

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Ketrick T. HAYES
Sergeant (E-5)
U.S. Marine Corps

Appellant

SUPPLEMENT TO PETITION FOR
GRANT OF REVIEW

USCA Dkt. No. 27-0001/MC

Crim. App. Dkt. No. 202400059

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

Jesse B. Neumann
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate
Defense Div.
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
Phone: (202) 685-7087
jesse.neumann2.mil@us.navy.mil
CAAF Bar No. 37933

Meggie C. Kane-Cruz
LCDR, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate
Defense Div.
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
Phone: (202) 685-8502
meggie.c.kane-cruz.mil@us.navy.mil
CAAF Bar. 38051

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Issues Presented

I

Whether a servicemember abandons the authority of his rank when he assaults a subordinate that is attempting to comply with his mental health treatment guidance and command training.

II

Whether the lower court abused its discretion by applying the wrong legal standard and imposing a burden on Appellant to prove a raised affirmative defense.

III

Whether the lower court abused its discretion by failing to acknowledge and consider important facts refuting the complaining witness's version of events.

Introduction

While Appellant was attempting to comply with his mental health treatment guidance and command training to remove himself from distressing situations to calm down and gather his thoughts before returning, his Sergeant Major assaulted him by grabbing his collar and body. Immediately following the assault, the Sergeant Major ordered Appellant to stand at parade rest while his hands were on Appellant. Appellant did not comply under these circumstances and yelled at the Sergeant Major to not touch him.

At Appellant's trial for willful disobedience, the Sergeant Major gave inconsistent testimony that minimized and distorted his touching of Appellant. However, this testimony was contradicted by three witnesses thereby raising Appellant's affirmative defense that the Sergeant Major abandoned his rank.

The Government presented no evidence that rebutted Appellant's affirmative defense, yet the military judge found that the Sergeant Major did not abandon his rank. The lower court similarly erred by affirming Appellant's conviction and effectively sanctioning the Sergeant Major's actions.

Statement of Statutory Jurisdiction

Appellant submitted a timely appeal to the Navy-Marine Corps Court of Criminal Appeals (NMCCA), which reviewed the case under Article 66(b), Uniform Code of Military Justice (UCMJ). Appellant invokes this Court's Article 67(a)(3), UCMJ, jurisdiction.

Statement of the Case

A military judge alone sitting as a special court-martial convicted Appellant, contrary to his pleas, of willful disobedience toward a noncommissioned officer in violation of Article 91, UCMJ.¹ The military judge sentenced him to a reprimand, which the Convening Authority issued.² On appeal, Appellant raised two assignments of error and the lower court affirmed the finding and sentence as correct in law and fact.³ Appellant then filed a timely motion for en banc reconsideration.⁴ After more than seven months, the lower court denied the motion only after Appellate Defense Counsel sought an update.⁵ Appellant timely petitioned this Court for review.

¹ R. at 355.

² R. at 428; Entry of Judgment at 2, Feb. 23, 2024.

³ *United States v. Hayes*, No. 202400059, slip op. (N-M. Ct. Crim. App. Nov. 19, 2025).

⁴ Appellant's Mot. for En Banc Recon., Dec. 17, 2025.

⁵ Order Denying Appellant's Mot. for En Banc Recon., Aug. 4, 2026.

Statement of Facts

A. A dispute occurred culminating in an assault on Appellant.

On March 1, 2023, Appellant was involved in a dispute with his command's Sergeant Major⁶ Appellant and the Sergeant Major were discussing a document used in the office for monthly performance recognition.⁷ Appellant and his admin chief, Staff Sergeant Charlie, were attempting to explain to the Sergeant Major that Appellant did not have the most recent version of the document due to a computer issue beyond his control.⁸ From the start, the Sergeant Major was observably upset.⁹ And throughout this conversation, things “progressively start[ed] to get, kind of, heated between” Appellant and the Sergeant Major.¹⁰

Eventually, the Sergeant Major discontinued his conversation with Appellant in order to speak to another Marine.¹¹ At that time, Appellant was getting overwhelmed and asked to be excused for a few minutes to go outside and “breathe for a minute because this is getting to [sic], like intense.”¹² The Sergeant Major denied Appellant's request.¹³ However, Appellant's Master Sergeant, Master

⁶ Pros. Ex. 1, 5; Def. Ex. B, K.

⁷ R. at 90-91.

⁸ R. at 165-66.

⁹ R. at 215.

¹⁰ R. at 247.

¹¹ R. at 94, 113.

¹² R. at 248.

¹³ *Id.*

Sergeant Bravo, said to let Appellant go.¹⁴ Ultimately, Appellant got up from his desk and left the office and the Sergeant Major pursued him into the hallway.¹⁵

A few seconds later, Appellant turned around to retrieve his Common Access Card (CAC) from the office and attempted to step around the Sergeant Major.¹⁶ At this point, the Sergeant Major grabbed Appellant.¹⁷ One witness saw the Sergeant Major grab Appellant by the collar;¹⁸ and two other witnesses saw the Sergeant Major grabbing Appellant's arms.¹⁹ This is generally consistent with Appellant's account that the Sergeant Major grabbed him.²⁰ Appellant responded by shouting "get your hands off me."²¹ The altercation was quickly brought to an end when other Marines in the office intervened, including Master Sergeant Bravo.²² Master Sergeant Bravo pushed the Sergeant Major away, and Appellant calmed down quickly.²³

¹⁴ R. at 117, 191.

¹⁵ R. at 100, 121, 271

¹⁶ R. at 252; Def. Ex. K; Pros. Ex. 1 at 2.

¹⁷ R. at 197, 253, 294; Def. Ex. K.

¹⁸ R. at 253; Def. Ex. K.

¹⁹ R. at 197, 294.

²⁰ Pros. Ex. 1.

²¹ R. at 178, 257.

²² R. at 173, 251.

²³ R. at 253-54.

The Sergeant Major claimed he had issued Appellant an order to stand at parade rest multiple times before the contact.²⁴ However, multiple witnesses testified that the Sergeant Major issued the order only *after* Appellant told the Sergeant Major not to touch him.²⁵ Appellant's alleged failure to obey the order to stand at parade rest is the basis of his sole charge and specification.²⁶

B. The circumstances of Appellant's mental health treatment and guidance.

Prior to these events, Appellant began seeing a mental health treatment provider who counseled him to “separate himself from people or situations if he found himself overly frustrated or distressed, so that he could calm down and gather his thoughts before returning to the situation.”²⁷ Similarly, the command had provided resiliency training that advised Marines to “take a breather,” which might include actions such as “tak[ing] a pause, maybe step[ping] outside[.]”²⁸ At trial, the Sergeant Major claimed he was aware of Appellant's mental health situation.²⁹ The Sergeant Major also claimed that looking out for the mental well-being of his Marines is part of his duties as a leader.³⁰

²⁴ R. at 95, 99.

²⁵ R. at 193, 251-52, 281, 291; Def. Exs. B, K.

²⁶ Charge Sheet.

²⁷ Def. Ex. C, J.

²⁸ R. at 228-29.

²⁹ R. at 306.

³⁰ R. at 127; *see* R. at 79.

The Sergeant Major testified that on the day in question he did not consider Appellant's mental health until he "thought [he and Appellant] were close to being [in] an altercation."³¹ When specifically asked at trial if he expects his Marines to comply with their mental health treatment, the Sergeant Major declined to give a firm answer:

Q. And you would expect those Marines to abide by the help

that they received, right?

A. I would expect Marines to not -- to follow orders, sir.

Q. You might be trying answer questions I'm not asking, so I'll ask that one again. You would expect Marines to abide by mental health counseling that they received, right?

TC: Objection: Relevance.

WIT: I do not know, sir.

MJ: Overruled. And he answered the question. Thank you.

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C. The Military Judge's special findings.

In his special findings, the Military Judge found "the prosecution proved beyond a reasonable doubt that Sergeant Major [Charlie] did not conduct himself in a manner which under all the circumstances departed substantially from the

³¹ R. at 307.

³² R. at 130-31.

required standards appropriate for his rank and position under similar circumstances.”³³ But he did not consider the Sergeant Major’s physical assault on Appellant in his analysis.³⁴ The lower court upheld Appellant’s convictions and asserted it provided “appropriate deference . . . to the fact that the military judge rejected Appellant’s abandonment of rank argument in his special findings.”³⁵

Reasons to Grant Review

I

A servicemember abandons the authority of his rank when he assaults a subordinate that is attempting to comply with mental health treatment guidance and command training.

Military law contains a special affirmative defense—referred to as abandonment or divestiture of rank—for those accused of an offense against the authority or rank of the victim:

If the [victim] conducts himself in a manner that departs substantially from the required standards appropriate to the . . . rank or position *under similar circumstances*, he loses the protection of the article proscribing the offense and the accused is entitled to a finding of not guilty. . . .³⁶

³³ Appellate Ex. XXXI at 5.

³⁴ *Id.*

³⁵ *Hayes*, slip op. at 5.

³⁶ *United States v. Ivory*, NMCCA 94 01647, 1995 CCA LEXIS 387, at *6 (N-M. Ct. Crim. App. Aug. 10, 1995) (unpublished) (citing *United States v. Cruz*, 25 M.J. 326 (C.M.A. 1987)) (emphasis added).

Here, the circumstances were that Appellant tried to comply with command training and his mental health treatment guidance to “separate himself from people or situations if he found himself overly frustrated or distressed, so that he could calm down and gather his thoughts before returning to the situation.”³⁷ In response, the Sergeant Major grabbed Appellant by the arm and collar simply because “[h]e was displeased with the actions of [Appellant.]”³⁸ This raised the affirmative defense.³⁹

After the affirmative defense was raised, the Government was required to prove beyond a reasonable doubt that the Sergeant Major’s behavior was not a substantial departure from the standards required *under the circumstances*.⁴⁰ However, the Government presented no evidence of the standards required of a Sergeant Major *while dealing with a subordinate known to be suffering from emotional distress and undergoing mental health treatment*.

Further, the military judge did not hold the Government to its burden to prove the standards required under these circumstances. In his special findings, the military judge did not address evidence that the Sergeant Major’s grabbed

³⁷ Def. Ex. C, J.

³⁸ Appellate Ex. XXXI at 5; R. at 197, 253, 294; Def. Ex. K.

³⁹ *Id.* at 2.

⁴⁰ *Ivory*, 1995 CCA LEXIS 387, at *6 (citing R.C.M. 916(b)).

Appellant.⁴¹ Nor did the military judge address Appellant’s mental health treatment guidance or the command’s resiliency training.⁴² Instead, the military judge ruled the Sergeant Major’s “actions were not a significant departure from how Sergeants Major are *widely expected* and *accepted* to conduct themselves.”⁴³

Contrary to this assertion, the lower court has previously held that even less aggressive physical contact is neither expected nor accepted. In *United States v. Kukharau*, the lower court affirmed that a disciplinary “love tap” on the helmet of a subordinate constitutes an assault consummated by a battery.⁴⁴ The *Kukharau* court specifically rejected the “contention that slapping a Marine’s helmet and a ‘good chewing out’ are simply part of Marine Corps culture.”⁴⁵

Here, the Sergeant Major’s conduct went substantially beyond a mere “love tap” on a padded helmet. Regardless, conduct that is *widely expected* and *accepted* is not the same as conduct that is *required under the circumstances*. And the circumstances here consisted of Appellant attempting to comply with his mental health treatment guidance when the Sergeant Major grabbed him.

⁴¹ Appellate Ex. XXXI.

⁴² *Id.*

⁴³ *Id.* at 5 (emphasis added).

⁴⁴ *United States v. Kukharau*, No. 202300062, 2024 CCA LEXIS 159, at *4 (N-M. Ct. Crim. App. Apr. 29, 2024), *rev. denied*, 2025 CAAF LEXIS 9 (C.A.A.F. Jan. 2, 2025).

⁴⁵ *Id.* at *11 n.53.

Consequently, the military judge’s ruling, and the lower court’s affirmation thereof, is based on an erroneous view of the law, failed to consider important facts, and conflicts with the applicable decision of another panel of the same court.⁴⁶ Accordingly, Appellant respectfully requests this Court grant review.⁴⁷

II

The lower court abused its discretion by applying the wrong legal standard and imposing a burden on Appellant to prove a raised affirmative defense.

Appellant raised the Government’s failure to rebut his affirmative defense as a factual sufficiency issue.⁴⁸ In response, the lower court affirmed the military judge’s decision to “reject[] Appellant’s abandonment of rank *argument*[.]”⁴⁹ However, this is a misapplication of the law because abandonment of rank is an affirmative defense, not an argument. Argument indicates a burden to persuade.⁵⁰

⁴⁶ See *United States v. Griggs*, 61 M.J. 402, 406 (C.A.A.F. 2005) (“A ruling based on an erroneous view of the law constitutes an abuse of discretion.”); see also *United States v. Comisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (“A military judge abuses his discretion when . . . he fails to consider important facts.”).

⁴⁷ See C.A.A.F. R. 21(b)(5)(B), (F).

⁴⁸ Appellant’s Br. at 18-27.

⁴⁹ *Hayes*, slip op. at 5.

⁵⁰ *Argument*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A statement that attempts to persuade . . . [t]he act or process of attempting to persuade.”).

But once an affirmative defense is raised *by some evidence*, the Government bears a burden—not Appellant.⁵¹

The defense met this low evidentiary threshold.⁵² According to multiple witnesses, the Sergeant Major grabbed Appellant before issuing the order to stand at parade rest.⁵³ This evidence thus raised the affirmative defense of abandonment of rank.⁵⁴ And once raised, the Government bore the burden to prove that grabbing Appellant by the collar and arm *before* ordering him to stand at parade rest aligned with the “standards appropriate for [the Sergeant Major’s] rank and position *under similar circumstances*.”⁵⁵ Yet the Government presented no evidence or authority showing that the Sergeant Major’s actions were appropriate under *any* circumstances—let alone circumstances involving mental health concerns. Therefore, in the absence of such evidence, there was no basis to find the affirmative defense overcome beyond a reasonable doubt.

The lower court’s opinion does not cite any evidence or authority that proves the Sergeant Major’s actions were appropriate under the circumstances. Moreover,

⁵¹ R.C.M. 916(b) (“[T]he prosecution shall have the burden of proving beyond a reasonable doubt that the defense did not exist.”).

⁵² Appellate Ex. XXXI at 2.

⁵³ R. at 251-52, 281, 291; Def. Exs. B, K.

⁵⁴ *See* R.C.M. 916(b) Discussion (“A defense may be raised by evidence presented by the defense, the prosecution, or the court-martial.”).

⁵⁵ Appellate Ex. XXXI at 5 (emphasis added).

the lower court doesn't even acknowledge the attendant circumstances. The opinion is completely devoid of any reference to the Sergeant Major's grabbing Appellant or Appellant's mental health guidance or command training.⁵⁶ Instead, the lower merely affirmed the military judge's special findings—which are similarly silent on the attendant circumstances and any authority permitting the Sergeant Major's conduct. This raises a question of whether the lower court independently reviewed the record. Indeed “CCAs ‘may only affirm that which they *independently* find correct in law and fact and that which they determine[], on the basis of the entire record, should be approved.’”⁵⁷

Regardless, the lack of reference to any authority or evidence justifying the Sergeant Major's conduct, and the lack of any reference to the attendant circumstances, highlight the same issue: The lower court did not analyze factual sufficiency under the framework of an affirmative defense. It improperly placed the burden of persuasion on Appellant instead of the Government. The lower court's disposition of this issue disregards the very concept of an affirmative

⁵⁶ *Hayes*, slip op.

⁵⁷ *United States v. Spencer*, 86 M.J. 379, 382 (C.A.A.F. 2026) (quoting *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998)) (cleaned up) (emphasis and alteration in original)); *United States v. Jenkins*, 60 M.J. 27, 29-30 (C.A.A.F. 2004) (doubting whether the NMCCA conducted an independent review of the issues the appellant raised and remanding for “a new Article 66(c) review before a panel comprised of judges who have not previously participated in this case”).

defense, and parts with every binding precedent concerning the Government’s burden of proof when an affirmative defense is raised.⁵⁸ Accordingly, review by this Court is warranted.⁵⁹

III

The lower court abused its discretion by failing to consider important facts refuting the Sergeant Major’s version of events.

“Service courts abuse their discretion when they act arbitrarily, capriciously, or unreasonably as a matter of law.”⁶⁰ Here the lower court did so by rubber-stamping the military judge’s special findings that, in turn, rubber-stamped the Sergeant Major’s unreliable version of events.⁶¹ This was unreasonable because the lower court “may only affirm that which they *independently* find correct in law and fact and that which they determine[], on the basis of the entire record, should be approved.”⁶² Here the *entire* record does not support such findings.

⁵⁸ *E.g.*, *United States v. Feliciano*, 76 M.J. 237, 239 n.1 (C.A.A.F. 2017) (“By default, . . . the prosecution bears the burden of having to disprove a defense raised at trial.”); *United States v. McDonald*, 78 M.J. 376, 379 (C.A.A.F. 2019) (“Once raised, the Government bore the burden to prove beyond a reasonable doubt that the defense did not exist.”) (citing R.C.M. 916(b)(1)).

⁵⁹ C.A.A.F. R. 21(b)(5)(B), (F).

⁶⁰ *United States v. Arroyo*, 86 M.J. 89, 93 (C.A.A.F. 2025) (citing *United States v. Flores*, 84 M.J. 277, 282 (C.A.A.F. 2024)).

⁶¹ *Hayes*, slip op. at 5; Appellate Ex. XXXI.

⁶² *Powell*, 49 M.J. at 463 (quoting (alteration in original) (emphasis added)).

The Sergeant Major’s testimony was controverted, inconsistent, and showed clear bias by denying and minimizing his witnessed assault of Appellant. Neither the military judge nor the lower court addressed or apparently considered these important facts.⁶³ Accordingly, the lower court abused its discretion by affirming the military judge’s ruling.

A. The Sergeant Major’s controverted testimony.

1. The timing of the order

The Sergeant Major asserted that he issued the order to stand at parade rest *before* he made contact with Appellant. However, both Master Sergeant Bravo and Sergeant Tango indicated that the order was given during or after physical contact occurred.⁶⁴

A. When I saw his, kind of, shadow pass the window, you know, Sergeant Major put his hands up, kind of, a stop. Going back to doing my work still. And then when, you know, Hey, get your hands off of me, get at parade rest.

⁶³ *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (“A military judge abuses his discretion when . . . he fails to consider important facts.”).

⁶⁴ R. at 251-52 (MSgt Bravo’s testimony).

Q. Okay.

At what point in that, you know, chain of events did that happen -- did he say that?

A. I know when they were physically, like, connected it was said. I know it was said a couple of times. I know for sure when they were together that he was told to get at parade rest.

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Q. What happened first the don't touch me statement from Sergeant Hayes or the parade rest statement from Sergeant Major Colon?

A. Don't touch me.

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Indeed, Sergeant Tango confirmed four times that he was certain the order came after the contact:

⁶⁵ R. at 251-52 (MSgt Bravo's testimony).

⁶⁶ R. at 281 (Sgt Tango's testimony).

Q. You remember there being an order to stand at parade rest?

A. Yes, sir.

Q. And your recollection today is that it was after they made contact?

A. Yes, sir.

Q. But you're not sure of that?

A. I'm sure of that, sir.

Q. But you're not sure exactly --

MJ: Was that you are or you are not --

WIT: I am sure.

MJ: You are sure?

WIT: Yes, sir.

MJ: Okay.

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2. Sergeant Major's grabbing of Appellant

The Sergeant Major testified that he did not grab Appellant by the arms or collar. In contrast, Master Sergeant Bravo saw the Sergeant Major grab Appellant by the collar,⁶⁸ and both Staff Sergeant Charlie and Sergeant Tango saw the Sergeant Major grab Appellant by the arms.⁶⁹ Further, Master Sergeant Bravo

⁶⁷ R. at 291 (Sgt Tango's testimony).

⁶⁸ R. at 253; Def. Ex. K.

⁶⁹ R. at 197, 294.

indicated that Appellant was trying to avoid the Sergeant Major when the Sergeant Major grabbed him:

Q. And then going back to when they made contact, what did it appear to you as, you know, what happened, like, who -- who initiated contact.

A. I don't know who initiated for sure. But it looked like Sergeant Major was trying to stop him from going around him.

Q. Okay. But you think Sergeant Hayes was trying to go around him?

A. Yes. Yes, sir.

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3. Appellant's supposed aggressiveness

The Sergeant Major claimed Appellant's "aggressiveness" required the use of "overwhelming force" by Master Sergeant Bravo in order to restrain Appellant and take him outside following the altercation.⁷¹ However, Master Sergeant Bravo testified that Appellant "calmed down quickly" and did not need to be "physically"

⁷⁰ R. at 252-53.

⁷¹ Pros. Ex. 5.

removed.⁷² In fact, Master Sergeant Bravo testified he had to push the Sergeant Major away during the altercation.⁷³

B. The Sergeant Major's personally conflicting statements.

At trial, when specifically asked if he touched Appellant with his hands, the Sergeant Major gave an evasive response of “my shoulder did, sir.”⁷⁴ However, even this vague response conflicts with the Sergeant Major's signed statement admitting Appellant “made contact with [his] body *and hand*[.]”⁷⁵

When the Sergeant Major initially spoke with Trial Defense Counsel, he admitted to speaking in an increasingly frustrated tone during his questioning of Appellant about the document.⁷⁶ However, at trial he denied this fact, admitted it *only* after being impeached, and became argumentative about the alleged source of his frustration.⁷⁷

At trial, the Sergeant Major disputed the notion that he was “yelling” at Appellant.⁷⁸ Instead, he asserted he was merely “raising his voice[.]”⁷⁹ The

⁷² R. at 253-54.

⁷³ *Id.*

⁷⁴ R. at 104.

⁷⁵ Pros. Ex. 5 (emphasis added).

⁷⁶ R. at 115.

⁷⁷ R. at 113-15.

⁷⁸ R. at 121.

⁷⁹ *Id.*

Sergeant Major was then impeached again and admitted that he had previously told civilian law enforcement that he was yelling at Appellant.⁸⁰

C. The Sergeant Major's bias to minimize his assault of Appellant.

Following the assault, Appellant filed an Inspector General (IG) complaint against the Sergeant Major.⁸¹ Appellant also got a restraining order against the Sergeant Major that was served on the Sergeant Major at his home by civilian law enforcement.⁸² The Sergeant Major admitted that this was stressful and he became angry that his children witnessed that.⁸³ As a result of that restraining order, the Sergeant Major had to appear in civilian court and entered into a mutual no contact order.⁸⁴ These circumstances present a clear motive for the Sergeant Major to minimize, or deny altogether, his assault of Appellant.

The issues raised above are all relevant in determining how much weight to provide Sergeant Major's testimony. Yet neither the military judge nor the lower court meaningfully addressed any of these important facts. Accordingly, the lower court abused its discretion by affirming the military judge's ruling.⁸⁵ Appellant respectfully requests this Court grant review to provide guidance to the field to

⁸⁰ R. at 122.

⁸¹ Pros. Ex. 1.

⁸² R. at 131-33.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Commisso*, 76 M.J. at 321.

ensure deference to the factfinder under the relatively new factual sufficiency framework is rationally applied.

Conclusion

This case presents important issues addressing the proper application of deference, affirmative defenses, and adherence to precedent. Consequently, Appellant respectfully requests this Court grant review to provide much needed guidance to the field.

Respectfully submitted,

//s//
Jesse B. Neumann
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate
Defense Div.
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
Phone: (202) 685-7087
jesse.neumann2.mil@us.navy.mil
CAAF Bar No. 37933

//s//
Meggie C. Kane-Cruz
LCDR, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate
Defense Div.
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
Phone: (202) 685-8502
meggie.c.kane-cruz.mil@us.navy.mil
CAAF Bar. 38051

Appendix

A. *United States v. Hayes*, No. 202400059, slip op. (N-M. Ct. Crim. App. Nov. 19, 2025)

Certificate of Compliance

This brief complies with the type-volume limitations of Rule 21 and 37 because it contains 4,126 words, and it has been prepared in 14-point, Times New Roman font.

//s//

Meggie C. Kane-Cruz
LCDR, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate Defense Div.
1254 Charles Morris Street SE
Bldg. 58, Suite 100
Washington Navy Yard, DC 20374
(202) 685-8502
meggie.c.kane-cruz.mil@us.navy.mil
CAAF Bar No. 38051

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered to the Court and delivered to the Director, Appellate Government Division (Code 46), at DACCode46@navy.mil and to the Deputy Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity (Code 40), at Joshua.D.Ricafrente.civ@us.navy.mil on October 13, 2026.

//s//

Meggie C. Kane-Cruz
LCDR, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate Defense Div.
1254 Charles Morris Street SE
Bldg. 58, Suite 100
Washington Navy Yard, DC 20374
(202) 685-8502
meggie.c.kane-cruz.mil@us.navy.mil
CAAF Bar No. 38051

This opinion is subject to administrative correction before final disposition.

United States Navy-Marine Corps
Court of Criminal Appeals

Before
KISOR, GANNON, and FLINTOFT

Appellate Military Judges

UNITED STATES
Appellee

v.

Ke'Trick T. HAYES
Sergeant (E-5), U.S. Marine Corps
Appellant

No. 202400059

Decided: 19 November 2025

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judge:
John L. Ferriter

Sentence adjudged 3 November 2023 by a special court-martial convened at Marine Corps Air Station, Miramar, California, consisting of a military judge sitting alone. Sentence in the Entry of Judgment: a reprimand.

For Appellant:
Lieutenant Jesse B. Neumann, JAGC, USN

For Appellee:
Lieutenant Stephanie N. Fisher, JAGC, USN
Lieutenant Commander James P. Wu Zhu, JAGC, USN

Judge GANNON delivered the opinion of the Court, in which Senior Judge KISOR and Judge FLINTOFT joined.¹

**This opinion does not serve as binding precedent, but
may be cited as persuasive authority under
NMCCA Rule of Appellate Procedure 30.2.**

GANNON, Judge:

Appellant was convicted, contrary to his pleas, of one specification of willful disobedience of a noncommissioned officer in violation of Article 91, Uniform Code of Military Justice (UCMJ).² The military judge sentenced Appellant to a reprimand.

This case is before us on direct appeal pursuant to Article 66(b)(1)(A), UCMJ. Appellant asserts two assignments of error (AOEs): (1) whether the evidence is legally sufficient to sustain Appellant's conviction for willful disobedience under Article 91 where the order issued was not lawful; and (2) whether the evidence is factually sufficient to sustain Appellant's conviction for willful disobedience under Article 91 where the noncommissioned officer abandoned the authority of his rank.

I. BACKGROUND

Appellant and Sergeant Major A. C. had a heated discussion in the offices of the recruiting station in San Francisco regarding Appellant's job performance. Appellant, evidently frustrated by the interaction he had with Sergeant Major A. C., expressed his displeasure, and departed the room in an impolite manner.³ Sergeant Major A. C. ordered him to stop and to stand at parade rest.⁴ The order was clear and Appellant heard it. But Appellant continued to walk away, and Sergeant Major A. C. repeated the order multiple times and

¹ The Court appreciates the contributions of 2ndLt Lawrence Lin, U.S. Marine Corps, and Mr. Jack Bracher.

² 10 U.S.C. § 891.

³ R. at 167-68.

⁴ R. at 95.

even followed Appellant into the hallway.⁵ Appellant continued to disregard Sergeant Major A C.'s orders to stand at parade rest.⁶

II. DISCUSSION

A. The Evidence is Legally Sufficient to Sustain a Conviction.

1. *Standard of review.*

We review questions of legal sufficiency *de novo*.⁷ The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.⁸ This legal sufficiency assessment draws every reasonable inference from the evidence of record in favor of the prosecution.⁹ As such, the standard for legal sufficiency involves a very low threshold to sustain a conviction.¹⁰

The elements of Article 91 as charged in this case are: (1) that the accused was an enlisted member; (2) that the accused received a certain lawful order from a noncommissioned officer to stand at parade rest; (3) that the accused knew Sergeant Major A. C. was a noncommissioned officer; (4) that the accused had a duty to obey the order; and (5) that the accused willfully disobeyed the order.¹¹

Whether an order is lawful is likewise a question of law that we review *de novo*.¹² Orders are clothed with an inference of lawfulness. “An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate. This inference does not apply to a patently illegal order, such as one that directs the commission of a crime.”¹³ A lawful order must have a valid military purpose.

⁵ R. at 96, 99.

⁶ R. at 96.

⁷ *United States v. Kearns*, 73 M.J. 177, 180 (C.A.A.F. 2014).

⁸ *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (quoting *United States v. Gutierrez*, 73 M.J. 172, 175 (C.A.A.F. 2014)).

⁹ *Id.* (quoting *United States v. Robinson*, 77 M.J. 294, 298 (C.A.A.F. 2018)).

¹⁰ *Id.* (quoting *United States v. Navrestad*, 66 M.J. 262, 269 (C.A.A.F. 2008) (Efron, C.J., joined by Stucky, J., dissenting)).

¹¹ Charge Sheet; *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. IV, para. 17.b.(2) at IV-25.

¹² *See United States v. New*, 55 M.J. 95, 107 (C.A.A.F. 2001).

¹³ *MCM*, pt. IV, para. 16.c.(2)(a)(i) at IV-24.

To have a valid military purpose the “order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and be directly connected with the maintenance of good order in the Service.”¹⁴

The essential attributes of a lawful order include: (1) issuance by competent authority—a person authorized by applicable law to give such an order; (2) communication of words that express a specific mandate to do or not do a specific act; and (3) relationship of the mandate to a military duty.¹⁵

2. Analysis.

Appellant contends that Sergeant Major A. C.’s order to stand at parade rest was unlawful, and the conviction therefore rests on a legal insufficiency. Having reviewed the lawfulness of this order de novo, we disagree. Regarding the other elements of Article 91, we find that at the time of the alleged offense, Appellant knew Sergeant Major A. C. was a senior noncommissioned officer.¹⁶ Sergeant Major A. C. repeatedly issued the clear directive—“stand at parade rest”—loud enough to be heard. The military judge properly found that that Appellant willfully disobeyed the order by not standing at parade rest.¹⁷ Thus, in viewing the evidence in the light most favorable to the Government, a reasonable factfinder could have found the elements of willful disobedience beyond a reasonable doubt. Accordingly, the conviction is legally sufficient.

B. The Evidence is Factually Sufficient to Sustain a Conviction.

1. Standard of review.

To trigger factual sufficiency review, an appellant must make a specific showing of a deficiency of proof.¹⁸ In other words, Appellant must: (1) assert a factual sufficiency error and (2) show a specific deficiency in proof. A specific deficiency in proof is a weakness in the evidence admitted at trial to support an element (or more than one element) and explain why, on balance, the evidence (or lack thereof) admitted at trial contradicts a guilty finding.¹⁹

¹⁴ *MCM*, pt. IV, para. 16.c.(2)(a)(iv) at IV-24.

¹⁵ *MCM*, pt. IV, paras. 16.c.(2)(a)(iii)-(iv); 16.c.(2)(d) at IV-24 .

¹⁶ App. Ex. XXXI at 3.

¹⁷ App. Ex. XXXI at 3-4.

¹⁸ Art. 66(d)(1)(B)(i).

¹⁹ See generally *United States v. Harvey*, 85 M.J. 127, 132 (C.A.A.F. 2024).

If a specific showing is made, the Court weighs the evidence and determines controverted questions of fact subject to “appropriate deference to the facts that the trial court saw and heard the witnesses and other evidence.”²⁰

The Court must be clearly convinced the guilty finding was against the weight of the evidence before it may set aside the finding.²¹ In other words, if this Court reverses the finding of this special court-martial, the Court must decide that the evidence, as it has weighed it, does not prove that Appellant is guilty beyond a reasonable doubt and the Court must be clearly convinced of the correctness of that decision.²²

2. Analysis.

We assume, without deciding, that Appellant’s pointing to conflicting testimony in raising the affirmative defense of abandonment of rank, is sufficient to making a specific showing of a deficiency in proof.²³ In asserting this defense, Appellant argues that it militates to the conclusion that the evidence is factually insufficient to sustain his conviction for willful disobedience. For its part, the Government contends that Appellant does not make a specific showing of a deficiency in proof.²⁴

We give appropriate deference, as we must, to the fact that the military judge saw and heard the witnesses and also to the fact that the military judge rejected Appellant’s abandonment of rank argument in his special findings.²⁵ Based on the testimonial nature of the evidence, the degree of deference in both respects is high. We are not clearly convinced that the verdict is against the weight of the evidence.

²⁰ Art. 66(d)(1)(B)(ii)(I), UCMJ.

²¹ Art. 66(d)(1)(B)(iii); *See Harvey*, 85 M.J. at 132.

²² *Harvey*, 85 M.J. at 132.

²³ *See generally* Appellant’s Brief at 29.

²⁴ *See* Government’s Brief at 21.

²⁵ App. Ex. XXXI at 5; Art. 66(d)(1)(B)(ii)(II).

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred.²⁶

The findings and sentence are **AFFIRMED**.



FOR THE COURT:

Mark K. Jamison
MARK K. JAMISON
Clerk of Court

²⁶ Articles 59 & 66, UCMJ.