

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

UNITED STATES
Appellee

v.

Sergeant (E-5)
SIERRA L. SKEEN,
United States Army
Appellant

SUPPLEMENT TO THE PETITION
FOR GRANT OF REVIEW

Crim. App. Dkt. No. 20240101

USCA Dkt. No. 26-0265/AR

Emily R. Ittner
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0692
Emily.r.ittner.mil@army.mil
USCAAF Bar Number 38091

Peter M. Ellis
Major, Judge Advocate
Branch Chief
Defense Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0715
Peter.m.ellis2.mil@army.mil
USCAAF Bar Number 38209

Kyle C. Sprague
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0716
Kyle.c.sprague.mil@army.mil
USCAAF Bar Number 36867

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Issue Presented¹

WHETHER THE ARMY COURT ERRED IN FINDING APPELLANT'S CONVICTION LEGALLY AND FACTUALLY SUFFICIENT WHEN IT FAILED TO CONSIDER THE MILITARY JUDGE'S RULING THAT A POST-ARRAIGNMENT AMENDMENT TO THE OFFENSE DATES WOULD PREJUDICE THE APPELLANT.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, [UCMJ] 10 U.S.C. § 866 (2019). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2019).

Statement of the Case

On March 1, 2024, an enlisted panel sitting as a general court-martial convicted appellant, contrary to her pleas, of one² specification of domestic violence and two specifications of forgery, in violation of Articles 128b and 105, Uniform Code of Military Justice [UCMJ]. (Charge Sheet; R. at 1265). The same day, the military judge sentenced appellant to reduction to E-1, confinement for a total of six months, and

¹ Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant personally asserts those matters set forth in Appendix B.

² The panel found appellant guilty of Specifications 9 and 10 of Additional Charge I, however the military judge granted the defense motion to merge the two specifications for findings as an unreasonable multiplication of charges. (R. at 1279).

forfeitures of \$1,000 of pay per month for a total of six months. (R. at 1331-32). The military judge adjudged the terms of confinement as follows: 6 months for Specification 9 of Additional Charge I; 1 month for Specification 1 of Additional Charge II; and 3 months for Specification 2 of Additional Charge II, all to be served concurrently. (Statement of Trial Results; R. at 1331-32).

On March 15, 2024, the convening authority took no action on the findings or sentence. (Action). On March 21, 2024, the military judge entered judgment. (Judgment of the Court).

Appellant opted for appellate review pursuant to Article 66(b)(1)(A). The Army Court docketed appellant's case on January 15, 2025. (Referral and Designation of Counsel).

On April 24, 2026, the Army Court affirmed the findings and sentence. (Appendix A). On May 21, 2026, appellant filed a motion for reconsideration, which the Army Court denied on June 16, 2026. (Appendix B).

Appellant was notified of the Army Court's decision and, in accordance with Rule 19 of this Court's Rules of Practice and Procedure, Appellate Defense Counsel filed a Petition for Grant of Review and request to separately file this Supplement on August 14, 2026. The Court docketed the case the same day. The Judge Advocate General of the Army designated the undersigned military counsel to represent

appellant, who hereby enter their appearance and file this Supplement to the Petition for Grant of Review under Rule 21.

Reasons to Grant Review

Pursuant to Rule 21(b), this Court should grant review based on *United States v. Kershaw*, which was decided *after* the Army Court decided to affirm appellant's findings and sentence. *United States v. Kershaw*, 2026 CAAF LEXIS 396, *16 (C.A.A.F. Apr. 30, 2026). In *Kershaw*, this Court held that a service court of criminal appeals (CCA) may conduct a variance analysis and affirm on factual sufficiency grounds so long as the variance does not prejudice appellant. *Kershaw* at *2, 13.

However, the Court left multiple questions unanswered in *Kershaw* that are raised here – namely, how should a service court of appeals weigh prejudice, specifically where a military judge has made an express finding that a change to the dates of the charged offenses would prejudice the accused? This case presents an opportunity for this court to resolve what was left unanswered in *Kershaw* by explaining exactly what prejudice would look like in the context of a material variance, and how a service court should test for such prejudice in its factual and legal sufficiency review.

In this case, the government sought to amend the charge sheet on the eve of trial by changing the dates of several specifications. The military judge denied the motion, finding that such a change would prejudice appellant, in that defense counsel

would need to alter their trial strategy and cross examination of the victim. (R. at 143-144). The Army Court summarily affirmed appellant’s convictions and sentence without analysis and denied appellant’s request for reconsideration. If the Army Court’s affirmance stands, the government will essentially achieve on appeal what the trial judge already denied at trial—a material variance.

Review is also warranted pursuant to Rule 21(b)(5)(B)(i). Under R.C.M. 603(e), a post-arraignment amendment is prohibited if it constitutes a “major change” and cannot be made over defense objection unless the charge is “preferred anew.” *United States v. Reese*, 76 M.J. 297, 302 (C.A.A.F. 2017). Furthermore, this Court has long held that a military judge’s discretionary rulings at trial are reviewed under an abuse of discretion standard and entitled to great deference [by appellate courts]. *United States v. Ramirez*, 84 M.J. 173, 175 (C.A.A.F. 2024). The Army Court’s decision to affirm conflicts with *Ramirez* (by failing to defer to the trial judge’s prejudice finding) as well as *Reese* (by allowing the government to overcome R.C.M. 603’s prohibition on prejudicial post-arraignment amendments to the charge sheet over defense objection).

This Court should grant review in order to define prejudice in the context of variance and clarify that a CCA must consider and address an express finding of prejudice by the military judge. This Court should set aside the findings and sentence as to Specification 9 of Additional Charge I and remand for a sentence

reassessment. Alternatively, this Court should remand to the Army Court to conduct its factual and legal sufficiency review anew pursuant to *Kershaw*.

WHETHER THE ARMY COURT ERRED IN FINDING APPELLANT’S CONVICTION LEGALLY AND FACTUALLY SUFFICIENT WHEN IT FAILED TO CONSIDER THE MILITARY JUDGE’S RULING THAT A POST-ARRAIGNMENT AMENDMENT TO THE OFFENSE DATES WOULD PREJUDICE THE APPELLANT.

Statement of Facts Relevant to the Assignment of Error

The night before trial, the government filed a motion (out of time) to amend the charge sheet pursuant to R.C.M. 603(e). Relevant to this assignment of error, the government moved to change the date range in Specification 9 of Additional Charge I from “1 September 2020 and on or about 30 September 2020” to “15 August 2020 and on or about 25 August 2020.” (App. Ex. LVI).

The government referred additional charges against appellant in December 2022. In its motion, the government claimed it had just received metadata from alleged injury photos from the victim’s mother (Ms. SK) during an interview the day before (24 February 2024). (App. Ex. LVI; R. at 137). Those photos were allegedly sent from the victim to Ms. SK on August 23 and August 25 in 2020. (R. at 846).

The defense objected to the government’s motion and argued that during their conversations with Ms. SK, she told defense she had the injury photos the year before. (R. at 135). Ms. SK stated that the government never followed up about the

photos. (R. at 135). The defense argued this would be a major change that prejudiced the appellant. Defense prepared its case based off the victim's statements, which accounted for her inconsistencies and memory. (R. at 135-36). If there was a last minute alteration to the dates, this would cause defense to have to change its strategy and would cause prejudice to appellant. (R. at 143-144). The military judge denied the government's motion to amend the charge sheet. (R. at 144).

At trial, the government did not present any evidence proving appellant committed the offense (Specification 9) during the dates it had originally charged (1 September 2020 and on or about 30 September 2020). (R. at 550, 552-553, 580).

During panel instructions as to Specification 9 of Additional Charge I, the military judge advised that the panel must be convinced, beyond a reasonable doubt, that the incident occurred between on or about 1 September 2020 and on or about 30 September 2020. (R. at 1173; App. Ex. LXXIX). The government never requested, nor did the military judge give, a variance instruction for Specification 9.

During the government's closing argument, it stated that Specifications 8, 9, and 10 of Additional Charge I happened in September of 2020. (R. at 1203). During defense's closing argument, counsel also discussed variance and how it was only applicable to the December 2019 to February 2020 date range. (R. at 1212). In this case, the dates are material with respect to Specification 9 because over a period of only a few weeks from August to September 2020, the appellant and her spouse (Ms.

moved, traveled to, and stayed in various different locations, including Fairfax, Virginia; Weed, California; and Oregon. (R. at 550-51, 645-46, 648, 651-52). Part of that time, Ms. HS and appellant were geographically separated in that Ms. HS had to return to Virginia without appellant. (R. at 651-52). There were multiple alleged incidents of domestic violence that occurred around this time frame, including one that occurred in a storage unit in Virginia and another (the basis of Specification 9) that occurred in Appellant's jeep in California. (R. at 550-51, 554, 645-46) In sum, the appellant would have suffered significant prejudice had the government been permitted to amend the dates for Specification 9 because this case included a variety of different domestic violence incidents spanning different dates and locations.

The panel members convicted appellant of Specification 9 of Additional Charge I based, at least in part, upon evidence presented by the government that the offense occurred in September 2020 instead of August 2020.

Standard of Review

The Court of Appeals for the Armed Forces (CAAF) reviews whether a Court of Criminal Appeals (CCA) applied "correct legal principles" to a factual sufficiency review. *United States v. Harvey*, 85 M.J. 127, 129 (C.A.A.F. 2024) (internal citations omitted). When the record demonstrates that a CCA misinterpreted the law, CAAF remands the case for another factual sufficiency review under the correct legal standard. *Id.* (internal citation omitted). A

misunderstanding of the applicable legal standard can affect not only the legal sufficiency analysis, but also the factual sufficiency analysis, *United States v. Moore*, __ M.J. ____, slip op at 12 (C.A.A.F. 2026).

The Court of Appeals for the Armed Forces reviews questions of statutory interpretation de novo. *United States v. Mendoza*, 85 M.J. 213, 218 (C.A.A.F. 2024) (internal citation omitted). This de novo standard includes “most legal sufficiency cases.” *Id.* at 217 (internal citation omitted). The Court asks whether, viewing the evidence in the light most favorable to the Government, any rational fact-finder could have found the essential elements of the crime beyond a reasonable doubt. *Id.* (internal citation omitted).

Law

A. “On or about”

“On or about” is a term of art in pleading that can allow the government to avoid proving an exact date of alleged criminal conduct, but only “if a date reasonably near is established.” *United States v. Hunt*, 37 M.J. 344, 347 (C.M.A. 1993) (quoting *United States v. Nersesian*, 824 F.2d 1294, 1323 (2d Cir. 1987)). While recent decisions suggest that “on or about” should indicate “a range of days to weeks,” this Court has declined to establish a red-line rule for what constitutes a “reasonable” date variance. *United States v. Simmons*, 82 M.J. 134, 139 (C.A.A.F. 2022). Nevertheless, this Court must interpret “on or about” language in a way that

protects an accused's constitutional right "to receive fair notice of what he is being charged with." *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011).

B. Variance

A variance between the details of the government's specification and the evidence introduced at trial is fatal if it is 1) material and 2) prejudicial to the accused. *United States v. Marshall*, 67 M.J. 418, 420 (C.A.A.F. 2009). A variance is material when it "substantially changes the nature of the offense, increases the seriousness of the offense, or increases the punishment of the offense." *Id.* A variance is prejudicial when it (1) puts the appellant "at risk of another prosecution for the same conduct," (2) misleads the appellant "to the extent that he has been inadequately able to prepare for trial," or (3) denies the appellant "the ability to defend against the charge." *Id.* (See also *United States v. Treat*, 73 M.J. 331, 336 (C.A.A.F. 2014)).

In *Kershaw*, this Court held that pursuant to the CCAs' broad authority, if there is a discrepancy between a fact pleaded by the government and proven at trial, and that fact is not an integral part of an element of the charged offense, the CCA has the authority to conduct a variance analysis and test for prejudice. *United States v. Kershaw*, 2026 CAAF LEXIS 396, *16 (C.A.A.F. Apr. 30, 2026). If the CCA determines there is no prejudice to the appellant, the CCA may affirm the conviction on factual sufficiency grounds regardless of the discrepancy. *Id.* This is the case

regardless of whether the fact-finder made exceptions and substitutions at trial. *Id.*

Argument

A. The Army Court Erred in Finding Specification 9 to be Factually & Legally Sufficient Because the Evidence Does not Support a Finding of Guilt.

The government failed to introduce evidence at trial proving that appellant committed a 128b offense “between on or about 1 September 2020” and “on or about 30 September 2020.” None of the witnesses testified that the alleged event in Specification 9 took place between 19 August and 25 August 2020. The only witnesses who testified that the alleged event occurred at all were the victim and her mother (Ms. SK).

Given the lack of direct or circumstantial evidence to support a conviction of appellant under Specification 9 during the charged date range, the panel members could not have reached a finding of guilty without considering the government’s evidence placing the alleged incident in August 2020 instead of September 2020. The government was required to prove the incident occurred during the dates alleged in the specification, but failed to do so.

B. *Kershaw*’s Two Step Test Precludes the Army Court from Making a Variance Finding in this Case.

Although the date range is not an essential element of Specification 9, the Army Court still erred in affirming appellant’s conviction. Pursuant to *Kershaw*, the Army Court can only affirm under a variance theory *if* that variance does not

prejudice an appellant. In this case, a change in dates would have caused such prejudice. The military judge explicitly acknowledged the possible harm to appellant in his denial of the government's motion to amend the charge sheet. The military judge agreed that the change being proposed by the government changed the "landscape" the defense had prepared to defend against. (R. at 143-44).

The original charge sheet put appellant on notice of the specific acts of domestic violence she needed to defend against. By amending the offense dates on the eve of trial, appellant would have needed to change her trial strategy to account for uncharged misconduct that occurred at a different time and location.

The government sought to amend the dates on the eve of trial to better match the testimony of its witnesses. The military judge found that a change in the dates only one day before trial "may prejudice the accused in the way that the defense has decided strategically to defend against this case and to cross-examine the alleged victim." (R. at 143-44).

The offense on the original charge sheet (Specification 9 of Additional Charge I) described appellant striking her spouse (Ms. HS) on the head "at or near Weed, California, between on or above 1 September 2020 and on or about 30 September 2020." (Charge Sheet). In the government's motion, it stated "...the AV has consistently stated that the assaults [with respect to Specifications 8, 9, and 10 of Additional Charge 1] occurred when the AV and the Accused were visiting the

Accused's parents in Weed, California from August to September 2020..." (App. Ex. LVI, p. 9). At trial, witnesses testified that appellant and Ms. HS were in California visiting family in August 2020 but were in Virginia in September 2020. (Cite).

A service court of criminal appeals must consider a variety of different types of prejudice, to include whether the discrepancy [in facts charges versus those proven at trial]: (1) materially misleads the accused about what he/she needed to defend against at trial; (2) Fails to protect the accused from a future prosecution for the same offense; (3) Alters the nature of the offense; (4) Changes the possible maximum punishment; or (5) Otherwise materially infringes upon an accused's due process rights. *Kershaw* at *12, n. 7 (internal citations omitted).

In this case, the proposed change in dates would have fundamentally prejudiced the appellant in a variety of ways. First, it would have deprived appellant of fair notice as to the incidents of domestic violence she needed to defend against. Defense counsel would have needed to comprehensively change their trial strategy and their timeline of events before, during, and after the alleged assault.

In sum, the victim's testimony regarding the events between August 2020 and September 2020 was very unclear. The victim, Ms. HS, testified that between June to July 2020, the appellant and she were in the process of moving to California. (R. 540-41). Ms. HS described one domestic violence incident around this time that

occurred at a storage unit in Fairfax, Virginia where appellant put her hand on Ms. HS's neck. (R. 544).

After moving out of their shared Fairfax, Virginia apartment, Ms. HS testified that she and appellant did not have anywhere to live initially and were living in hotels "for a little bit." (R. 547). Ms. HS also described living with appellant's father from "August to September of 2020" in Weed, California for about a month and half. (R. 550). In September 2020, Ms. HS testified that appellant put her in a headlock and punched her face when they were in appellant's Jeep in Weed, California. (R. at 550-51, 645). Ms. HS said she and appellant had been in California "probably a few weeks" when the incident occurred but could not recall exactly when the assault had occurred. (R. 553).

This incident formed the basis of appellant's conviction for Specification 9 of Additional Charge I. (Charge Sheet; Statement of Trial Results). On cross examination, Ms. HS testified that she had at least two medical appointments at Walter Reed³ (which is located in Bethesda, Maryland) during August 2020. (R. 628). Ms. HS also admitted that in her initial police report, she told law enforcement that the incident in appellant's jeep actually happened in Hunts Circle, Virginia. (R. 646). Ms. HS also stated that while in California, she and appellant took a trip along

³ Walter Reed National Military Medical Center is a U.S. military medical facility located in Bethesda, Maryland.

the coast of Oregon with appellant's family. (R. at 648). Ms. HS also testified that around the same time frame, she returned to Virginia to begin a new job. (R. at 651-52). Appellant was still in California at that time, but later returned to Virginia. (R. at 651-52).

From August to September 2020, appellant and Ms. HS were in Fairfax, VA; Bethesda, Maryland; Oregon; and Weed, California in a variety of hotels and homes. The dates of events in the case were critical to defense's strategy, particularly in terms of their impeachment questions of the victim (Ms. HS). Had the government been allowed to amend the charge sheet, the defense would have needed to potentially call different witnesses, as well as significantly alter their cross-examination of Ms. HS.

A change in dates would have been particularly prejudicial here given that this case encapsulated a variety of different domestic violence incidents spanning different dates and locations. At least two charged incidents occurred when appellant and Ms. HS were transitioning between multiple states and homes. A change in dates would have misled appellant about which incidents she needed to defend against at trial and would have altered the nature of the offense itself. In sum, the specific dates were critical, and allowing the government to amend its charge sheet on the eve of trial would have prejudiced appellant and infringed on her due process rights.

Furthermore, any amendment to the charge sheet would be considered a

“major” change *per se* under R.C.M. 603(b) given that it would be “likely to mislead the accused as to the offense charged.” R.C.M. 603(b). Major changes cannot proceed against defense objection unless the charges are preferred anew, thus the government should have been limited in its arguments and evidence to the time frame on the charge sheet.

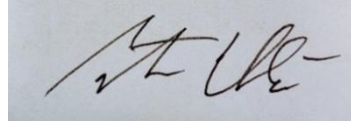
Allowing appellant’s conviction to stand is fundamentally unfair, in that it allows the Government to supersede a trial judge’s finding of prejudice. In appellant’s case, proof that the assault occurred in August 2020 was never presented to the panel, and therefore, the Army Court erred in affirming her conviction as to Specification 9 of Additional Charge I.

Conclusion

For the foregoing reasons, appellant respectfully requests this Court grant his
Petition for Grant of Review.



Emily R. Ittner
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
USCAAF Bar Number 38091



Peter M. Ellis
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar Number 38209



Kyle C. Sprague
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar Number 36867

Certificate of Compliance with Rules 24(c) and 37

1. This Brief on Behalf of Appellant complies with the type-volume limitation of Rule 24(c) because it contains 3,413 words.
2. This Brief on Behalf of Appellant complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.



Emily R. Ittner
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0692
USCAAF Bar No. 38091

APPENDIX A

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
COOPER, WILLIAMS, and SCHLACK
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant SIERRA L. SKEEN
United States Army, Appellant

ARMY 20240101

Headquarters, 19th Expeditionary Sustainment Command
Larry A. Babin, Military Judge
Lieutenant Colonel Christopher C. Waite, Staff Judge Advocate

For Appellant: Colonel Frank E. Kostik, Jr., JA; Lieutenant Colonel Kyle C. Sprague, JA; Major Peter M. Ellis, JA; Captain Jessica A. Adler, JA (on brief and reply brief).

For Appellee: Colonel Richard E. Gorini, JA; Major Elizabeth G. Van Dyck, JA; Captain Melissa D. Zigrang, JA (on brief).

24 April 2026

DECISION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence, as entered in the Judgment, correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

FOR THE COURT:

A handwritten signature in black ink, appearing to read 'S. P. Haight', with a large, sweeping flourish extending from the end of the signature.

STEVEN P. HAIGHT
Acting Clerk of Court

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
COOPER, WILLIAMS, and SCHLACK
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant SIERRA L. SKEEN
United States Army, Appellant

ARMY 20240101

ORDER

WHEREAS:

On 21 May 2026, appellant requested reconsideration of this court's decision, issued 24 April 2026, and suggested reconsideration en banc. The request for reconsideration is DENIED. The suggestion for reconsideration en banc is not adopted.

DATE: 16 June 2026

FOR THE COURT:


JAMES W. HERRING, JR.
Clerk of Court

CF: JALS-DA
JALS-GA
JALS-CCR
JALS-CR2

APPENDIX B

Appendix B: Matters Submitted Pursuant to *United States v. Grostefon*

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

I. WHETHER THE ARMY COURT ERRED IN AFFIRMING APPELLANT’S CONVICTION FOR FORGERY UNDER ARTICLE 105, UCMJ, WHEN THE MILITARY ORDERS DID NOT ALTER LEGAL RIGHTS OR LIABILITIES.

Reasons to Grant Review

This issue presents the unique question of whether the alteration of one’s military orders can constitute forgery, given that the definitions of “legal efficacy” and “falsity” have yet to be clearly defined by this Court.

There are two distinct forgery offenses under Article 105, UCMJ: forgery by (1) “making or altering” and (2) forgery by “uttering.” *United States v. Weeks*, 71 M.J. 44, 46 (C.A.A.F. 2012).

“Falsity in the forgery context is a term of art that developed in common law.” *United States v. Weeks*, 71 M.J. 44, 47 (C.A.A.F. 2012) (internal citations omitted).¹ When the falsity lies in the representation of facts, rather than genuineness of execution, it is not forgery. *Id* at 48. (citing MCM pt. IV, para 48.c(2), other internal citations omitted). False recitals of fact in a document therefore do not make the document a forgery

¹ In *Weeks*, this Court held that whether something is a “false instrument” at common law (and therefore under the UCMJ) is dependent on whether the falsity is in the representation of the facts versus the genuineness of the execution. *Weeks* at 48.

and forgery is not committed by the genuine making of a false instrument, even when made with the intent to defraud. *Id.* (internal citations omitted). Yet that is exactly what happened in this case – the appellant changed the representation of facts within a document itself. This does not constitute forgery under this Court’s precedent.

The distinction between forgery and the making of a false instrument depends on whether the accused impersonates another person, such as the classic example of someone signing someone else’s name to a legal document. *Id.* In *Banfield*, this Court held that when appellant found unsigned travelers checks in the street, signed them using a fictitious name, and spent them on merchandise, he did commit forgery. *United States v. Banfield*, 37 M.J. 325, 326 (C.M.A. 1993). In contrast, in *Weeks*, the Court held that when the appellant falsely signed checks for an account belonging to another person, he did not impersonate the actual owners, or commit forgery. *Weeks* at 48.

In this case, appellant did not forge another’s signature, she instead changed one sentence in otherwise genuine permanent change of station orders. Under the UCMJ, which incorporates common law definitions, this is not forgery. There is further ambiguity over whether alteration of one’s military orders meets the strict “legal efficacy” requirement under the UCMJ. In sum, the instant case presents an opportunity for this Court to clarify the definition of “falsity” in a military context.

In addition to the lack of clear definition of “falsity,” unlike federal cases, the military offense of forgery contains an additional element that a document have “legal efficacy.” “Legal efficacy” has been defined by this Court on a case-by-case and fact-

specific basis. This Court should grant review to define these legal terms of art and resolve the differences in how each service court has analyzed forgery offenses. The facts of this case are similar to *United States v. Hopwood*, where this Court found that signing an application for credit was not forgery, even if the application was a necessary step in a process that could create a legal right or liability. *United States v. Hopwood*, 30 M.J. 146, 148 (C.M.A. 1990).

In sum, the development of the offense of forgery stems from common law, and terms such as “falsity” and “legal efficacy” are terms of art that have yet to be clearly defined by this Court. This Court should grant review to clarify those definitions in the military context.

Facts Relevant to Assignment of Error II

Appellant was found guilty of two specifications of Article 105, UCMJ, one for falsely altering military orders and one for uttering the falsely altered military orders. (R. at 1265). In February 2019, appellant and the victim, Ms. HS, moved into appellant’s home. (R. at 441-42). At this time, Ms. HS was living in her own apartment. (R. at 441). During trial, over defense objection, the military judge granted the government’s motion to admit Pros. Ex. 1, which were orders allegedly created by the appellant. (R. at 444, 449-50; Pros. Ex. 1).

The government then moved to introduce Pros. Ex. 23; the original orders given to appellant, which the military judge granted over the defense’s objection. (R. at 450, 461). The government published Pros. Ex. 23 and Pros. Ex. 1 side by side to the panel. (R. at

465). Ms. HS testified she did not see appellant put her name on the orders [Pros. Ex. 1] nor was she with appellant when the alteration allegedly occurred. (R. at 466-67). Ms. HS testified she accompanied appellant to the leasing office of her apartment complex. (R. 467). Ms. HS testified appellant handed the paperwork to the apartment complex leasing office. (R. at 442-43). Appellant was found guilty of Specifications 1 and 2 of Additional Charge II. (R. at 1265). The military judge granted the defense's motion to merge them sentencing due to an unreasonable multiplication of charges. (R. at 1279).

Standard of Review

This Court reviews questions of law, such as whether an appellant "falsely" made a check or whether something constitutes a "signature or writing" de novo. *United States v. Weeks*, 71 M.J. 44, 46 (C.A.A.F. 2012).

Law

To be found guilty of forgery under Article 105, UCMJ, the government must prove:

- (a) that the accused falsely made or altered a certain signature or writing;
- (b) that the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change another's legal rights or liabilities to that person's prejudice; and
- (c) that the false making or altering was with the intent to defraud.

See Manual for Courts-Martial, United States (2019 ed.) [MCM] pt. IV ¶ 37.b.

"There are two separate and distinct forgery offenses under Article 105, UCMJ: (1) forgery by "making or altering" and (2) forgery by "uttering." *United States v. Weeks*, 71 M.J. 44, 46 (C.A.A.F. 2012). The statute does not set out alternative ways to commit

forgery, in the sense of having to choose; rather, it specifies two conceptually distinct and different ways to commit forgery so that, in a given factual context one or the other or both might be violated.” *United States v. Albrecht*, 43 M.J. 65, 68 (C.A.A.F. 1995).

Argument

The Army Court Erred in Finding Specification 1 of Additional Charge II Legally Sufficient.

The government failed to show that the military orders, standing alone, would create any legal right or liability. *United States v. Hopwood*, 30 M.J. 146, 148 (C.M.A. 1990). In *Hopwood*, the Court determined that the submission of an application for credit was not forgery, in that the application would not create any legal right or liability on part of the makers. *Id.* Here, the writing does not appear on its face or from facts in the record of trial to impose a legal liability on another and therefore the document has no legal efficacy. *Id.*

Similar to *Hopwood*, military orders are administrative documents, which require independent third-part action to have legal effect. Pursuant to the Servicemembers Civil Relief Act, 50 U.S.C. § 3955, there are other actions required in order to terminate a lease, namely, written notice and delivery to the landlord. Military orders in and of themselves cannot terminate a civilian lease without additional requirements being met as well as additional follow up actions being taken on the part of the landlord and others, such as the military human resources and payroll offices. The government did not present evidence that these steps were accomplished such that the orders on their face would create any immediate legal right or liability. This is different from other cases where the Court has

found that the document created “perfects” an immediate right for an appellant. See, e.g. *United States v. Taylor*, 9 U.S.C.M.A. 596, 601 (C.M.A. 1958) (forged ration books allowed appellant to purchase cigarettes at post exchange, diminishing government supply and increasing demand).

In *United States v. Thomas*, 25 M.J. 396, *398 (C.M.A. 1988), the Court of Military Appeals defined the “legal efficacy” requirement for a forgery offense:

..the writing must appear either on its face or from extrinsic facts to *impose a legal liability* on another, or to *change a legal right or liability to the prejudice of another*. . . . Thus, the false making, with intent to defraud, of an instrument affirmatively invalid on its face is not forgery nor is the false making or altering, with intent to defraud, of a writing which could *not impose a legal liability*...

The “legal efficacy” requirement is interpreted “strictly.” *Id.*

Additionally, it is not clear that appellant “falsely made” her military permanent change of station orders. In this case, appellant changed a fact contained those orders, but did not fictitiously sign them or otherwise impersonate another person, which is required to commit forgery. *Weeks* at 48.

In this case, the government failed to meet the strict “legal efficacy” standard. Specifically, the government failed to show the alteration of the military orders, in and of themselves, dictated a legal liability or harm. The military orders may be a necessary step in a process that may eventually establish a legal right or liability, similar to the credit application to buy an automobile in *Hopwood*. Like *Hopwood*, in this case, the alteration of the military orders did not create a legal liability and therefore, the appellant’s alleged alteration of the documents does not constitute forgery.

II. WHETHER THE ARMY COURT ERRED IN FAILING TO ORDER A *DUBAY* HEARING TO DETERMINE WHETHER A CLOSE RELATIONSHIP EXISTED BETWEEN THE LEAD PROSECUTOR AND A KEY GOVERNMENT WITNESS THAT WAS NEVER DISCLOSED TO DEFENSE.

Facts Relevant to Assignment of Error II

After the court-martial, appellant discovered that LTC SM had a particularly familiar relationship with Ms. SK, Ms. HS's mother. Contemporaneously with this filing, appellant filed a motion to attach Defense Exhibit A, which is an affidavit and pictures which show the government failed to disclose a relationship and this failure may have influenced the proceedings. (Defense App. Ex. A).

During the government's argument on its motion to amend the charge sheet, the government stated they had access to Ms. SK throughout this investigation and had been in contact with her. (R. at 136). The government continued that Ms. SK was in Korea before the original trial date and provided her phone to the government. (R. at 136). Yet, the government stated it was not until 24 February 2024 that they received more concrete evidence of the corrected dates. (App. Ex. LVI). There is only one memorandum for record documenting a telephone call between the government and Ms. SK that occurred on 8 November 2022 in then record. (App. Ex. XXXV-C).

However, LTC SM was so familiar with Ms. SK, he ended up giving his dog to her. (Defense App. Ex. A). At some point LTC SM and Ms. SK became friends on Facebook, and LTC SM wrote multiple comments to Ms. SK, to include "what a women" in reference to Ms. SK's post that her daughter (the alleged victim in this case)

was going to “speak on a subject that is near and dear to my heart and hers” at the “#JAGSCHOOL.” (Defense App. Ex. A).

Standard of Review

When there are factual issues that need resolution, and the record of trial must be expanded, this court can order an evidentiary hearing in accordance with *United States v. Dubai*. 17 C.M.A. 147, 37 C.M.R 411 (1967).

Law

Dubai hearings are an oft-utilized and “well-accepted procedural tool [used by appellate courts in the military] for addressing a wide range of post-trial collateral issues.” *United States v. Fagan*, 59 M.J. 238, 241 (C.A.A.F. 2004).

In *Ginn*, the Court of Appeals for the Armed Forces (CAAF) announced six principles to be applied by the court of criminal appeals in disposing of post-trial, collateral, affidavit-based claims, such as ineffective assistance of counsel:

First, if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant’s favor, the claim may be rejected on that basis.

Second, if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis.

Third, if the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers an affidavit that expressly agrees with those facts, the court can proceed to decide the legal issue on the basis of those uncontroverted facts.

Fourth, if the affidavit is factually adequate on its face but the appellate filings and the record as a whole “compellingly demonstrate” the improbability of those facts, the Court may discount those factual assertions and decide the legal issue.

Fifth, when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide

the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal.

Sixth, the Court of Criminal Appeals is required to order a factfinding hearing only when the above-stated circumstances are not met. In such circumstances the court must remand the case to the trial level for a *Dubay* proceeding. During appellate review of the *Dubay* proceeding, the court may exercise its Article 66 factfinding power and decide the legal issue.

United States v. Ginn, 47 M.J. 236, 248 (C.A.A.F. 1997).

Argument

1. The *Ginn* Factors Have Not Been Met and Therefore a *Dubay* Hearing is Necessary.

Appellant submitted an affidavit and pictures of posts that were made on Facebook as evidence of inappropriate actions by LTC SM. (Defense App. Ex. A). The affidavit sets forth specific facts that, if resolved in appellant's favor would result in relief. *Id.* The relationship between Ms. SK, a crucial witness and the mother of the alleged victim in this case, and LTC SM create an appearance of a relationship that would have been a fertile source for cross examination of Ms. SK for bias under MRE 608(c), and possibly the addition of LTC SM to the defense witness list.

It is clear by the record that Ms. SK was in Korea for the original trial date, but it is unknown for how long and how many times she met with the government during her time in Korea. (App. Ex. LVI). The record has one memorandum of record from the government documenting a phone call on 8 November 2022 it had with Ms. SK. (App. Ex. XXXV-C). Yet, according to the record of trial, the defense knew the government

met with Ms. SK in person prior to the original trial date, and at a minimum, again on 24 February 2024, the day before trial. (R. at 136-37; App. Ex. LVI). Despite knowing these two in-person encounters occurred, there are no notes or memorandums in the record of trial from these two meetings.

According to the record, it is known that during both in-person meetings with Ms. SK, she provided the government exculpatory information that should have been disclosed to the defense. During the first in-person meeting, when the original trial date was set, Ms. SK provided her phone for an extraction. (R. at 136). The government also noted it had previously asked her to check on her iCloud account to see if there were any photos there, but the government never received anything from Ms. SK. (R. at 137). The government then highlighted in their motion to amend, how it just received the metadata associated with the photos on 24 February 2024, the weekend before trial. (R. at 137). Despite the government acknowledging receipt of exculpatory evidence during the meeting before the original trial date as well as the meeting the weekend before the trial actually began, defense received no notes documenting this information.

At the time the court-martial concluded, defense was aware of two in-person meetings and a phone call between the government and Ms. SK. Despite the limited interactions between the government and Ms. SK, LTC SM felt he knew Ms. SK well enough to place his beloved dog in the care of Ms. SK following the court-martial. This information only became known to the appellant through Facebook. (Defense App. Ex. A). On 28 April 2024, less than 60 days from the adjournment of appellant's court-

martial, LTC SM gave his dog to [Ms. SK], to whom he familiarly referred using her first name. (Defense App. Ex. A). Lieutenant Colonel SM became friends on Facebook with Ms. SK, commenting on multiple posts that Ms. SK made. (Defense App. Ex. A). The different posts were all relatively close to the adjournment of the court-martial; 10 May 2024, 31 July 2024, and 8 August 2024. (Defense App. Ex. A). Did this relationship between LTC SM and Ms. SK exist prior to the conclusion of this court-martial, and if so, why are there no disclosures of such in the record? Did this relationship blossom during trial preparations, and if so, why did the government decline to disclose any memorandums or notes documenting any meetings or conversations with Ms. SK?

The affidavit contains more than speculative observations, as pictures of the posts and comments made by LTC SM to Ms. SK are included as direct evidence of these interactions. *Id.* There is nothing in the record of trial that contradicts these facts as asserted by appellant. *Id.* In reviewing the objective evidence currently available to the defense and this court, it seems highly likely there were more than two trial preparation meetings to develop such a relationship.

This available evidence raises serious questions about the fairness of appellant's trial. First, it appears there were discovery violations regarding the meetings that defense already knows about. While the government acknowledged receipt of exculpatory evidence from Ms. SK, no notes have been produced from any meetings or conversations with her, but for the 8 November telephone call. (R. at 136-37). Second,

there is the overarching question related to the Facebook interactions between Ms. SK and LTC SM regarding what exactly was going on between a prosecutor and one of his star witnesses; a witness who he would entrust his beloved dog to within the following 60 days. There is a reasonable inference given the lack of discovery for meetings where it is known exculpatory evidence existed and the direct evidence of comments and posts made by LTC SM to Ms. SK, that some type of relationship beyond that of a typical prosecutor and witness existed and was not disclosed to the defense. (Defense App. Ex. A).

Since the *Ginn* factors have not been met, this court is should order a factfinding hearing to resolve this matter. *Id.*

2. Prejudice

The unknown extent of the relationship between LTC SM and Ms. SK and their interactions throughout the preparation for this case manifest injustice and create an appearance of unfairness. This appearance needs to be explored and questioned to understand what actions were taken by LTC SM and whether those actions should have been disclosed to defense under R.C.M. 701. Whether a relationship existed during the court-martial lends to the inability of the defense to present their case. Questions as to the credibility and the bias of Ms. SK and Ms. HS were unasked and unanswered. Since none of this information pertaining to a relationship between LTC SM and Ms. SK were brought to light until post-trial, appellant was unable to explore this line of questioning. Information regarding a relationship and motives for testifying could have impacted the

fact finder, but defense was never given the opportunity to explore this. Since appellant has become aware of the prejudice to her case, the perception is that she did not receive a fair trial.

**III. WHETHER SPECIFICATION 1 AND SPECIFICATION 2 OF
ADDITIONAL CHARGE II ARE MULTIPLICIOUS AND SHOULD
BE MERGED FOR FINDINGS.**

**IV. WHETHER THE ARMY COUR ERRED IN FINDING THAT
SPECIFICATIONS 1 AND 2 OF ADDITIONAL CHARGE II WERE
LEGALLY AND FACTUALLY SUFFICIENT.**

**V. WHETHER THE MILITARY JUDGE ERRED WHEN HE FAILED TO
PROVIDE A CURATIVE INSTRUCTION TO THE PANEL AFTER
SUSTAINING A SECTION III OBJECTION.**

During the voir dire, the military judge provided a blanket instruction to the panel members, which stated “during the trial, when I sustain an objection, disregard the question and answer. If I overrule an objection, you may consider both the question and answer. (R. at 308). Ms. HS provided testimony on direct examination regarding Additional Charge II, Specification 1 and 2, which appellant was found guilty of. Defense timely objected during Ms. HS’s testimony when she said, “She [Appellant] said it would be a very easy process of a copy and paste, and she would just put my name and the date that that (sic) needs to correct the date on the document.” (R. at 467). Defense objected to this statement since it was not provided in Section III disclosures. (R. at 467). The government conceded that they failed to disclose that specific statement to defense. (R. at 467). The military judge sustained the objection. (R. at 467). The military judge failed to provide a curative instruction to the panel. As the trial

continued, the military judge warned counsel that he is being very deliberate to give reasons when overruling objections. (R. at 577). The military judge continued, and stated counsel needs to record the reasons so counsel doesn't improperly argue evidence that was admitted for one purpose and argue it means something else. (R. at 577). The military judge concluded with the fact he would be listening very closely to arguments to ensure the only purpose that evidence was allowed in for would be argued. (R. at 577). During the government's closing argument regarding Additional Charge II, Specification 1 and 2, the government references the statement made by Ms. HS on direct, which the military judge sustained. (R. at 467). Specifically, the government counsel stated, "and you heard the testimony from [Ms. HS], how the accused stated, she came up with this idea and stated it's, it's going to be easy. (R. at 1196).

"Failure to object to improper argument before the military judge begins to instruct the members on findings shall constitute forfeiture of the objection." R.C.M. 919(c). Since defense counsel did not object during the government's closing argument, this court reviews for plain error, which occurs "when: (1) an error was committed; (2) the error was plain, clear, or obvious; and (3) and the error resulted in material prejudice to an appellant's substantial rights." *United States v. Wilkins*, 71 M.J. 410, 412 (C.A.A.F. 2012).

Appellant is entitled to relief as the military judge failed to provide a curative instruction to the panel after sustaining a Section III objection and appellant suffered

prejudice when the Government counsel during closing referenced the sustained testimony.

- VI. WHETHER THERE WAS UNDUE COMMAND INFLUENCE WHEN THE ADDITIONAL CHARGES WERE PREFERRED. (SEE DEFENSE APP. EX. B)**
- VII. WHETHER THE MILITARY JUDGE SHOULD HAVE RECUSED HIMSELF GIVEN HIS CLOSE RELATIONSHIP WITH LTC SM. (SEE DEFENSE APP. EX. C)**
- VIII. WHETHER THE FACT THAT THE APPELLANT VISITED WITH MS. HS AFTER THE ALLEGATIONS HIGHLIGHTS THE LACK OF EVIDENCE TO SUPPORT THE FINDING OF GUILTY FOR SPECIFICATION 9 OF ADDITIONAL CHARGE**
- IX. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED DEFENSE'S 404(B) OBJECTION DURING DR. N.C.'S TESTMONY.**
- X. WHETHER THE TESTIMONY OF DR. N.C. AMOUNTED TO PROPENSITY EVIDENCE FOR EITHER THE ACCUSED OR THE VICTIM.**
- XI. WHETHER APPELLANT IS ENTITLED TO RELIEF DUE TO UNREASONABLE POST TRIAL DELAY.**

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Skeen,
Crim App. Dkt. No. 20240101, USCA Dkt. 26-0265/AR was electronically with
the Court and Government Appellate Division on October 6, 2026.

A handwritten signature in black ink, reading "Emily R. Ittner". The signature is fluid and cursive, with the first name "Emily" being the most prominent part.

EMILY R. ITTNER
Defense Appellate Counsel
Defense Appellate Division
(703) 693-0692