
[37] Art. 131b, UCMJ, 10 U.S.C. § 931b (2018).

The statute in *Sager* read:

> "knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring."[38]

Both sentences involve *mens rea*: Article 131b (specific intent) and Article 120(d) (knowledge). Both involve three operative words. Both have "otherwise" preceding the third word, which this Court explained was "important to the context of the offense," because it means "unaware in a manner different from asleep and different from unconsciousness."[39]

Here, the lower court's conclusion that "influence" and "impede" are subsumed by "otherwise obstruct" conflicts with the canon against surplusage.[40] In *Sager*, this Court explained that "to accept the view that the words 'asleep, unconscious, or otherwise unaware,' create only one theory of criminality would be to find that the words 'asleep,' 'unconscious,' and 'or' are mere surplusage. This we are unwilling to do."[41] But that is precisely what the lower court has done.

The lower court held that "influence" and "impede" are subsumed by "otherwise obstruct," that they mean the same thing, and can be proven by the

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[38] *Sager*, 76 M.J. at 161-62 (quoting Article 120(d), UCMJ, 10 U.S.C. § 120(d) (2012)).
[39] *Id*. at 162.
[40] *Id*.
[41] *Id*.

same evidence.[42] In doing so, the lower court did not acknowledge or address the canon against surplusage.[43] Rather, it declared the words "interchangeable" and "synonyms."[44]

This Court's opinion in *Sager* relied heavily on the words "or otherwise" and the canon against surplusage.[45] But, while attempting to distinguish *Sager*, the lower court did not acknowledge this Court's treatment of the word "otherwise" and that canon.[46] Instead it held that the words all mean the same thing.[47] The lower court's opinion raises more questions than it answers and will lead to uncertainty in the field. Obstruction of justice is a common charge in military justice. This Court should provide clear guidance to the field and reconcile the lower court's published opinion with *Sager*.[48] It should grant review to settle the question.[49]

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[42] *Guzman*, No. 202200266, slip op. at 8-10.
[43] *Id*.
[44] *Id*. at 10. Appellant's Brief included the dictionary definitions of the three words. Appellant's Brief at 30; *Impede*, MERRIAM WEBSTER'S DICTIONARY (2025) ("to interfere with or slow the progress of"); *Influence*, MERRIAM WEBSTER'S DICTIONARY (2025) ("the power or capacity of causing an effect in direct or intangible ways"); *Obstruct*, MERRIAM WEBSTER'S DICTIONARY (2025) ("to block or close up by obstacle").
[45] *Sager*, 76 M.J. at 162.
[46] *Guzman*, No. 202200266, slip op. at 8-10.
[47] *Guzman*, No. 202200266, slip op. at 8-10.
[48] C.A.A.F. Rule 21(b)(5)(b)(i).
[49] C.A.A.F. Rule 21(b)(5)(A).

B. The lower court squarely rejects the MCM's model specification, which concurs with Appellant's view, and considers Appellant's and the President's view as "splitting hairs."

The MCM's sample specification, consistent with Appellant's and *Sager*'s interpretation, lists the three theories of intent with parenthesis, denoting a choice between them: ". . . with intent to (influence) (impede) (obstruct) the due administration of justice . . . ."[50]

Nonetheless, the lower court held that Appellant was "splitting hairs" and "endeavoring" in "Olympic-caliber mental gymnastics" to explain how all three words are different theories of intent.[51] But in so doing, the lower court necessarily holds that the President is also splitting hairs in Olympian style.[52] The President has clearly outlined these three as separate theories of liability. This Court should resolve the lower court's undoing of that portion of the MCM.[53]

The lower court instead pointed to the MCM's discussion as supporting its view, but that paragraph aligns with the President's model specification (and

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[50] MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, para. 83.e (2019) [hereinafter MCM].
[51] *Guzman*, No. 202200266, slip op. at 9.
[52] Although Appellant briefed the MCM's model specification and raised it during oral argument, the lower court declined to address the model specification in its opinion. Appellant's Br. at p. 28.
[53] C.A.A.F. Rule 21(b)(5)(D).

Appellant's view).[54] The discussion explains that "[e]xamples of obstructing justice include wrongfully influencing, intimidating, impeding, or injuring a witness[.]"[55] *Sager* itself explains why this sentence supports Appellant's view: those four examples are all different theories of obstruction of justice's intent element. Yes, "influencing" and "impeding" are two ways to obstruct justice. And "intimidating" or "injuring" are ways of "otherwise" obstructing justice, in "a manner different from" influence "and different from" impede.[56]

In fact, the Government charged Appellant with "intimidating" Ms. Hotel with an "intent to obstruct." Just as the MCM's explanation says of the word "intimidat[e]," this is an example of obstruction, and would fall under "otherwise obstruct" in the statute because it is not "influence" or "impede." And influencing, impeding, and intimidating are all different from "injuring," which would be another way of "otherwise obstruct[ing]." All of this is entirely consistent with the plain language, the MCM discussion, the MCM model specification, and *Sager*. This Court can, and should, resolve the issue and the validity of those sections of the MCM.[57]

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[54] *Guzman*, No. 202200266, slip op. at 11 (citing MCM, Pt. IV, para. 83(c) at IV-134 (2019 ed.)).
[55] *Id*.
[56] *Sager*, 76 M.J. at 162.
[57] C.A.A.F. Rule 21(b)(5)(A), (D).

C. The lower court's rationale conflicts with ACCA precedent.

The lower court's comparison of Article 131b's disjunctive intent list to Article 120(g)(2)'s disjunctive intent list directly contradicts ACCA precedent.[58] The lower court held that all three words in Article 131b are just different ways of saying the same specific intent *mens rea*.[59] In doing so, it compared Article 131b to other articles in the Code, like "aggravated and abusive sexual contact under Article 120," which requires "the intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person."[60]

But the ACCA held in *United States v. Hale* that sexual contact's disjunctive list in Article 120(g)(2) created "separate theories of specific intent."[61] There, the Government charged three theories in the alternative: (1) abuse, humiliate, harass, and degrade the victim, (2) intent to arouse and gratify his sexual desire, and (3) intent to arouse and gratify the victim's sexual desire.[62] There, the Government charged all three theories, and there was no due process concern.[63] Logically,

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[58] *United States v. Hale*, No. 20190614, 2021 CCA LEXIS 245, at *16-17 (A. Ct. Crim. App. May 19, 2021).
[59] *Guzman*, No. 202200266, slip op. at 10 (holding that the Government had to allege "the specific intent of somehow obstructing justice," and "[r]egardless of which synonym for 'obstruct' the Government alleges, the charged act and required knowledge do not change").
[60] *Id.* at 10, n.29.
[61] *Hale*, 2021 CCA LEXIS 245, at *16-17.
[62] *Id*. at *17-18.
[63] *Id*.

humiliating a victim is different from gratifying your own desire, which is also different from seeking to arouse the victim. *Hale*'s holding makes sense, and the ACCA there cited to *United States v. Williams*, which itself relied on *Sager*.[64]

The lower court holds that Article 131b's three words all mean the same thing, just like Article 120(g)(2)'s disjunctive intent list. But the ACCA held otherwise. This Court should grant review to resolve the differences between the CCAs—as now, the lower court's published opinion not only impacts Article 131b, but also Article 120(g)(2).[65]

D. The lower court's conclusion that even if Article 131b created three theories of liability, the result would not change, both misstates the law and is clearly erroneous on the facts in the Record.

The lower court concludes that even if it is incorrect on *Sager* and Article 131b, it would not matter, because this is an instructional issue and not a due process issue.[66] This is a misstatement of the law, because "convicting [the accused]" of a crime "not contained in the specification" is a "violat[ion] of [the

[64] *Id*. at *16 (citing *United States v. Williams*, 78 M.J. 543, 547 (Army Ct. Crim. App. 2018), *rev. denied*, 78 M.J. 209 (C.A.A.F. 2018)); *see also Williams*, 78 M.J. at 547 (citing *Sager*, 76 M.J. at 161-62).
[65] C.A.A.F. Rule 21(b)(5)(iii).
[66] *Guzman*, No. 202200266, slip op. at 7.

accused's] Fifth Amendment right not to be convicted of an offense different than those appearing on the charge sheet."[67]

The import of *Mendoza* here is twofold: (1) its clear distinction between different theories of criminal liability and the impacts of that on due process; and (2) the necessary conclusion that an accused cannot stand convicted of something he is not charged with.[68] But neither *Mendoza*, nor this Court's later cases interpreting it, involved the members being *instructed* on uncharged theories of liability.[69] The lower court's holding that due process is not implicated here directly contradicts this Court's precedents in *United States v. Girouard* and *United States v. McMurrin*. In those cases, this Court found that lesser-included-offense instructions cannot be used to convict individuals of crimes they were

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[67] *United States v. McMurrin*, 70 M.J. 15, 19-20 (C.A.A.F. 2011); *see also United States v. Mendoza*, 85 M.J. 213, 222 (C.A.A.F. 2014) ("But what the Government cannot do is prove [one charge] by merely establishing [another charge]."); *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011) ("the prejudice is clear—Appellant was convicted of an offense that was not an LIO of the charged offense"); *United States v. Smith*, No. NMCCA 201100594, 2012 CCA LEXIS 908, at *11 (N-M. Ct. Crim. App. Dec. 27, 2012) ("A failure to provide correct and complete instructions to the members prior to deliberation on findings carries constitutional implications, specifically if the failure amounts to a denial of due process.") (citing *United States v. Jackson*, 6 M.J. 116, 117 (C.M.A. 1979)).
[68] *Mendoza*, 85 M.J. at 221-22.
[69] *Id.*; *see United States v. Serjak*, No. 25-0120/AF, slip op. (C.A.A.F. Jan. 23, 2026); *United States v. Hennessy*, No. 25-0112/AF, slip op. (C.A.A.F. Jan. 23, 2026); *United States v. Moore*, 25-0110/AF (C.A.A.F. Jan. 23, 2026); *United States v. Casillas*, 86 M.J. 94 (2025).

never charged with, which is what happened here.[70] Standing convicted of a crime that was not charged is, and has always been, a due process problem—since well before *Mendoza*.[71]

The lower court clearly errs by stating that the instruction here "did not alter the Government's approach[,]" that the "Government did not conflate different and inconsistent theories of criminal liability," and that it only focused on the argument that Appellant "intended to obstruct justice."[72] The opposite is true. The Government conflated the three theories and argued all three, interchangeably, in its closing argument.[73] But the words "influence" and "impede" did not appear in the trial before the Military Judge's instruction.[74] The Defense did not defend against them. All three words have different definitions and they mean different things.[75] But once the judge so instructed on "influence" and "impede", the

[70] *McMurrin*, 70 M.J. at 19-20; *Girouard*, 70 M.J. at 11.
[71] *Id*.
[72] *Guzman*, No. 202200266, slip op. at 11.
[73] R. at 748, 751, Appellate Exhibit LII at p. 11.
[74] *See* note 20, *supra*.
[75] *Id.*; *Impede*, MERRIAM WEBSTER'S DICTIONARY (2025) ("to interfere with or slow the progress of"); *Influence*, MERRIAM WEBSTER'S DICTIONARY (2025) ("the power or capacity of causing an effect in direct or intangible ways"); *Obstruct*, MERRIAM WEBSTER'S DICTIONARY (2025) ("to block or close up by obstacle").

Government then hijacked those uncharged theories of liability and deployed them in argument.[76]

The Court squarely addressed this problem in *Girouard*. The lower court assumes that, even if properly instructed, the members would have convicted of only "obstruct." But assuming what the members did, or would have done, is "speculative at best."[77] To affirm and avoid a due process problem, the lower court had to assume that the members convicted on "obstruct" and that they did not convict, instead, on "influence" and "impede." The members are presumed to follow instructions—a presumption routinely wielded against appellants.[78] That presumption should hold and the lower court conflicted with *Girouard* in assuming the prejudice away.

Conclusion

This Court should grant review to reconcile the lower court's published opinion with *Sager*, the MCM, and the ACCA's decision in *Hale*—all three of which support Appellant's argument that Article 131b, UCMJ creates three theories of liability, and not one.

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[76] *See* note 70, *supra*.
[77] *Girouard*, 70 M.J. at 11-12.
[78] *See e.g.*, *United States v. Taylor*, 53 M.J. 195, 198-99 (C.A.A.F. 2000) (holding the presumption intact even where three members asked questions about an issue they were previously instructed to disregard).

II.

This Court should grant review to reconcile *Davis* with *Mitchell*, *Buchana*, *Smith*, *Girouard*, *McMurrin*, and RCM 920(f)'s plain language, all of which conflict with finding waiver of the instructional error here.

As Judge Hardy explained in his recent dissent in *United States v. Malone*, the Court's decision in *United States v. Davis* "preserved the distinction" between waiver and forfeiture.[79] *Davis* did not change the definition of forfeiture or waiver, and it did not invalidate RCM 920(f), which states in no uncertain terms that the failure to object to an instruction constitutes forfeiture.[80] Nonetheless, the lower court held that *Davis* compels finding a waiver not only here, but any time an Appellant responds "no objection" to the general trial script colloquy about instructions generally.[81]

The lower court reasons that this is precisely what this Court meant to do in *Davis*.[82] But that is not what this Court held in *Davis*, and it is not what the cases

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[79] No. 25-0140/AR, slip op. at 1 (C.A.A.F. Jan. 20, 2026) (Hardy, J., dissenting) (citing *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (other citations omitted).
[80] R.C.M. 920(f) (2019).
[81] *Guzman*, No. 202200266, slip op. at 12-14.
[82] *Id*. at 13 ("It is clear that the CAAF foresaw this very situation and intended this very result"), *id*. at 14 ("However, the import of the Benchbook was not lost on the CAAF when Davis was decided[.]").

this Court cited to in *Davis* held, either.[83] Unless and until this Court invalidates RCM 920(f), there must be *some* scenario where an appellant's failure to object to a general colloquy, where the instructional issue in question is never contemplated or discussed on the record, constitutes forfeiture (and not intentional, knowing, waiver). This is that scenario here, and the Court should grant review.[84]

A. This case presents a question about *Davis's* breadth different from the Court's recent opinion in *Malone* and the granted case of *Nelson*.

This court recently addressed whether an appellant's statement that he had "no motions" waived a motion (*Malone*), and it has also granted review to address whether an appellant's failure to object to the omission of a defense waived the defense instruction (*Nelson*).[85] This case is different and the Court should grant review here because the question requires reconciling other precedents that this Court did not address in *Malone* and does not need to address in *Nelson*.

Specifically, the question here is whether an appellant's general "no

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[83] *Compare Davis*, 79 M.J. at 331 (citing *United States v. Smith*, 2 C.M.A. 440, 442 (1953)), with *Smith*, 2 C.M.A. 442-43 ("We must make it clear, however, that this doctrine is and must be limited in view of the fundamental nature of the right under consideration. We are not to be understood as saying that mere failure to object will constitute a waiver to improper instructions.").

[84] C.A.A.F. Rule 21(b)(5)(D).

[85] *Malone*, No. 25-0140/AR, slip op. at 9-15; *United States v. Nelson*, No. 26-0059/AF, 2026 CAAF LEXIS 41, at *1 (C.A.A.F. Jan. 12, 2026) (granting review to determine whether failure to object to the omission of a reasonably raised defense constituted waiver or forfeiture).

objection" response to the general trial script colloquy about overall instructions knowingly and intelligently waived objections to the erroneous instructions on (1) the "essential elements" of the offense (the specific intent instruction here) and (2) to instructions on uncharged theories of liability (specific intent to "influence" or "impede").[86]

B. This Court should grant review to reconcile *Davis* with *Smith*, *Buchana*, and *Mitchell*—all of which compel finding forfeiture vice waiver here.

Over fifty years ago, this Court's predecessor held that it "will not hold waiver" of an instruction "where the issue concerns an essential element of the offense."[87] In *United States v. Buchana*, the CMA held that a law officer gave an erroneous instruction regarding "flight" from a scene and specific intent.[88] There, the law officer asked "counsel for either side if [they had] any objections to the instructions [he had] given or request[ed] that [he] single out any additional matters[,]" and "trial defense counsel replied in the negative."[89] This exchange is

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[86] *United States v. Mitchell*, 15 M.J. 214, 216-17 (C.M.A. 1983) (holding no waiver of "essential element" instructions, even when there is no objection); *United States v. Buchana*, 41 C.M.R. 394, 398 (1970) (same); *Girouard*, 70 M.J. at 10 (declining to find waiver even though the Defense requested the erroneous instruction); *McMurrin*, 70 M.J. at 18 ("Additionally, we find that Appellee's failure to object forfeited, rather than waived, any error," even though the Defense argued the erroneous instruction in closing argument).
[87] *Buchana*, 41 C.M.R. at 398.
[88] *Id*. at 397-98.
[89] *Id*.

remarkably similar to the trial script colloquy underpinning the *Davis* decision and this case.[90]

Similarly, in *Mitchell*, the CMA reversed where, for a solicitation charge, the instructions omitted anything "from which one could infer the necessity for a finding of specific intent."[91] The CMA noted that "no objection was made to the instruction at trial," but explained that "there is no waiver of a defect relative to an essential element of the offense."[92]

Notably, the CMA in *Buchana* explained how, and why, a defense counsel may miss an instructional error, and why this weighed against finding waiver. It held: "subtle analysis is required to judge the potential prejudicial impact of an erroneous instruction," and "for this reason, the failure of the trial defense counsel to object promptly at trial is less significant here than in the case of an inflammatory argument since with the instructions on inferences the prejudice may not occur until the court-martial has retired to deliberate on the findings."[93]

This Court did not cite to *Buchana* or *Mitchell* in *Davis*, and it should grant review to clarify whether it has overturned them.[94] Notably, though, it did cite to

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[90] *Davis*, 79 M.J. at 330.
[91] *Mitchell*, 15 M.J. at 216-217.
[92] *Id*. (citing *Buchana*, 41 C.M.R. 394; *United States v. Gilbert*, 37 C.M.R. 66 (C.M.A. 1966); *United States v. Gaiter*, 1 M.J. 54 (C.M.A. 1975)).
[93] *Buchana*, 41 C.M.R. at 398.
[94] C.A.A.F. Rule 21(b)(5)(A).

United States v. Smith, a 1953 CMA case—but in *Smith*, the instructional issue was *specifically* mentioned on the record *by the Defense*.[95] The CMA made clear: "We are not to be understood as saying that mere failure to object will constitute a waiver to improper instructions."[96] *Smith* squarely rejected the proposition that the lower court now holds *Davis* stands for: a mere failure to object constitutes waiver of any issues with any instruction. Rather, the *Smith* Court only regarded a situation "where defense clearly and unequivocally assents[.]"[97]

Here, a general "no objection" statement to an issue that was never contemplated or discussed, let alone clearly and unequivocally assented to, was held to constitute a waiver. And it was for an "essential element," namely specific intent (where the Military Judge twice erroneously instructed: first by listing all three theories for the element, and then by listing a wrong theory for specific intent).[98] If this is waiver, then RCM 920(f) is invalidated, and there is *no scenario* where counsel stating "no objection" to a standard colloquy would constitute forfeiture. But the President has defined it as forfeiture.

That is a far broader proposition than this Court held in *Davis*, and it

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[95] *Compare Davis*, 79 M.J. at 331 (citing *Smith*, 9 C.M.R. at 72) with *Smith*, 9 C.M.R. at 441 ("During the course of his closing argument, defense counsel spelled out in detail the constituent elements of larceny[.]").
[96] *Smith*, 9 C.M.R. at 72.
[97] *Id*.
[98] R. at 729-30.

conflicts with what its predecessor held in *Buchana*, *Mitchell*, *Smith*, the latter of which the Court cited to in *Davis*. Notably, federal courts disagree with the concept that "the mere failure to object to [an error], even when the party admits there is no objection" constitutes waiver as opposed to forfeiture.[99] This Court should grant review to reconcile *Davis* with those cases.[100]

C. The more applicable cases to Appellant's are the "LIO" cases of *Girouard* and *McMurrin*, which compel a finding of no waiver.

The most comparable cases to Appellant's are actually the pre-*Davis* cases of *Giroud* and *McMurrin*—both of which held there was no waiver, and both of which included far more "knowing" and "intelligent" waivers than here.[101] There, both cases involved the members being instructed on the LIO of negligent homicide, when it was not a proper LIO (in *Girouard* to murder, and in *McMurrin* to involuntary manslaughter).[102]

In *Girouard*, the Defense actually *requested* the instruction, and this Court still declined to find waiver, pointing out the military judge's *sua sponte* duty to

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[99] *United States v. Fowler*, 819 F.3d 298, 306 (6th Cir. 2016) (citation omitted); *see also Neder v. United States*, 527 U.S. 1, 9 (1999) (explaining that failure to object to incorrect instructions at trial is reviewed for "plain error") (citing *Johnson v. United States*, 520 U.S. 461, 468-69 (1997)).
[100] C.A.A.F. Rule 21(b)(5)(A), (B)(i).
[101] *Girouard*, 70 M.J. at 10-11; *McMurrin*, 70 M.J. at 18.
[102] *Id*.

instruct the court.[103] Similarly, in *McMurrin*, the Court declined to find waiver, even where the defense argued against negligent homicide in closing.[104]

Here, the legal error is essentially the same. The Military Judge instructed the members that they could convict on a different criminal theory than the one that was charged: specific intent to "influence" or "impede" as opposed to "obstruct." Like the LIO cases, this instructional issue directly impacts Fifth and Sixth Amendment rights, as opposed to ancillary instructions about evidentiary issues or defenses.[105] This Court should grant review to square the waiver issue here with the contrary holdings in *Girouard* and *McMurrin*. Neither *Davis*, nor the Court's recent opinions applying it, nor *Malone*, nor *Nelson* address the issue of instructions on uncharged theories of liability.[106] Only *Girouard* and *McMurrin* addressed that—and they found no waiver.

The President's 2023 amendment to the RCM, adding RCM 920(g), is particularly persuasive. There, post-*Davis*, the President made clear that a LIO instruction is only waived after "receiving applicable notification of those [LIOs]

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[103] *Girouard*, 70 M.J. at 11 (the Court also pointed to changes in the law that the defense at trial would not have been able to know at the time).
[104] *McMurrin*, 70 M.J. at 17-18.
[105] *Girouard*, 70 M.J. at 11.
[106] See *Malone*, No. 25-0140/AR, slip op.; *Nelson*, 2026 CAAF LEXIS 41; *United States v. Rich*, 79 M.J. 472, 477 (C.A.A.F. 2020); *United States v. Wilson*, 84 M.J. 383, 396 n.10 (C.A.A.F. 2024); *Davis*, 79 M.J. at 330;.

of which an accused may be convicted."[107] Then, "an accused must affirmatively acknowledge that the accused understands the rights involved and affirmatively waive the instruction on the record. The accused's waiver must be made freely, knowingly, and intelligently."[108] When analyzed in conjunction with RCM 920(f)'s plain language that "[f]ailure to object to an instruction . . . forfeits the objection[,]" RCM 920(g) reflects the importance of *Buchana*, *Mitchell*, *Girouard*, and *McMurrin*.[109] Before an accused is convicted of something they are not charged with—the law requires an actual, affirmative, knowing waiver. It requires more than a general "no objection" answer, where the Record contains no indication that anyone in the courtroom, let alone the accused, contemplated the uncharged theory of liability.

D. Appellant would prevail under plain error and demonstrate prejudice.

Under a plain error analysis, the Military Judge's instructions were clear and obvious error: Article 131b's specific intent element creates three theories of liability, and the Military Judge instructed on two that were not charged.[110]

As in *Girouard*,

> [H]aving fulfilled the first two plain error prongs, the only question that remains is whether Appellant suffered prejudice to a substantial right.

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[107] MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. II, R.C.M. 920(g) (2024).
[108] *Id*.
[109] R.C.M. 920(f) (2019), R.C.M. 920(g) (2024).
[110] Section I, *supra*.

> The rights at issue in this context are substantial, given that they are rooted in both the Fifth and Sixth Amendments. And under the facts of this case, the prejudice is clear—Appellant was convicted of an offense that was not [on the charge sheet]. Appellant did not agree to, and the military judge did not, amend the charge or specification.[111]

The lower court offers that Appellant's defense would not have changed if he were also charged with "influence" and "impede," and that the result would have been the same if the Military Judge had correctly instructed the panel.[112] First, this presumes the lower court is correct that Article 131b creates a single theory of liability—if the Court agrees with Appellant on *Sager*'s applicability, then the lower court's due process and prejudice conclusions fall apart. The words mean different things, and slowing (impede) is different than changing (influence), which are both different from blocking (obstruct).

Second, this analysis conflicts with *Girouard's* and *McMurrin's* prejudice holdings. In *Girouard*, the defense was that the appellant there was not involved in the death at all—only in the coverup.[113] This would have been a defense to both specific intent *and* negligent homicide—he contested the act itself. The Court still

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[111] *Girouard*, 70 M.J. at 11.
[112] *Guzman*, No. 202200266, slip op. at 10 (holding the three words are synonyms and interchangeable); *id*. at 11-12 (holding there was no due process violation); *id*. at 16 (holding there would have been no prejudice under ineffective assistance of counsel even if the counsel had objected to the instruction).
[113] *Girouard*, 70 M.J. at 11.

found prejudice.[114] Similarly, in *McMurrin*, the defense was that the appellant had no legal duty and his actions were not the proximate cause of the death.[115] These were defenses to both involuntary manslaughter *and* negligent homicide and the defense specifically argued them as such in closing.[116] The Court still found prejudice.[117] The rationale was clear in both cases: the appellants were not charged with the offenses of which they were convicted, the specifications were not amended in accordance with RCM 603, and they did not defend themselves on the theory that they were not guilty of the charged offense but guilty of the uncharged offense.[118]

These lower court's holdings on due process and prejudice cannot square with these opinions. Appellant directly contested the essential element on which the members were erroneously instructed; yet they were told they could convict

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[114] *Id*.
[115] *McMurrin*, 70 M.J. at 17 ("the defense's theory of the case was the under either involuntary manslaughter or negligent homicide, Appellee was not guilty because the Government failed to allege or prove that Appellee owed MMFR Stephens a legal duty," "defense counsel argued . . . he was not the proximate cause [of the death] and, 'as such. . . that contributory [sic] negligence appropriate for [involuntary manslaughter and negligent homicide], is not present in this case'").
[116] *Id*.
[117] *Id*. at 18-19.
[118] *Id*. at 19-20; *Girouard*, 70 M.J. at 11-12.

him on different theories of liability.[119] As in *Girouard*, any "assumption" that the members did not convict him on these uncharged theories, or that the result would have been the same if properly instructed, "is speculative at best," and would require ignoring the presumption that the members follow instructions. [120]

Conclusion

This Court should grant review to reconcile *Davis* with prior case law holding that there is not waiver of "essential element" instructions with a general "no objection" statement, and to reconcile it with the LIO cases finding no waiver, and due process violations, where the members were instructed they could convict on an offense not charged.

[119] *See United States v. Payne*, 73 M.J. 19, 25-26 (C.A.A.F. 2014) (looking to whether the defense contested the element on which there was an erroneous instruction, and the strength of the evidence, to determine prejudice).
[120] *Girouard*, 70 M.J. at 11-12.

III.

This Court should grant review to make clear that when trial defense counsel fail to object to instructions based on a legal theory for which their client was not charged, they commit ineffective assistance of counsel, thereby compromising the accused's right to a fair trial.

In *Malone*, this Court viewed the appellant's failure to raise ineffective assistance of counsel as persuasive regarding his knowing and intelligent waiver of a motion at trial.[121] Here, Appellant raised ineffective assistance of counsel and argued that his counsel was deficient for failing to object to a plainly erroneous instruction.[122]

Appellant recognizes that *Davis*, and cases like it, encourage timely objections at the trial level to preserve issues. As the CMA said in *Smith* in 1953, courts-martial should not "become a game where the sly defense counsel can acquiesce in erroneous instructions merely to build a record for obtaining reversal on appeal."[123] But as the Court also said in *Smith*, "[c]omplete, correct instructions on the elements of the offenses charged are a fundamental and vital right, absolutely necessary to the fair dispensation of justice in court-martial trials."[124]

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[121] *Malone*, No. 25-0140, slip op. at 10.
[122] Appellant's Br. at 44-47.
[123] *Smith*, 9 C.M.R. at 72.
[124] *Id*.

There is no sly game here, and what happened in this trial is immediately apparent from the Record. Everyone, to include defense counsel and the Military Judge, relied on an incorrect Benchbook guide, and did not catch the erroneous instruction. The failure of defense counsel to remain cognizant of the specific charges against their client constitutes ineffective assistance. This core duty is not merely administrative; it is a cornerstone of a competent defense. The danger of ignoring this duty is particularly acute when, as here, the Government invites the members to convict on uncharged theories of liability, leaving the accused undefended against claims he was never formally noticed to defend.

For all the reasons explained above in the due process and prejudice analysis, the lower court's conclusion that this error did not matter, and would not have changed anything, conflicts with cases of this Court. It conflicts with *Girouard*'s and *McMurrin*'s prejudice analysis and it conflicts with their holdings that guessing what the members would or would not have done if properly instructed is speculation at best.

The lower court's analysis relies on ignoring the presumption that the members follow instructions. Its characterization of the trial is plainly incorrect. The record shows the Government shifted its argument only after the Military Judge gave the flawed instruction. Before that point, the prosecution had failed to introduce any evidence of intent to "influence" or "impede." The irony here is

stark: the very presumption that members follow instructions—a presumption an appellant can almost never defeat—is what proves the prejudice. The members did exactly as they were instructed, and in doing so, convicted the Appellant based on theories he was never charged with or on notice to defend against.

Conclusion

The Court should grant review to make clear that, if *Davis* has truly invalidated RCM 920(f) and there is no forfeiture of instructional issues and *only* waiver, then defense counsel's failure to object to instructions on uncharged theories of liability is ineffective assistance of counsel that prejudices the appellant. That is a question this Court has not, but should, settle—particularly if *Davis* is now held to eliminate forfeiture of instructional errors, contrary to the RCM.[125]

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[125] C.A.A.F. Rule 21(b)(5)(A).

Appendix

A. *United States v. Guzman*, No. 202200266, slip op. (N-M. Ct. Crim. App. Dec. 19, 2025) (unpublished).

Certificate of Compliance

1. This brief complies with the type-volume limitations of Rule 21(b) because it contains 6,820 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in 14-point, Times New Roman font.

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Certificate of Filing and Service

I certify that I delivered the foregoing to the Court and opposing counsel on March 6, 2026.

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United States Navy–Marine Corps Court of Criminal Appeals

Before
DALY, HARRELL, and KORN
Appellate Military Judges

UNITED STATES
Appellee

v.

Marvin B. GUZMAN
Chief Hospital Corpsman (E-7), U.S. Navy
Appellant

No. 202200266

Decided: 19 December 2025

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judges:
Ryan J. Stormer (Arraignment)
Andrea K. Lockhart (Trial)

Sentence adjudged 24 June 2022 by a general court-martial tried at Naval Base San Diego, California. Sentence in the Entry of Judgment: no punishment.

For Appellant:
Lieutenant Benjamin M. Cook, JAGC, USN

For Appellee:
Captain Jacob R. Carmin, USMC (argued and on brief)
Lieutenant K. Matthew Parker, JAGC, USN (on brief)

Judge KORN delivered the opinion of the Court, in which Chief Judge DALY and Senior Judge HARRELL joined.

PUBLISHED OPINION OF THE COURT

KORN, Judge:

A general court-martial composed of members with enlisted representation convicted Appellant of one specification of violation of a lawful general order, one specification of abuse of position as a military recruiter, and one specification of obstructing justice, in violation of Articles 92, 93a, and 131b, Uniform Code of Military Justice (UCMJ).[1] After findings, the military judge conditionally dismissed the Article 92 charge due to an unreasonable multiplication of charges and subsequently sentenced Appellant to no punishment.

Appellant raises four assignments of error (AOE):

> **I. Is the evidence supporting charge III factually insufficient to sustain a conviction for obstruction of justice where the accused did not have an intent to obstruct an ongoing investigation?**
>
> **II. Is Appellant's conviction for obstruction of justice legally insufficient where the government argued uncharged theories of criminal liability and the military judge instructed the members on those uncharged theories?**
>
> **III. Was the Defense's failure to request the appropriate instruction for the intent element of obstruction of justice forfeiture, and if so, was the military judge's failure to provide the proper instruction plain error?**
>
> **IV. If this Court finds waiver, was trial defense counsel ineffective for failing to request the appropriate instruction for obstruction of justice's intent element?**

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[1] 10 U.S.C. §§ 892, 893a, 931b.

I. BACKGROUND

Appellant was a Hospital Corpsman by rate and a Navy recruiter by assignment. While serving as a recruiter, he engaged in a romantic and sexual relationship with Ms. Hotel, a registered nurse he was actively assisting through the process of pursuing a Navy commission. Their relationship ultimately ended disharmoniously, with Ms. Hotel accusing Appellant of abandoning her while she was pregnant with his child, and Appellant reporting to his command that Ms. Hotel was harassing him and falsely claiming that he was the father of her unborn child.

Unsurprisingly, once Appellant reported that an applicant for Naval service was claiming she was pregnant with his child, his command opened an investigation into Appellant's behavior. The investigating officer (IO) attempted to interview Ms. Hotel, but she repeatedly told the IO she was not ready to be interviewed. While the interview was pending, Appellant communicated with Ms. Hotel, imploring her not to speak with the IO and indicating his willingness to support her and their unborn child.

Ms. Hotel, unwilling to forgive Appellant for failing to support her when she was hospitalized with pregnancy-related complications, ultimately informed him of her decision to meet with the IO. Appellant responded with a lengthy text message (hereinafter "the 1 August text message") that included the language which forms the basis of his conviction for obstructing justice. In the text message, Appellant stated that he intended to report Ms. Hotel to her employer (the San Diego County Sheriff's Office) for improperly accessing his wife's contact information as part of her continued harassment of Appellant, and for violating privacy regulations by improperly obtaining medical information about him. Despite these threats, Ms. Hotel eventually spoke with the IO, and Appellant carried through on his threat to report her to her employer.

The Government charged Appellant with a violation of a lawful order for wrongfully engaging in a personal, intimate or sexual relationship with Ms. Hotel; abuse of his position as a military recruiter for engaging in sexual activity with Ms. Hotel; and, relevant to this appeal, obstructing justice for wrongfully "intimidat[ing] an applicant for military service . . . by telling her that he 'will make sure you loose [sic] your license as an RN and job,' or words to that effect, with the intent to obstruct the due administration of justice. . . ."[2] When instructing the members prior to deliberations on the obstructing justice charge, the military judge said that:

[2] Charge sheet.

> [Y]ou must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:
>
> . . . .
>
> That [sending the 1 August text message] was done with the intent to influence, impede or otherwise obstruct the due administration of justice.
>
> . . . .
>
> While the prosecution is required to prove beyond a reasonable doubt that [Appellant had] the specific intent to impede the due administration of justice, there need not be an actual obstruction of justice.[3]

Before instructing the members, the military judge asked Appellant if he objected to this instruction or desired additional instructions, and defense counsel responded in the negative to both questions.

II. DISCUSSION

A. The evidence supporting Charge III is factually sufficient to sustain a conviction for obstructing justice.

1. Standard of Review

For cases involving crimes that occurred prior to 2021, we review factual sufficiency de novo.[4] The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," we are convinced of an appellant's guilt beyond a reasonable doubt.[5] We do not presume either innocence or guilt, and instead take "a fresh, impartial look at the evidence" to independently determine whether each element has been satisfied with proof beyond a reasonable

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[3] R. at 729-30.

[4] Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2019); *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003). Although Appellant sent the text message that formed the basis for his conviction for obstructing justice on 1 August 2021, his convictions for violation of a lawful general order and abuse of position as a military recruiter involved date ranges spanning from July 2020 to August 2021. Therefore, we review all of his convictions under the prior version of Article 66.

[5] *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *see also* Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2019) ("In considering the record, the Court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.").

doubt.[6] Proof beyond a reasonable doubt "does not mean the evidence must be free from conflict."[7]

2. Analysis

In order to prove Appellant guilty of obstructing justice, the Government had to prove beyond a reasonable doubt that on or about 1 August 2021: (1) Appellant wrongfully intimidated Ms. Hotel, an applicant for military service, by telling her that he "will make sure you loose [sic] your license as an RN and job," or words to that effect; (2) Appellant did so in the case of a certain person against whom he had reason to believe there were or would be criminal or disciplinary proceedings pending; and (3) the act was done with the intent to obstruct the due administration of justice.[8]

It is undisputed that Appellant sent the 1 August text message to Ms. Hotel threatening to report her to her employer. It is likewise undisputed that at the time he sent the 1 August text message, he was aware that he was under investigation by his command due to his relationship with Ms. Hotel. Appellant argues that his conviction for obstructing justice is factually insufficient because his intent in sending the 1 August text message was to stop Ms. Hotel's harassment, not to prevent her from participating in the command investigation.[9] We disagree and find that Appellant's intent in sending the 1 August text message was to obstruct the due administration of justice by preventing Ms. Hotel from speaking with the IO.

Intent can be proven by either direct or circumstantial evidence,[10] and the circumstantial evidence of Appellant's intent was significant. He sent messages to Ms. Hotel guaranteeing that he would love and support their unborn child and describing the consequences his family would face if she participated in the investigation. And Ms. Hotel testified that Appellant begged her not to speak with the IO. All of these communications took place in the final few days of July, and they all serve as compelling circumstantial evidence that his intent in sending the 1 August text message was to obstruct her from participating in

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[6] *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

[7] *United States v. Rankin*, 63 M.J. 552, 557 (N-M. Ct. Crim. App. 2006) (internal citation omitted).

[8] *See Manual for Courts-Martial, United States* (2019 ed.), pt. IV, para. 83(b); Charge Sheet.

[9] Appellant's Brief at 12.

[10] *See, e.g., United States v. Kearns*, 73 M.J. 177, 182 (C.A.A.F. 2014); *United States v. Jones*, 32 M.J. 430, 432 (C.M.A. 1991).

the investigation. We are therefore convinced beyond a reasonable doubt that Appellant was guilty of obstructing justice.

B. Appellant's conviction for obstructing justice is legally sufficient and did not constitute a denial of due process.

1. Standard of Review

To determine legal sufficiency, we ask "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt."[11] The standard for legal sufficiency therefore "involves a very low threshold to sustain a conviction."[12]

2. Analysis

As we found in Section A, the Government clearly established all the elements of obstructing justice. The evidence demonstrated that Appellant sent the 1 August text message to Ms. Hotel with full awareness of the fact that his command was investigating him for engaging in an inappropriate relationship with Ms. Hotel. The circumstantial evidence of his intent was significant, as he had previously spoken to her directly and sent her multiple messages attempting to dissuade her from participating in the investigation. Considering the evidence presented at trial in the light most favorable to the prosecution, a reasonable factfinder could have found all the elements beyond a reasonable doubt. The evidence is therefore legally sufficient.

a. United States v. Mendoza

Appellant asks us to find the conviction for obstructing justice legally insufficient because "a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process."[13] We decline to do so, because that is not what occurred in this case. Appellant relies on the Court of Appeals for the Armed Forces' (CAAF) decision in *United States v. Mendoza* to argue that we should find legal insufficiency because the Government charged one offense under one factual theory of liability and then argued a different offense and a different factual theory at trial.[14] We disagree with Appellant's summation of

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[11] *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia,* 443 U.S. 307, 319 (1979)).

[12] *United States v. Smith*, 83 M.J. 350, 359 (C.A.A.F. 2023) (quoting *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019)).

[13] Appellant's Brief at 26 (quoting *Jackson*, 443 U.S. at 314).

[14] Appellant's Brief at 31.

what transpired at trial. The record clearly demonstrates that the Government charged Appellant with sending the 1 August text message with the intent to obstruct justice, then argued and proved at trial that Appellant had the intent to obstruct justice. This is wholly unlike what happened in *Mendoza*, where the Government charged the accused with sexual assault without consent, but instead of proving that the victim did not consent to the sexual act, relied on evidence that the victim was incapable of consenting to the sexual act due to her high level of intoxication.[15] In that case, the CAAF determined that conflating "two different and inconsistent theories of criminal liability" raised "significant due process concerns."[16]

The *Mendoza* Court was particularly troubled that proving a lack of consent by demonstrating that the victim was incapable of consenting "would allow the Government to circumvent the mens rea requirement that Congress specifically added to the offense of sexual assault of a victim who is incapable of consenting."[17] That is because under a charge of sexual assault of a victim who is asleep, unconscious, or otherwise unaware, "the Government must prove not only that the victim was incapable of consenting *but also* that the victim's condition was known or reasonably should have been known by the accused."[18] No similar issue existed in Appellant's case. Even if the intent to "influence" or "impede" are different and inconsistent theories of criminal liability than the intent to "otherwise obstruct," the inclusion of those terms in the military judge's instructions and trial counsel's argument in no way modified the mens rea requirement (specific intent) in Appellant's case. Regardless of the inclusion of the terms "influence" and "impede," the charged offense remained a specific intent crime, and the Government still had to prove (and did so effectively) Appellant's specific intent to obstruct justice.

Even if the military judge's inclusion of instructions on the intent to influence and impede created a similar due process issue to that in *Mendoza*, we can still affirm the findings as legally sufficient. That is because in *Mendoza*, the CAAF did not prohibit service courts of criminal appeals (CCAs) from evaluating the legal sufficiency of convictions in cases where the members were provided an alternate theory of guilt than the one charged. Instead, the CAAF determined that, when situations arise where verdicts could potentially be

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[15] 85 M.J. 213 (C.A.A.F. 2024).

[16] *Id.* at 215.

[17] *Id*. at 220.

[18] *Id*. (emphasis in original).

based on *uncharged* theories, CCAs must specify that the basis of any affirmance on legal sufficiency grounds is on the *charged* theory.[19] We have done so here. The Government charged Appellant with sending a text message with the intent to obstruct justice. The Government put on evidence to prove that Appellant intended to obstruct justice with that text message, and we find that the evidence that Appellant obstructed justice was legally sufficient.

b. United States v. Sager

Appellant also relies on the CAAF's decision in *United States v. Sager* to argue that "influence, impede, or otherwise obstruct" are three different and inconsistent theories of criminal liability.[20] We disagree and conclude that they are not. In *Sager*, the accused was charged with abusive sexual contact under Article 120(d), for committing sexual contact while the victim was "asleep, unconscious, or otherwise unaware that the sexual contact was occurring."[21] The CAAF determined that "asleep, unconscious, or otherwise unaware" were three distinct theories of criminality, and "therefore [held] that the CCA erred in its interpretation of Article 120(d) when it 'conclude[d] that asleep or unconscious are examples of how an individual may be "otherwise unaware" and are not alternate theories of criminal liability.' "[22] While we are bound to follow rulings of our superior court, Appellant's case involves entirely different language from an entirely different punitive article, and *Sager*, with its limited holding regarding Article 120(d), is therefore not controlling here.

Although the phrasing of the intent element of obstructing justice, listing three terms in the disjunctive and including the term "otherwise," is syntactically similar to *Sager*, the similarity ends there. That is because for Appellant to be correct, and for "influence," "impede," and "otherwise obstruct" to be different and inconsistent terms, we would have to conclude that Congress intended to distinguish between the almost entirely overlapping terms of "influence the due administration of justice" and "impede the due administration of

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[19] "The ACCA's opinion affirming Appellant's conviction did not specify whether the ACCA found that [the victim] was capable of consenting, stating only that the evidence established that Appellant engaged in sexual intercourse with a victim whom he knew to be 'highly intoxicated.' " *Mendoza*, 85 M.J. at 222 (citing *U.S. v. Mendoza*, No. 20210647, 2023 CCA LEXIS 198, at *10 (Army Ct. Crim. App. May 8, 2023) (unpublished)).

[20] Appellant's Brief at 30.

[21] 76 M.J. 158 (C.A.A.F. 2017).

[22] *Id*. at 162. (quoting *United States v. Sager*, No. 201400356, 2015 CCA LEXIS 571, at *9 (N-M. Ct. Crim. App. Dec. 29, 2015) (unpublished)).

justice." We would additionally have to conclude that Congress intended to further distinguish those two terms from every other type of obstructing the due administration of justice. Although we recognize that we "must presume that a legislature says in a statute what it means and means in a statute what it says there,"[23] we conclude that the result advocated by Appellant is not the mandated outcome. For as the CAAF made clear in *Sager*, we must "interpret words and phrases used in the UCMJ by examining the ordinary meaning of the language, the context in which the language is used, and the broader statutory context."[24] In so doing, it is clear that these terms, unlike the terms in *Sager*, are properly viewed as creating a single theory of criminal liability.[25]

By any reasonable definition, "influence" and "impede" not only fall under the general umbrella of types of obstruction, but proof of the intent to do either inherently satisfies the requisite proof of intent to do the other (and to obstruct generally). This is unlike the clear and understandable distinctions that exist between the terms "asleep, unconscious, or otherwise unaware." Asleep and unconscious are inherently different states of (un)awareness. They have different physiological causes, and, most importantly, the distinction between them is widely understood. This is not the case with the language at issue here, which is similar to the *Sager* language only in the use of the disjunctive "or" and the term "otherwise." To even endeavor to invent a hypothetical situation where one can impede the due administration of justice without influencing the due administration of justice, or vice versa, requires Olympic-caliber mental gymnastics that we cannot expect of trial practitioners, military judges, or members.[26]

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[23] *Id.* at 161 (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)).

[24] *Id*. at 161 (quoting *United States v. Pease*, 75 M.J. 180, 184 (C.A.A.F. 2016)).

[25] To the extent that the text of Article 131b is ambiguous, we may look to its heading, "Obstructing justice," as a "tool[] available for the resolution of a doubt." *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R.*, 331 U.S. 519, 529 (1947). Doing so reinforces our conclusion that influencing and impeding the due administration of justice are not separate from, but merely examples of, obstructing the due administration of justice. We also note that Article 120(b)(2), as incorporated into Article 120(d) and analyzed in *Sager*, has no similar contextual clue, further distancing Appellant's case from the holding in that case.

[26] Appellant's proffered explanation of how one intent can exist without the others demonstrates the significant hair-splitting required in such an undertaking, and in fact better illustrates that these terms are interchangeable as opposed to distinct:

The *Sager* Court quoted the Supreme Court of the United States in *Reiter v. Sonotone Corp.*, which said that "[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise."[27] The context clearly dictates otherwise in Appellant's case. A significant difference exists between the purpose of the clauses at issue in the Article 131b charge in Appellant's case and the Article 120(d) charge in *Sager*. Here, the clauses go to an accused's intent, while in Article 120(d) they go to both an accused's knowledge and to the charged act itself.[28] This is not a distinction without a difference. To charge obstructing justice under Article 131b, the Government must allege a wrongful act (in Appellant's case, intimidating Ms. Hotel by sending her a threatening text message) with the specific intent of somehow obstructing justice. Regardless of which synonym for "obstruct" the Government alleges, the charged act and required knowledge do not change. There is therefore no conceivable way that an accused could be disadvantaged by the Government proving that the accused's intent was any of the interchangeable words that fall squarely under the definition of obstruction, as the accused would always be on proper notice of what the Government must prove.[29] This differs considerably from *Sager*, where the disjunctive phrase dealt with the charged act and knowledge, thereby creating potentially impermissible confusion about what the Government had to prove.

> One can impede without influencing (i.e., slowing the progress of when someone talks to an investigator without changing what she ultimately tells the investigator). One can influence without impeding (i.e., changing what someone tells an investigator without causing a delay). And one can impede or influence without obstructing (delaying or changing what she tells an investigator without blocking her from speaking to the investigator).

Appellant's Brief at 30.

[27] 76 M.J. at 161-62 (quoting 442 U.S. 330, 339 (1979)).

[28] Article 120(d) includes the clause at issue in both element (ii) ("that the other person was asleep, unconscious, or otherwise unaware that the sexual contact was occurring") and element (iii) ("that the accused knew or reasonably should have known that the other person was asleep, unconscious, or otherwise unaware that the sexual contact was occurring").

[29] This interpretation is consistent with how disjunctives are applied in intent elements in other punitive articles. For example, unpremeditated murder under Article 118 requires the intent to kill or inflict great bodily harm; aggravated and abusive sexual contact under Article 120 require the intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

The explanation section of Article 131b in the Manual for Courts-Martial indicates that the President viewed the terms in question interchangeably, much as we do: "Examples of obstruction of justice include wrongfully influencing, intimidating, impeding, or injuring a witness . . . or a party. . . ."[30] The fact that the examples listed include "influencing" and "impeding," along with two other examples, all of which fit neatly and similarly under the general obstruction umbrella, indicates that reading "influence" and "impede" as distinct from, and inconsistent with, "otherwise obstruct," is to put form so far before substance as to produce an untenable result. For although an accused would be prejudiced if the government were to charge him with committing wrongful sexual contact while the victim was asleep, but then prove that the victim was in fact unconscious, no such prejudice would or could occur with an obstructing justice charge. Furthermore, we disagree with Appellant's contention that at trial "Appellant tailored his defense to rebut the charged allegation of intent to obstruct," as opposed to impede or influence.[31] Instead, Appellant argued at trial that his sole motivation in texting Ms. Hotel was to stop her harassment of him and his wife, not to prevent her from participating in the investigation.[32]

Even if Appellant's argument is correct, and the clause at issue in this case must be read to create three distinct theories of criminal intent, the result would not change. That is because, unlike in *Sager*, the Government in Appellant's case charged a single intent (obstruction) and proved that intent. The Government charged Appellant with sending a text message to Ms. Hotel with the intent to obstruct justice, and the Government put on evidence of Appellant's intent to obstruct justice. This is not a situation, like in *Sager*, where Defense was unsure what the Government's theory was, or was unable to properly prepare for trial based on multiple charged theories of criminality. Appellant correctly points out that the military judge included the terms "influence" and "impede" in her instructions on intent. But that created an instructional issue (which Appellant raises in AOE III and we address below), not a due process issue. Furthermore, this instruction did not alter the Government's approach. The Government did not conflate different and inconsistent theories of criminal liability. The Government charged and proved that Appellant intended to obstruct justice when he tried to convince Ms. Hotel not to participate in the command investigation into his misconduct. The military judge's inclusion of these additional terms did not impact the Government's case or play any role in Appellant's conviction, and we therefore conclude that

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[30] Pt. IV, para. 83(c) at IV-134 (2019 ed.).

[31] Appellant's Brief at 35.

[32] R. at 768-69.

Sager does not impact our determination that the evidence supporting Appellant's conviction for obstructing justice was legally sufficient.

C. Appellant affirmatively waived any objection to the military judge's instruction on the intent element of obstructing justice.

1. Standard of Review

"Whether an appellant has waived an issue is a legal question that this Court reviews de novo."[33] "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' "[34] "While we review forfeited issues for plain error, we cannot review waived issues at all because a valid waiver leaves no error for us to correct on appeal."[35]

2. Analysis

In *United States v. Davis*, the CAAF granted review to determine if the military judge properly instructed the members on the elements of an offense, but ultimately found that the issue was waived instead of answering the granted question.[36] Acknowledging that Rule for Courts-Martial (R.C.M.) 920(f) provided that "[f]ailure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes [forfeiture,]" the CAAF went on:

> Appellant did not just fail to object and thereby merely forfeited his claim. He affirmatively declined to object to the military judge's instructions and offered no additional instructions. By "expressly and unequivocally acquiescing" to the military judge's instructions, Appellant waived all objections to the instructions, including in regards to the elements of the offense. . . . As Appellant has affirmatively waived any objection to the military judge's findings instructions, there is nothing left for us to correct on appeal.[37]

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[33] *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (citing *United States v. Haynes*, 79 M.J. 17, 19 (C.A.A.F. 2019)).

[34] *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

[35] *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) (quoting *United States v. Pappas*, 409 F.3d 828, 830 (7th Cir. 2005)).

[36] *Davis*, 79 M.J. at 332.

[37] *Id*. at 331 (interpreting R.C.M. 920(f) then in effect) (citations omitted).

That is precisely what happened here. Defense counsel affirmatively declined to object to the military judge's instructions, stating that he had no objections to the military judge's proposed instructions and requesting no additional instructions.[38]

Appellant asks us to "revisit [our] application of" *Davis*, however, since its "framework does not account for scenarios in which defense counsel simply overlooks an applicable instruction."[39] We disagree, as the CAAF already considered this issue:

> [T]he instant facts present an even stronger case for waiver than the facts in the most recent *Davis* decision. There, the record was unclear whether the defense even contemplated requesting a mens rea instruction. Nevertheless, we found an "*intentional* relinquishment or abandonment of a *known* right" where the appellant twice affirmatively declined to object to the proposed findings instructions. Here, however, it is evident that Appellant pondered the possibility of requesting a mistake of fact as to consent instruction, but ultimately made no such request.[40]

It is clear that the CAAF foresaw this very situation and intended this very result.[41] Appellant further argues that we should sidestep *Davis* since it "conflicts with the plain language of the RCMs [and] flies in the face of the joint trial script. . . ."[42] As the argument goes, the combination of the *Military Judges' Benchbook*, which specifically prompts the military judge to inquire

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[38] R. at 723-24.

[39] Appellant's Brief at 39, 41.

[40] *United States v. Rich*, 79 M.J. 472, 477 (C.A.A.F. 2020) (emphasis in original) (citations omitted).

[41] The CAAF continues to follow *Davis*'s precedent as evidenced in a more recent opinion:

> To the extent Appellant now complains about the adequacy of the military judge's limiting instruction, we note that trial defense counsel expressed no similar concerns during the court-martial. Rather, the defense acquiesced in the language of the instruction when it was proposed and given. Therefore, this issue has been waived on appeal. *See United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020).

United States v. Wilson, 84 M.J. 383, 396 n.10 (C.A.A.F. 2024).

[42] Appellant's Brief at 39.

about objections to instructions and requests for additional instructions,[43] and *Davis*, which holds that negative responses to those scripted queries constitutes waiver, swallows the forfeiture provision of R.C.M 920(f). However, the import of the *Benchbook* was not lost on the CAAF when *Davis* was decided:

> The Court's decision has important consequences for counsel in all future trials before members. In this case, the military judge informed counsel of the instructions that he intended to give. Then, in accord with the script in the Military Judges' Benchbook, the military judge asked both parties whether they had any objections to the instructions. Both counsel answered in the negative. The Court holds that their answers waived (and not merely forfeited) any objection to the instructions and that this waiver prevents any review of the instructions. *Counsel in future cases therefore must be especially careful to raise any objections that they might have to proposed instructions when the military judge asks them—as military judges do in almost every case before members—whether they have any objections.*[44]

Bound as we are to follow our superior court's binding precedent, we elect not to revisit our application of *Davis*. We therefore find that Appellant waived the issue of whether the military judge erred in her instructions on the intent element of obstructing justice.

D. Trial defense counsel did not provide ineffective assistance by failing to object to the military judge's instruction on obstructing justice's intent element.

1. Standard of Review

"[T]he [Sixth Amendment] right to counsel is the right to the effective assistance of counsel."[45] "Allegations of ineffective assistance of counsel are reviewed de novo."[46]

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[43] *See* Dep't of Army Pam. 27-9, *Military Judges' Benchbook*, paras. 2-5-20 (Nov. 19, 2025) ("MJ: Counsel, I intend to give the standard sentencing instructions. Do counsel have any requests for any special instructions?"); 2-5-25 (Nov. 19, 2025) ("MJ: Do counsel object to the instructions as given or request other instructions?").

[44] *Davis*, 79 M.J. at 332 (Maggs, J., concurring) (citation modified) (emphasis added).

[45] *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann* v. *Richardson*, 397 U.S. 759, 771 n.14 (1970)).

[46] *United States v. Palik*, 84 M.J. 284, 288 (C.A.A.F. 2024) (citing *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007)).

2. Analysis

Pursuant to *Strickland v. Washington*, to prevail on a claim of ineffective assistance of counsel, an appellant must first "show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[47] An appellant first "must show that counsel's representation fell below an objective standard of reasonableness."[48] "Judicial scrutiny of counsel's performance must be highly deferential[,]" and we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . ."[49] Second, an appellant "must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [appellant] of a fair trial, a trial whose result is reliable."[50] An appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[51] And relevant here:

> An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve.[52]

Appellant argues that "[a]llowing your client to be convicted on an uncharged theory of criminal liability cannot possibly be a strategic decision."[53] While this proposition makes intuitive sense, we do not agree that it applies in Appellant's case. As we explained above, the terms "influence" and "impede" did not subject Appellant to uncharged theories of criminal liability, and defense counsel's failure to object to their inclusion in the instructions was therefore not error. Even if those terms did subject Appellant to uncharged theories

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[47] *Strickland*, 466 U.S. at 687.

[48] *Id.* at 688.

[49] *Id.* at 689.

[50] *Id.* at 687.

[51] *Id.* at 694.

[52] *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 689-90).

[53] Appellant's Brief at 44.

of criminal liability, however, we need not determine whether defense counsel's failure to object fell below an objective standard of reasonableness, since:

> [A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [appellant] as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.[54]

We are convinced that even had the military judge omitted the intents to "influence" and "impede" from the instructions in response to an objection by defense counsel, the result of the proceeding would have been the same. There is no reasonable probability that the members would have arrived at a different verdict absent the military judge's inclusion of the additional intent instructions. This is evident for two reasons. First, the Government clearly demonstrated that Appellant sent the 1 August text message with the intent to obstruct justice, and the members did not need to rely on any lesser or different level of intent to arrive at a guilty verdict. Second, Appellant's defense at trial, both before and after the military judge instructed the members on the three different intent terms, was unmistakably that he did not intend the 1 August text message to impact Ms. Hotel's decision whether to speak with the IO. Instead, Appellant's theory throughout trial was that "his intent was to stop Ms. Hotel's harassment."[55] The members clearly rejected this argument because of the evidence presented at trial, not because of the military judge's inclusion of two additional undefined terms in the intent instruction. Therefore, because Appellant suffered no prejudice, we reject his claim of ineffective assistance of counsel.

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[54] *Strickland*, 466 U.S. at 697.

[55] Appellant's Brief at 12.

III. CONCLUSION

After careful consideration of the record, the briefs of appellate counsel, and the oral argument held on 20 November 2025, 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.[56]

The findings and sentence are **AFFIRMED**.

FOR THE COURT:

MARK K. JAMISON
Clerk of Court

[56] Articles 59 & 66, UCMJ.