IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee* v. **Fernando M. BROWN** Chief Machinery Technician (E-7) U.S. Coast Guard, *Appellant*	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 001-69-21 USCA Dkt. No. 22-0249/CG

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

SCOTT HOCKENBERRY
Civilian Appellate Defense Counsel
Daniel Conway and Associates,
Attorneys-at-Law
12235 Arabian Place,
Woodbridge, VA 22912
Tel. 586-930-8359
Fax. 210-783-9255
hockenberry@militaryattorney.com
www.mcmilitarylaw.com
CAAF Bar No. 37385

KRISTEN R. BRADLEY
LCDR, USCG
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Suite 100
Washington Navy Yard, D.C. 20374
Tel. 202-685-8588
Kristen.R.Bradley@uscg.mil
CAAF Bar No. 37650

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ISSUE PRESENTED

ARE APPELLANT'S CONVICTIONS UNDER ARTICLE 91 LEGALLY INSUFFICIENT WHERE THERE IS AN ABSENCE OF EVIDENCE THAT THE CHARGED CONDUCT OCCURRED IN THE SIGHT, HEARING, OR PRESENCE OF THE ALLEGED VICTIMS WHILE THEY WERE IN THE EXECUTION OF THEIR OFFICE?

Introduction

Article 91 only criminalizes being "disrespectful *in . . . deportment toward . . .* a petty officer, *while* that officer *is in the execution of his office.*"[1] The President has defined the elements of this offense to require that acts done "toward" a petty officer must also be "*within sight or hearing*" of the petty officer.[2] The President has defined "in execution of office" as "engaged in any act or service required or authorized by treaty, statute, regulation, the order of a superior, or military usage,"[3] and explained that disrespect "in deportment" consists of conduct done "*in the presence of*" the petty officer.[4]

Here, Chief Brown texted memes about three of his peers to the Chief's Mess group text message, which was used not just for official business, but also for

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[1] 10 U.S.C. § 891(3) (2018) (emphasis added).

[2] JA 0183 (*Manual for Courts-Martial*, pt. IV, para. 17.b (2019 ed.) [*MCM 2019*]) (emphasis added).

[3] JA 0181 (*MCM 2019*, pt. IV, para. 15.c.(3)(f)) (emphasis added).

[4] JA 0180 (*MCM 2019*, pt. IV, para. 15.c(2)(b)) (emphasis added).

jokes and other off-duty chats and levity. When not all of his peers appreciated his sense of humor, rather than simply being told to knock it off, he was criminally charged with disrespect "in deportment" under Article 91 for creating and sending the memes. At trial, however, the Government offered no evidence that Chief Brown was co-located with any of the recipients at the time these messages were composed, sent, received, or read—and it was clear from context that he was not co-located with them. Additionally, the Government did not offer evidence proving (a) when the three memes were created, (b) when two of them were sent, or (c) what the alleged victims were doing to demonstrate that they were in the execution of their office at those times.

As such, the evidence is insufficient to prove that the charged acts of creating and sending the memes were done (a) while the alleged victims were in execution of office, (b) within the sight or hearing of the alleged victims, or (c) in the presence of the alleged victims, as required by the statute, elements, and definitions of the offense. The Government and the Military Judge stretched Article 91 beyond its physical and temporal limits to convict Chief Brown for conduct that did not occur within the range of sensory perception of the three alleged victims while they were in the execution of their office. The lower court stretched Article 91 even thinner when it attempted to cure the absence of evidence in this case by impermissibly broadening the scope of the article far beyond the

statutory and executive language used to define it, and by affirming the convictions based on a legal analysis directly contrary to that applied by the Military Judge in his special findings. This Court should correct these errors.

Statement of Statutory Jurisdiction

The Coast Guard Court of Criminal Appeals had jurisdiction over this matter under Article 69(d)(1)(A), Uniform Code of Military Justice (UCMJ).[5] Chief Brown invokes this Court's jurisdiction under Article 67(a)(3), UCMJ.[6]

Statement of the Case

A Military Judge sitting as a special court-martial convicted Chief Brown, contrary to his pleas, of three specifications of disrespect toward a petty officer in violation of Article 91, UCMJ,[7] and one specification of violating a lawful general order prohibiting sexual harassment in violation of Article 92, UCMJ.[8] The Military Judge granted a motion for a finding of not guilty pursuant to Rule for Courts-Martial (R.C.M.) 917 with respect to one specification of disrespect toward a petty officer in violation of Article 91, UCMJ, and one specification of violating a lawful general order prohibiting sexual harassment in violation of Article 92, UCMJ. The Military Judge sentenced Chief Brown to reduction to E-4, a

[5] 10 U.S.C. § 869(d)(1)(A) (2018).
[6] 10 U.S.C. § 867(a)(3) (2018).
[7] 10 U.S.C. § 891 (2018).
[8] 10 U.S.C. § 892 (2018).

reprimand, and restriction for thirty days. The Convening Authority approved the sentence as adjudged.

The lower court affirmed the disrespect convictions, set aside the sexual harassment conviction, and reassessed the sentence, disapproving any reduction below E-6.[9] Chief Brown timely petitioned this Court for review of the disrespect convictions, which this Court granted on October 3, 2022.[10]

Statement of Facts

Chief Brown's three convictions for disrespect toward a petty officer in violation of Article 91, all stem from text messages he sent to his fellow chiefs while their ship, Coast Guard Cutter *Polar Star* (WAGB 10), was in dry dock in Vallejo, California.[11] While the ship was in dry dock, the crew was divided into three different groups—two in the ship's homeport in Seattle, Washington, and one with the ship in Vallejo.[12] During this time, eleven members of the ship's Chief's Mess, at least four of whom were E-7s (including Chief Brown) and one of whom was an E-8, used a group text on their personal cellphones to communicate about various matters—some work-related, some not—while they were both on and off

[9] JA 0008 (*United States v. Brown*, 82 M.J. 702, 711 (C.G. Ct. Crim. App. 2022)).
[10] JA 0001 (Order Granting Review).
[11] JA 0012, 0015 (Charge Sheet; Statement of Trial Results).
[12] JA 0020.

duty.[13] No one was ordered to participate in or monitor the group text,[14] but it was a way for peers and colleagues to stay in contact while in different locations. The group text was sometimes used to pass work-related information about the ship, including call-in information for regular telephonic "Chief's Calls."[15] But it was also used for a variety of non-work-related reasons, such as "friendly conversations";[16] to "share jokes,"[17] pictures, and memes;[18] and to provide "some levity."[19]

1. Chief Brown sent text messages within the Chief's Mess group text, including three meme-like photos poking fun at Senior Chief K.B., Chief S.C., and Chief J.D.

While the *Polar Star* was in Vallejo, Chief Brown sent messages to his fellow chiefs in the group text.[20] Three of these included meme-like[21] photos poking fun at Senior Chief K.B., Chief S.C., and Chief J.D.—who were all part of

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[13] JA 0020-0021.
[14] JA 0118.
[15] JA 0078-0079.
[16] JA 0079.
[17] JA 0059.
[18] JA 0140.
[19] JA 0030; *see also* JA 0164 (Pros. Ex. 10 (where one member of the group text, Chief J.D., shared a meme)).
[20] *See* JA 0162-0164.
[21] "Meme" is a term commonly used to refer to "an amusing or interesting item (such as a captioned picture or video) or genre of items that is spread widely online especially through social media." *Simpson, Next Friend of J.S. v. Tri-Valley Cmty. Unit Sch. Dist. No. 3*, 460 F. Supp. 3d 863, 866 (C.D. Ill. 2020) (citing Merriam-Webster's Dictionary).

the group text during that time.[22] One meme depicted a man in cowboy boots, short-cut denim shorts, and Dallas Cowboys body-paint, with a caption suggesting it was the reason Senior Chief K.B. missed a recent Chief's Call.[23] Another included a high school yearbook photo of Chief S.C. captioned with the phrase, "[v]oted most likely to steal your bitch."[24] The third depicted crudely drawn male genitalia on Chief J.D.'s hard hat.[25] At least one of the subjects of these memes (Senior Chief K.B.) found the joke it contained to be "funny" and not disrespectful.[26]

2. <u>There is no evidence Chief Brown was co-located with any of the alleged victims at the time he created or sent the memes, nor as to what the alleged victims were doing at that time.</u>

The record does not indicate where Chief Brown was physically located at the time these memes were created or sent, let alone received or viewed. There is no evidence that he was co-located with the alleged victims at any of those times. The meme regarding Senior Chief K.B. was sent on July 16, 2019 at 1939, which was "outside working hours,"[27] but the record is silent on what Senior Chief K.B. was doing or where he was located when the text was sent or viewed. The record is

[22] JA 0021.
[23] JA 0163.
[24] JA 0162.
[25] JA 0164.
[26] *See* JA 0107.
[27] JA 0107.

silent on when the meme regarding Chief S.C. was created or sent. She testified she was not on duty at the time and was away from the ship recovering from surgery while on convalescent leave.[28] Similarly, the record does not indicate when the meme related to Chief J.D. was created or sent, or what he was doing at those times. Chief J.D. was generally located with the ship in dry dock during the time period he viewed the message,[29] but a witness testified the message was not provided in the course of work and was "somebody trying to be funny."[30]

3. The Military Judge's special findings are silent as to how the creation or sending of the memes occurred within the sight, hearing, or presence of the alleged victims while they were in the execution of their office.

At the Defense's request, the Military Judge made written special findings pursuant to R.C.M. 918(b).[31] The special findings correctly note the President's elements for each offense requiring that the behavior charged as disrespect in deportment (i.e., the creation and sending of the memes) "was used toward and within sight or hearing" of the respective alleged victims who were "then in execution of [their] office."[32] The special findings also note that disrespect by acts includes any of the various acts done "in the presence of" the petty officer.[33]

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[28] JA 0124, 0149.
[29] JA 0083.
[30] JA 0031.
[31] JA 0166 (Special Findings at 1).
[32] JA 0167, 0169, 0171 (Special Findings at 2, 4, 6).
[33] JA 0167, 0169, 0172 (Special Findings at 2, 4, 7).

However, the special findings do not address *when* the memes were actually created or sent (the charged behaviors)—nor where the alleged victims were located or what they were doing at the time—as a basis for finding that they were "*then* in the execution of [their] office" at those times.[34] Additionally, the special findings do not state that the behavior was, in fact, used toward and within the sight or hearing of the respective alleged victims, nor analyze the "within sight or hearing" requirement.[35] Similarly, the special findings do not reconcile the definition of "disrespect by acts"—which requires that the acts occurred "in the presence" of the petty officer(s)—with the fact that the memes were sent by text message.[36]

4. <u>The lower court held sending a text message directly to an individual is actionable under Article 91, UCMJ, irrespective of physical proximity, or what the victim was doing at the time the accused conveyed the disrespect.</u>

The lower court broadly held that the elements of Article 91 are satisfied whenever "an accused directly causes disrespectful behavior or language to come within the victim's sight or hearing."[37] While stating the purpose of Article 91 is to "prevent[] disrespect of a . . . petty officer when that person is trying to do his or

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[34] *See* JA 0167, 0169, 0172 (Special Findings at 2, 4, 7) (emphasis added).
[35] *See generally* JA 0166 (Special Findings).
[36] *See generally* JA 0166.
[37] JA 0004 (*Brown*, 82 M.J. at 706 ("On its face, [Article 91] makes no distinction regarding the means used to convey the contempt or disrespect.")).

her job" the court reasoned "it would make no sense—and would likely be impracticable—to base liability on what the victim was doing at the time the accused conveyed the disrespect."[38] The court concluded that "[w]hether the recipient of a communication is in the execution of his office depends not so much on *when* and *where* he receives it as on *why* and in *what context*."[39] Next, the lower court held that the victims were in execution of office at the time they "viewed the messages"[40] because they were "authorized" and "expected, to use the Chief's Mess text message group to communicate about work-related matters."[41] The lower court did not mention or reconcile the fact that its analysis, focused on the time of the *viewing*, directly contradicted the analysis the factfinder actually engaged in, which focused on the time of the *sending*.

Summary of Argument

This case requires this Court to examine whether Article 91's seventy-one-year-old text applies to Chief Brown's use of remote, non-contemporaneous communications technology, where the Government failed to present evidence proving elements required by both Congress and the President. The answer is no.

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[38] JA 0005 (*Id.* at 707-08).
[39] JA 0006 (*Id*. at 708) (emphasis in original).
[40] JA 0006 (*Id.* at 708 ("Thus, when the victim chief petty officers *viewed the messages* that Appellant placed within their sight, whether they were at home or aboard the cutter, they were in the execution of their office.")) (emphasis added).
[41] JA 0006 (*Id.*).

Ordinary principles of statutory interpretation demonstrate that disrespect by deportment is only criminal if it occurs both "within sight or hearing" and "in the presence of" petty officers who are "then in the execution of [their] office." The execution-of-office requirement places temporal limitations on the criminality of an accused's conduct that are plainly rooted in both the statutory text and the President's elements and explanations. Further, the text of the President's "within sight or hearing" element adds a physical proximity requirement to the contemporaneity requirement, narrowing the scope of this statute even more. Additionally, the President's explanation that the accused's acts must be "in the presence of" the alleged victim shows that disrespectful deportment under Article 91 must occur in close physical proximity to the alleged victim, supporting the limitation created by the "within sight or hearing" element.

Here the charged conduct—the creating and sending of jocular memes to individuals who later receive and view them in other locations—falls outside the plain meaning of the statute, elements, and definitions. Particularly where, as here, the Government failed to offer evidence proving that the alleged victims were actually in the execution of their office at those times. These insufficiencies of proof are echoed in—and exacerbated by—the Military Judge's special findings, which provide no analysis of the "within sight or hearing of" or "in the presence of" requirements. The special findings summarily conclude that the alleged victims

were "in the execution" of office at the times Chief Brown communicated the messages, but fail to make any findings as to what they were doing or where they were located at those times.

The statutory context, legislative history, and historical usage of the phrases within Article 91 reinforce the existence of the contemporaneity and physical proximity requirements. These requirements specifically distinguish disrespect toward a petty officer under Article 91 from disrespect toward commissioned officers under Article 89, which does not include such requirements. By limiting criminal liability to disrespectful acts in close enough proximity to be observable at the time the alleged victim is in execution of office, these requirements vindicate the purpose of Article 91 and provide both certainty and notice of the relevant location and timeframe for such conduct.

An overbroad reading of the statute, such as the lower court's here, reanimates the very application problems that these requirements seek to solve. This Court should not judicially amend Article 91 to sweep in conduct that its text, context, and history do not support or contemplate. To the extent any ambiguity remains in the statutory or executive language at issue, the vagueness doctrine and rule of lenity require such ambiguity to be resolved in favor of Chief Brown, not against him as the lower court has done.

This Court should construe Article 91 in accordance with the congressional and executive language, which provides clear temporal and physical boundaries for when enlisted members can joke around or blow off steam with their peers without fear of criminal sanction.

Argument

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT CHIEF BROWN'S CONVICTIONS UNDER ARTICLE 91 DUE TO THE ABSENCE OF EVIDENCE THAT THE CHARGED CONDUCT OCCURRED IN THE SIGHT, HEARING, OR PRESENCE OF THE ALLEGED VICTIMS WHILE THEY WERE IN THE EXECUTION OF THEIR OFFICE.

Standard of Review

Questions of statutory interpretation are reviewed *de novo*.[42] The *Manual for Courts-Martial* is interpreted according to the rules of statutory interpretation[43] and its text is interpreted through *de novo* review.[44] A military judge's special findings on the issue of a servicemember's guilt or innocence are subject to the same appellate review as a general finding of guilt, and are reviewed for legal sufficiency *de novo*.[45]

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[42] *United States v. Jacobsen*, 77 M.J. 81, 84 (C.A.A.F. 2017).
[43] *United States v. Lucas*, 1 C.M.A. 19, 22 (C.M.A. 1951).
[44] *United States v. Rendon*, 58 M.J. 221, 224 (C.A.A.F. 2003).
[45] *See United States v. McMurrin*, 69 M.J. 591, 597 (N.M. Ct. Crim. App. 2010), *aff'd*, 70 M.J. 15 (C.A.A.F. 2011); *see also* JA 0197 (*United States v. Jones*, No.

Law and Analysis

1. Article 91 only criminalizes disrespect in deportment that occurs "within sight or hearing" and "in the presence" of a petty officer "while" they are "in the execution of [their] office."

The language of the UCMJ is interpreted according to the traditional rules of statutory interpretation, which apply equally when interpreting both the statutory language itself and other provisions within the *Manual for Courts-Martial*.[46] Those rules provide that all questions of statutory interpretation must begin with the text.[47] If the meaning is still ambiguous after examining the text,[48] courts look to the context within the broader statutory scheme,[49] the historical usage,[50] the

37122, 2009 WL 1508418, at *3 (A.F. Ct. Crim. App. 29 Apr. 2009) (citing *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002))).

[46] *United States v. Wilson*, 76 M.J. 4, 7 (C.A.A.F. 2017) (applying the canon of *expressio unius est exclusio alterius* to the President's explanation of the offense in *MCM* Part IV); *United States v. Murphy*, 74 M.J. 302, 305 (C.A.A.F. 2015) (applying the traditional rules of statutory interpretation to the Rules for Courts-Martial); *United States v. Custis*, 65 M.J. 366, 370 (C.A.A.F. 2007) (applying the traditional rules of statutory interpretation to the Military Rules of Evidence) (citing *United States v. James*, 63 M.J. 217, 221 (C.A.A.F. 2006)).

[47] *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1056 (2019).

[48] *United States v. Kearns*, 73 M.J. 177, 181 (C.A.A.F. 2014) (citing *United States v. Turkette*, 453 U.S. 576, 580 (1981)).

[49] *See Republic of Sudan*, 139 S. Ct. at 157; *Murphy*, 74 M.J. at 305 *Murphy*, 74 M.J. at 305.

[50] *See Abramski v. United States*, 573 U.S. 169, 179 (2014).

purpose of the statute,[51] the legislative history,[52] and other interpretive canons.[53] If ambiguity remains, courts apply the "rule of lenity" as a "tiebreaker" which requires that "ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor."[54] Similarly, the vagueness doctrine requires fair notice to the accused "as to the particular conduct which was prohibited."[55]

As this Court explained in *United States v. Davis,* although courts are not bound by the President's elements and explanations in Part IV of the *Manual for Courts-Martial*, "where the President unambiguously gives an accused greater rights than those conveyed by higher sources, [courts] should abide by that decision unless it clearly contradicts the express language of the Code."[56]

When determining whether the President's elements and explanations in Part IV give the accused greater rights, courts attempt to ascertain whether the President intended the explanation to limit the conduct covered by the offense or simply to capture an interpretation of the offense under existing case law.[57] The text of the

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[51] *See Davis v. United States*, 495 U.S. 472, 481 (1990) (examining Congress' purpose in drafting the statute at issue).
[52] *See United v. Davis*, 139 S. Ct. 2319, 2328 (2019) (examining the legislative history of a criminal statute).
[53] *See Davis*, 139 S. Ct. at 2328 (2019) (examining the fixed meaning and constitutional avoidance canons).
[54] *Davis*, 139 S. Ct. at 2333; *United States v. Santos*, 553 U.S. 507, 514 (2008).
[55] *United States v. Moore*, 58 M.J. 466, 469 (2003).
[56] *United States v. Davis*, 47 M.J. 484, 487 (C.A.A.F. 1998).
[57] *See United States v. Czeschin*, 56 M.J. 346, 349 (C.A.A.F. 2002).

President's narrowing construction need not be unambiguous to be afforded deference, it must only unambiguously limit the scope of conduct covered by the statute.[58] Even if courts are not bound by the President's elements and explanations, they can still be persuasive when discerning the meaning of statutory language.[59]

Article 91(3), UCMJ, states "[a]ny . . . enlisted member who . . . treats with contempt or is disrespectful in language or deportment toward a . . . petty officer, while that officer is in the execution of his office; shall be punished as a court-martial may direct."

Three main textual components of that statutory language support reading Article 91 to have both a contemporaneity and a physical proximity requirement. Underneath those three statutory provisions, the President's language in Part IV of the *Manual for Courts-Martial* further narrows the scope of conduct covered by this offense, through the delineation of elements and explanations.

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[58] *See Czeschin*, 56 M.J. at 348. The lower court erroneously misapprehended this rule to require both. JA 0004 (*Brown*, 82 M.J. at 706 (characterizing the "within sight or hearing" element as "interpreting, not narrowing the statute" and failing to analyze whether the "in the presence of" requirement narrowed the statute)).
[59] *United States v. Reese*, 76 M.J. 297, 302 (C.A.A.F. 2017).

Statutory Text[60]	Text of Element[61]	President's Explanation
"disrespectful . . . in deportment"	"did or omitted certain acts . . . that under the circumstances . . . was disrespectful"	"Disrespect by acts includes neglecting the customary salute, or showing a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness ***in the presence of*** the superior officer."[62]
"toward a . . . petty officer"	"toward and ***within sight or hearing*** of a . . . petty officer"	"'Toward' requires that the behavior and language be ***within the sight or hearing*** of the . . . petty officer concerned."[63]
"***while*** that officer is in the execution of his office"	"the victim ***was then*** in the execution of office"	"***when*** engaged in any act or service required or authorized by treaty, statute, regulation, the order of a superior, or military usage. . . The commanding officer on board a ship or the commanding officer of a unit in the field is generally considered to be on duty at all times."[64]

[60] JA 0176 (Art. 91(3), 10 U.S.C. § 891(3)) (emphasis added).
[61] JA 0183 (*MCM 2019*, pt. IV, para. 17.b.(3)) (emphasis added).
[62] JA 0180 (*MCM 2019*, pt. IV, para. 15.c.(2)(b)) (emphasis added).
[63] JA 0184 (*MCM 2019*, pt. IV, para. 17.c.(5)) (emphasis added).
[64] JA 0181 (*MCM 2019*, pt. IV, para. 15.c.(3)(f)) (emphasis added).

A. Article 91 plainly requires that disrespectful deportment occur contemporaneous with when the alleged victim is "in the execution of [their] office."

Article 91(3)

Any . . . enlisted member who . . . treats with contempt or is disrespectful in . . . deportment toward a . . . petty officer, ***while that officer is in the execution of his office***; shall be punished as a court-martial may direct.

Statutory Text	Text of Element	President's Explanation
"***while*** that officer is in the execution of his office"[65]	"the victim ***was then*** in the execution of office"[66]	"***when*** engaged in any act or service required or authorized by treaty, statute, regulation, the order of a superior, or military usage. . . The commanding officer on board a ship or the commanding officer of a unit in the field is generally considered to be on duty at all times."[67]

The statutory text of Article 91 contains an inherent contemporaneity requirement. Article 91 only criminalizes disrespect that occurs "*while* that officer is in execution of his [or her] office."[68] "While," when used as a conjunction,

[65] JA 0176 (Art. 91(3), 10 U.S.C. § 891(3)) (emphasis added).
[66] JA 0183 (*MCM 2019*, pt. IV, para. 17.b.(3)) (emphasis added).
[67] JA 0181 (*MCM 2019*, pt. IV, para. 15.c.(3)(f)) (emphasis added).
[68] JA 0176 (emphasis added).

means "during the *time* that."[69] Thus, this language plainly requires that the charged disrespect be contemporaneous with the alleged victim's execution of office.

The President's element and explanations in the *Manual for Courts-Martial* mirror this temporal requirement. The element requires that "the victim was *then* in the execution of office" when the disrespectful act occurs.[70] "Then" plainly means "at that *time*."[71]

The President has further explained that "[a]n officer is in the execution of office *when engaged* in any act or service required or authorized by treaty, statute, regulation, the order of a superior, or military usage."[72] In this regard, the President specifically noted that only "[t]he commanding officer on board a ship or the commanding officer of a unit in the field is generally considered to be on duty at all times."[73] This supports that anyone *other* than a commanding officer is *not* on duty at all times;[74] and so, the Government must prove the alleged victim was in

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[69] *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/while (last accessed Nov. 2, 2022) (emphasis added).
[70] JA 0183 (*MCM 2019*, pt. IV, para. 17.b.(3)(e)).
[71] *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/then (last accessed Nov. 1, 2022) (emphasis added).
[72] JA 0181 (*MCM 2019*, pt. IV, para. 15.c.(3)(f)) (emphasis added).
[73] JA 0181 (*Id.*).
[74] *Wilson*, 76 M.J. at 7 (C.A.A.F. 2017) (applying the canon of *expressio unius est exclusio alterius* to the President's explanation of the offense in *MCM* Part IV).

the execution of office at the time of the disrespectful conduct.

In *United States v. Glaze*, the Court of Military Appeals explained that the "in execution of office" element requires that the alleged victim be "in the performance of an act or duty either pertaining to or incident to his office, or legal and appropriate for an officer of his rank and office to perform."[75] The *Glaze* court specifically examined the victim's status "at the time of the assault."[76] Although the accused in *Glaze* was charged with assault upon a non-commissioned officer under Article 91, and not disrespect by deportment as was the case here, the temporal requirement is the same under both theories of liability. Whether the alleged victim is in the execution of office is determined *at the time of the accused's action* which serves as the underlying basis for the offense.

Accordingly, the statute, element, and President's definitions—as well as caselaw—all align to require proof that the alleged victim was in the execution of office at the time of the disrespectful conduct, which here is charged as the creation and sending of three memes.

The lower court, however, disregarded the grounded view from *Glaze*,

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[75] *United States v. Glaze*, 11 C.M.R. 168, 172 (C.M.A. 1953) (quoting William Winthrop, *Military Law and Precedents* 571 (2d ed., Gov't Print. Off. 1920) (1896) and adopting that language as the legal test for this element); *United States v. Jackson*, 8 M.J. 602, 603 (A.C.M.R. 1979).
[76] *Glaze*, 11 C.M.R. at 172.

opting instead for a more novel approach:

> Whether the recipient of a communication is in the execution of his office depends not so much on *when* and *where* he receives it as on *why* and in *what context*. A person can see or hear a message in a private capacity while in uniform at work (say, while listening to a message from his wife on his personal cell phone), yet see or hear a message in his official capacity while at home in his pajamas (perhaps reading an email from a watch officer about an incident at work).[77]

This approach—which completely disregards any temporal requirement—is untethered to either the statutory or executive language, is too broad, and should be rejected.

First, it is too broad because it confuses communication medium with content in determining whether an act is "required or authorized by treaty, statute, regulation, the order of a superior, or military usage."[78] Here, for example, the lower court framed the alleged victims' execution of office as "us[ing] the Chief's Mess text message group to communicate about work related matters," from which it then concluded that when they "viewed the messages that [Chief Brown] placed within their sight, whether they were at home or aboard the cutter, they were in the execution of their office."[79] The victims' execution of office cannot not be simply using the Chief's Mess text message group, which was also used to communicate

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[77] JA 0006 (*Brown*, 82 M.J. at 708) (emphasis in original).
[78] JA 0181 (*MCM 2019*, pt. IV, para. 15.c.(3)(f)).
[79] JA 0006 (*Brown*, 82 M.J. at 708).

about *non-work-related matters* of exactly the sort Chief Brown was sending (jokes, levity, etc.). Communication *about work-related matters* might be "an[] act or service required or authorized by treaty, statute, regulation, the order of a superior, or military usage."[80] But the lower court did not find the alleged victims were communicating about work-related matters at the time Chief Brown sent the memes. To the contrary, it was clear that they were not. The sending of jocular memes via text message is akin to fellow chiefs ribbing each other over beers after work; yet, the lower court's overbroad interpretation of the execution-of-office requirement sweeps in this sort of otherwise permissible conduct.

Second, the lower court's view erroneously frames the relevant time for the execution of office around when the alleged victims "viewed the messages,"[81] as opposed to when Chief Brown actually *created* or *sent* them—which are the disrespectful acts alleged on the charge sheet.[82] If Article 91 is taken to mean that a jocular text message can become criminal disrespect the moment it is *eventually* seen by a petty officer in the execution of office (who may not have been so at the time it was sent), this would put potentially criminal disrespectful messages in some sort of limbo of unknown duration until they become criminal when they are

[80] JA 0181 (*MCM 2019*, pt. IV, para. 15.c.(3)(f)).
[81] JA 0006 (*Brown*, 82 M.J. at 708).
[82] JA 0012 (Charge Sheet).

finally read. Surely this cannot be the rule.

B. Disrespect under Article 91 must occur both "toward" and "within sight or hearing" of the alleged victim, which creates both a temporal and physical limitation.

Article 91(3)

Any . . . enlisted member who . . . treats with contempt or is disrespectful in . . . deportment ***toward a . . . petty officer***, while that officer is in the execution of his office; shall be punished as a court-martial may direct.

Statutory Text	Text of Element	President's Explanation
"toward a . . . petty officer"[83]	"toward and ***within sight or hearing*** of a . . . petty officer"[84]	"'Toward' requires that the behavior and language be ***within the sight or hearing*** of the . . . petty officer concerned."[85]

Article 91's statutory language provides that disrespect must also be "toward" the alleged victim.[86] "Toward" means "in the direction of"[87] and supports that the alleged victim must be the object at which the disrespect is directed.

The President's elements narrow the scope of this language, requiring that the disrespect be both "toward *and within sight or hearing*" of the alleged victim.[88]

[83] JA 0176 (Art. 91(3), 10 U.S.C. § 891(3)) (emphasis added).
[84] JA 0183 (*MCM 2019*, pt. IV, para. 17.b.(3)) (emphasis added).
[85] JA 0184 (*MCM 2019*, pt. IV, para. 17.c.(5)) (emphasis added).
[86] JA 0176 (Art. 91(3), 10 U.S.C. § 891(3)).
[87] *Black's Law Dictionary* (11th ed. 2019); *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/toward (last accessed Nov. 2, 2022)
[88] JA 0183 (*MCM 2019*, pt. IV, para. 17.b.(3)(c)).

The meaning of that requirement is plain from the text alone. "Within" is defined as "in or into the range of."[89] "Sight" is defined as "the range of vision."[90] And "hearing" is defined as "earshot."[91] Together these words contemplate a sensory range within which the conduct must occur. And the use of the conjunction "and" means it is not enough for the disrespectful conduct to be directed "toward" alleged victims; it must *also* occur in sufficient proximity for it to be observable by them.

Additionally, historical usage and case law interpreting the phrase "within sight or hearing," and materially identical phrases, demonstrate that it is a term of art denoting a requirement for physical proximity, within the range of sensory perception. Indeed, these sources demonstrate that "within sight or hearing" is merely a more precise historical synonym for "presence."

Over a century ago, Colonel William Winthrop defined "presence" as it related to the 86th Article of War's prohibition on contempt of court as being "at or near the entrance of the court-room, or outside but *in the sight or hearing of* the

[89] *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/within (last accessed Nov. 2, 2022).
[90] *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/sight (last accessed Nov. 2, 2022).
[91] *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/hearing (last accessed Nov. 2, 2022).

court."[92] Although that definition pertains to a different offense, the purpose of the offenses are similar: to prevent disrespectful conduct from interfering with individuals who are trying to carry out their assigned duties. Colonel Winthrop's definition of "presence" as "in the sight or hearing" captures and clarifies factual scenarios at the periphery of immediate physical presence. Even though it was possible at that time of Colonel Winthrop's writing to transmit disorderly messages (perhaps by mailing a letter threatening a witness), Colonel Winthrop's definition *does not* cover such conduct. In fact, he specifically discusses that acts committed in the court's "constructive" presence were not punishable under the 86th Article.[93]

Similarly, the service courts have used the materially identical phrase "within sight or call" as the *definition of* the word "presence."[94] Again, just as in Winthrop, case law uses the phrase as a way of denoting the boundaries of a requirement for physical proximity. In all cases, the term is used to clarify

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[92] JA 0210-0213 (William Winthrop, *Military Law and Precedents* 307-10 (2d ed. 1920), https://www.loc.gov/rr/frd/Military_Law/pdf/ML_precedents.pdf) (emphasis added).

[93] JA 0204-0205 (*Id.* at 301-02 ("Its effect in our law is to authorize the punishment only of some 'disrespect' contempts, or contempts committed in the presence or immediate proximity of the court when in session, as distinguished from 'constructive' contempts, *i.e.* acts committed at distance from the court, or beyond its 'precinct,' but which operate to prevent and obstruct the due administration of justice.")).

[94] *See United States v. Royal*, 2 M.J. 591, 594 (N.C.M.R. 1976) (on opposite sides of the door for the head); *United States v. Ream*, 1 M.J. 759, 761 n.3 (A.F.C.M.R. 1975) (persons on separate levels of a home where one could still hear the other).

situations on the periphery of immediate physical presence of another person, perhaps to a boundary (e.g. courtroom entrance) or visual obstruction (e.g. house walls or restroom stall), but still within their close physical proximity and visual or aural reach. Finally, scholarship confirms Article 91's physical proximity requirement.[95]

This historical usage and scholarship aligns perfectly with the plain meaning outlined above. Where, as here, plain meaning, historical usage, and authoritative scholarship all support the same conclusion, that conclusion should be adopted.

The construction provided in the President's elements should be afforded deference, since it unambiguously narrows the type of conduct covered by Article 91 and comports with the remainder of the statutory text.[96] This narrowing language also comports with the in-execution-of-office requirement, since disrespect that occurs close enough to be "within sight or hearing" of alleged victims will be contemporaneously observable by them while they are in execution of their office.

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[95] *See* David A. Schlueter, *Military Criminal Justice: Practice and Procedure*, § 2-3[C], 88 (2021 ed.) (stating that Article 91 disrespect must occur "*in the presence of* the victim") (emphasis added).
[96] *See Davis*, 47 M.J. at 487.

Indeed, Article 91 has always required such contemporaneity and physical proximity. It was adapted from Article 65 of the 1917 Articles of War,[97] which used very similar language: "Any soldier who . . . uses threatening or insulting language, or behaves in an insubordinate or disrespectful manner *toward* a noncommissioned officer *while in the execution of his office*, shall be punished as a court-martial may direct."[98] And the explanation in the 1917 *Manual for Courts-Martial* explicitly connects the execution-of-office and sight-or-hearing requirements in a precise way: "the phrase 'while in the execution of his office' limits the application of this part of the article to language and behavior within sight or hearing of the noncommissioned officer toward whom it is used."[99]

The enactment of the UCMJ in 1951 carried forward the same relationship between these elements into the current Article 91. As the 1951 *Manual for Courts-Martial* provides, "[t]he word 'toward' read in connection with the phrase 'while such officer is in the execution of his office' *limits the application* of this

[97] JA 0203 (*Uniform Code of Military Justice; Text, Reference and Commentary Based on the Report of the Committee on a Uniform Code of Military Justice to the Secretary of Defense* 123 (1949), https://tile.loc.gov/storage-services/service/ll/llmlp/Vol-V-printed-UCMJ/Vol-V-printed-UCMJ.pdf).
[98] JA 0194 (*Manual for Courts-Martial*, para. 416 (1917 ed.) [hereinafter *MCM 1917*]) (emphasis added).
[99] JA 0195 (*MCM 1917*, para. 416.III).

part of the article to behavior and language within the sight or hearing of a certain . . . petty officer concerned."[100]

This logic is as sound now as it was in 1917 and 1951: The requirements that disrespect be directed *towards* a petty officer *while* that petty officer is in a particular status create a temporal limitation that is difficult to apply to remote and non-contemporaneous forms of communication. To avoid such difficulties, the President chose to require physical proximity through the "within sight or hearing" element. This Court should follow the President's direct statements in historical manuals as to the meaning of "within sight or hearing."

A broad reading of "within sight or hearing," which includes remote and non-contemporaneous communications such as the victim "seeing" a previously sent written message, reanimates the very application problems that the requirement so eloquently solves. This Court should not endorse a definition that defeats the ascertainable and sound intent behind the "within sight or hearing" element.

In sum, all sources of authority reinforce the same conclusion: "within sight or hearing" requires physical proximity, within the range of sensory perception.

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[100] JA 0189 (*Manual for Courts-Martial*, ch. XXVIII, para. 170d (1951 ed.) [hereinafter *MCM 1951*]) (emphasis added).

C. Disrespect in "deportment" under Article 91 must occur "in the presence of" the alleged victim, further requiring physical proximity.

Article 91(3)		
Any . . . enlisted member who . . . treats with contempt or is ***disrespectful in . . . deportment*** toward a . . . petty officer, while that officer is in the execution of his office; shall be punished as a court-martial may direct.		
Statutory Text	**Text of Element**	**President's Explanation**
"disrespectful . . . in deportment"[101]	"did or omitted certain acts . . . that under the circumstances . . . was disrespectful"[102]	"Disrespect by acts includes neglecting the customary salute, or showing a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness ***in the presence of*** the superior officer."[103]

Article 91's contemporaneity and physical proximity requirements are also rooted in the definition of disrespect by deportment (all three of the specifications at issue allege only disrespect "in deportment"). "Deportment," according to the President's elements for Article 91, means "behavior" or "acts."[104] The President,

[101] JA 0176 (Art. 91(3), 10 U.S.C. § 891(3)) (emphasis added).
[102] JA 0183 (*MCM 2019*, pt. IV, para. 17.b.(3)) (emphasis added).
[103] JA 0180 (*MCM 2019*, pt. IV, para. 15.c.(2)(b)) (emphasis added).
[104] JA 0183 (*MCM 2019*, pt. IV, para. 17.b.(3)(b),(c)); *see also* Military Judges' Benchbook, para. 3A-15-3(d) (29 Feb. 2020) [hereinafter Benchbook]; *Merriam-*

through the definition provided in the *Manual for Courts-Martial*, narrowed the scope of disrespect by deportment by stating, "[d]isrespect by acts includes neglecting the customary salute, or showing a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness *in the presence of* the superior officer."[105]

The most natural reading of the President's explanation is that the phrase "in the presence of" modifies the entire list, and the series qualifier canon supports such a reading.[106] Where "several words are followed by a clause which is applicable as much to the first and other words as to the last" and "[t]he modifying clause appear[s] . . . at the end of a single, integrated list"[107] the series-qualifier canon provides that the phrase qualifies each item in the list.[108] The phrase "in the presence of" makes sense when read with each word in the President's list. It would be illogical to require "rudeness" to occur in the victim's presence in order to be criminal, but allow any "showing of marked disdain" to be criminal regardless of the victim's presence.

Webster Online Dictionary, https://www.merriam-webster.com/dictionary/deportment (last accessed Nov. 1, 2022).
[105] JA 0180 (*MCM 2019*, pt. IV, para. 15.c.(2)(b)).
[106] *See* Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147-51 (2012 ed.).
[107] *Jama v. Immigration and Customs Enf't*, 543 U.S. 335, 344 n.4 (2005).
[108] *See United States v. Bass*, 404 U.S. 336, 339-40 (1971).

The requirement that disrespectful acts occur "in the presence" of the alleged victim limits what falls within the scope of disrespect in "deportment" under Article 91. Because this limiting language plainly affords an accused greater protection from criminal prosecution, and "does not contradict the express language of the statute," this Court should defer to the President's explanation.[109]

The "presence" requirement should be given the most natural reading based on the nature of the items appearing in the President's list. All of them suggest that "presence" is derived from physical proximity. In fact, one item from the list—"neglecting the customary salute"—*only* occurs if two military members are in close physical proximity. Therefore, "in the presence of" in the context of this offense should therefore be interpreted to mean physical proximity.

This interpretation comports with the plain meaning of "in the presence of" which generally means "in the immediate vicinity" or "close physical proximity coupled with awareness."[110] These definitions illustrate that in order for disrespect by deportment to be criminal under Article 91, the victim must be in close physical

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[109] *See United States v. Wilson*, 76 M.J. 4, 6, (C.A.A.F. 2017).

[110] *Black's Law Dictionary, Presence* (11th ed. 2019); *see United States v. Schmidt*, 82 M.J. 68, 75 (C.A.A.F. 2022) (Ohlson, C.J. concurring in the judgment) ("close physical proximity coupled with awareness"); *see also id.* at 78 ("one person is in the immediate vicinity of another person"); *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/presence (last accessed Nov. 2, 2022) (defining "presence" as "the part of space within one's immediate vicinity").

proximity to the disrespectful conduct such that it is possible for them to perceive the conduct.

Additionally, this is not the first time courts have interpreted the meaning of "presence" under the UMCJ, and this Court should interpret the language here using the same approach as in *United States v. Knowles* and *United States v. Miller*. In *Knowles*, this Court's predecessor interpreted similar language in the Article 134 offense of indecent liberties with a minor, concluding the conduct had to be done "in the presence of" the victim.[111] The *Knowles* court held this language did not cover a telephone call from an accused in one location to a victim in another, as it required "greater conjunction of the several senses of the victim with those of the accused than that of hearing a voice over a telephone wire."[112]

After the *Manual for Courts-Martial* was revised in light of *Knowles* to require indecent liberties to be done in the victim's "physical presence," this Court held in *United States v. Miller* that "in the presence of" requires more than mere "constructive presence" through internet-based audio-visual communication from one location to another.[113] Ultimately, the Court's opinion in *Miller* prompted Congress to amend the statutory language at issue such that conduct "in the

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[111] *United States v. Knowles*, 35 C.M.R. 376, 377 (C.M.A. 1965).
[112] *Id.* at 378 (reserving the question of whether the requirement would be met by acts or language over an audio-visual system).
[113] *United States v. Miller*, 67 M.J. 87, 89-90 (C.A.A.F. 2008).

presence of" the victim could specifically be done "via any communication technology."[114]

This Court should take a similar position in this case: When Congress wants to ensure that a crime can be committed through constructive—as opposed to physical—presence, it must do so explicitly.[115] Article 91 says nothing about the use of remote communication technology to commit this offense, and this Court should not read in those words here. Rather, the physical proximity requirements of Article 91 require the alleged victim to be within the physical range of auditory or visual sensory perception.

Furthermore, as explored below, communication mediums that are both remote and non-contemporaneous, such as written messages, frustrate Article 91's contemporaneity requirements.

D. <u>When viewed in the context of the UCMJ as a whole, Article 91's contemporaneity and physical proximity requirements distinguish it from Article 89.</u>

The limitation of Article 91 disrespect to conduct that is "within sight or hearing" of an alleged victim who is then in the execution of office distinguishes

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[114] *See Schmidt*, 82 M.J. at 73 ("[I]n the current statue, Congress filled the gap created by Knowles and Miller by more broadly defining 'in the presence of' a child as 'including via any communication technology.'").
[115] *See* Article 120b(c), UCMJ, 10 U.S.C. § 920b(h)(5) (defining a "lewd act" as one accomplished "via any communication technology").

the scope of disrespect toward a petty officer from disrespect toward a superior commissioned officer under Article 89. The canon known as *in pari materia* provides that the meaning of a statute must be derived by looking at other sections of the same Act under review.[116] When the drafters "include[] particular language in one section of a statute but omit[] it in another section," it may be presumed that they acted "intentionally and purposely" to give effect to "the disparate inclusion or exclusion."[117]

In criminalizing disrespect toward a petty officer, Article 91 works very differently from Article 89, which criminalizes similar disrespect toward a superior commissioned officer. Article 89(a) provides "[a]ny person subject to this chapter who behaves with disrespect toward that person's superior commissioned officer shall be punished as a court-martial may direct."[118] While both offenses use the word "toward," Article 89(a) differs from Article 91(3) in that it does not require that: (1) the victim be in the execution of office,[119] or that the disrespect occur (2)

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[116] *United States v. McPherson*, 73 M.J. 393, 395-96 (C.A.A.F. 2014) (quoting *United States v. Diaz*, 69 M.J. 127, 133 (C.A.A.F. 2010)).
[117] *McPherson*, 73 M.J. at 395-96 (citing *Bates v. United States*, 552 U.S. 23, 29-30 (1997)) (additional internal quotation marks and citations omitted).
[118] JA 0177 (10 U.S.C. § 889(a)).
[119] *Compare* 10 U.S.C. § 889(a) (criminalizing when a person "behaves with disrespect toward" an officer without mentioning the officer's status) *with* § 889(b) (criminalizing striking or offering "any violence against that officer while the officer is in the execution of the officer's office").

within the victim's sight or hearing[120] or (3) presence.[121] Thus, as the 1917 *Manual for Courts-Martial* explains, "the word 'toward' [in Article 91's predecessor is not] used in the same sense as in the [article discussing disrespect to a superior officer]."[122] While "toward" in Article 89 essentially means "with regard to," the same word carries a different, far more limited meaning, in the context of Article 91 and requires that the accused's conduct occur within the physical proximity of the alleged victim.

Additionally, the President explicitly stated that presence is *not* an essential element of disrespect under Article 89.[123] But, notably, the President omitted any such disclaimer regarding the immateriality of presence in his explanation of Article 91.[124] The explicit disclaimer of a presence requirement with respect to Article 89 disrespect, and the corresponding omission of any similar disclaimer with respect to Article 91 disrespect (a mere four pages later in the *Manual for Courts-Martial*) is precisely the sort of "disparate inclusion or exclusion" that is

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[120] JA 0180 (*MCM 2019*, pt. IV, para. 15.b.(1)(b) ("That such behavior or language was directed toward that officer.")).
[121] JA 0180 (*MCM 2019*, pt. IV, para. 15.c.(2)(c)).
[122] JA 0194 (*MCM 1917*, para. 416.III).
[123] JA 0180 (*MCM 2019*, pt. IV, para. 15.c.(2)(c) ("It is not essential that the disrespectful behavior be in the presence of the superior, but ordinarily one should not be held accountable under this article for what was said or done in a purely private conversation.")).
[124] JA 0184 (*MCM 2019*, pt. IV, ¶ 17.c.(5)).

significant in textual interpretation.[125] The natural conclusion from this "disparate inclusion/exclusion" is that presence *is* required for Article 91 disrespect.

Finally, disrespect under Article 89 does not have the temporal limitation of "while in the execution of office." The fact that this element is excluded from Article 89, but included in Article 91, is meaningful. It illustrates once again that Article 89 has no temporal bounds and disrespect toward a superior commissioned officer is criminal whenever it occurs. On the other hand, Article 91 only criminalizes disrespect that occurs *at the time* the alleged victim is in execution of his or her office. The difference in these two statutes reflects a statutory acknowledgement of the different ways petty officers are permitted to communicate with and about their fellow petty officers, as opposed to superior commissioned officers. Article 91 should be interpreted in a way that gives meaning to the different types of disrespect criminalized under these articles.

E. The purpose of Article 91 is vindicated by the contemporaneity and physical proximity requirements.

Article 91's requirements for both contemporaneity and physical proximity also comport with its purpose. As the lower court correctly noted, Article 91's purpose is "'to ensure obedience to [petty officers'] lawful orders, . . . to protect

[125] *See United States v. McDonald*, 78 M.J. 376, 380 (C.A.A.F. 2019).

them from violence, insult, or disrespect'"[126] and to "prevent[] disrespect of a . . . petty officer when that person is trying to do his or her job."[127] And that is exactly why the temporal and physical proximity requirements are so important. Unlike commanding officers, petty officers are generally not envisioned to be in execution of their office at all times, particularly when their ship is in dry dock. They must have a way to joke around with one another—and to correct each other when their sophomoric ribbing goes a little too far—without fear that in exercising their freedom of expression they will be subject to criminal sanction simply because their jokes are communicated via off-duty text message as opposed to over a few beers in a bar.

Article 91 strikes an importance balance between maintaining camaraderie and good order and discipline. And the contemporaneity and physical proximity requirements ensure that remains possible. A broad reading of Article 91 that places the execution-of-office requirement at the time a text message is read, as opposed to sent (as is charged here), would make it nearly impossible for servicemembers to send a text in jest without fear that the recipient might read it while on duty or while at work, and their message would suddenly become

[126] JA 0005 (*Brown*, 82 M.J. at 707 (citing *MCM 2019*, pt. IV, para. 17.c.(1)) (alterations in original)).
[127] JA 0005 (*Id.* at 708).

criminal. This rule would have a chilling effect on personal relationships between servicemembers and might actually harm unit cohesion.

It is apparent that Congress and the President intentionally drew very different lines about what constitutes criminal disrespect toward enlisted members as opposed to officers. The execution-of-office and physical proximity requirements help to ensure that only disrespect with the ability to have an immediate impact on the military mission is criminal under Article 91.

F. The legislative history of Article 91 illustrates that it must be interpreted in the way it would have been understood at the time of drafting.

As mentioned above, Article 91's statutory text and presidentially delineated elements have remained unchanged since the UCMJ was first enacted in 1951. At the time of enactment, remote, electronic forms of communication such as cellphones did not exist. There is no way Article 91's original drafters contemplated whether it covered this specific type of conduct. And even as the use of technology has exploded over the years, Congress has never once acted to update this statute to cover electronic communications, let alone those that are remote and non-contemporaneous.

Congress is presumed to know the law when it passes new legislation.[128] Over ten years ago, Congress demonstrated an awareness that language in the UCMJ relating to "presence" may not adequately cover emerging advancements in communication technology, and amended what is now Article 120b, UCMJ, to ensure that conduct required to be "in the presence of" a child includes conduct "via any communication technology."[129] Despite this manifestation of congressional awareness that "presence" does not naturally include the use of communication technology, Congress did not amend Article 91 at that time.

And in 2016, Congress passed the Military Justice Act of 2016 (MJA 2016), which was a major reform to the UCMJ. But before that in 2013, the Secretary of Defense, at the direction of the Chairman of the Joint Chiefs of Staff, stood up a Military Justice Review Group to "conduct a comprehensive review of the UCMJ and the military justice system."[130] The Military Justice Review Group, in making its legislative recommendations for MJA 2016, did not recommend any amendments to Article 91, saying "[i]n view of the well-developed case law

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[128] *United States v. Schmidt*, 82 M.J. 68, 73 (C.A.A.F. 2022) (quoting *United States v. McDonald*, 78 M.J. 376, 380 (C.A.A.F. 2019) (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990)).

[129] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541(a), 125 Stat. 1405 (2011).

[130] JA 0199 (DEPARTMENT OF DEFENSE MILITARY JUSTICE REVIEW GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP – PART I: UCMJ RECOMMENDATIONS 5 (Dec. 22, 2015), https://jsc.defense.gov/Portals/99/MJRG%20Part%201.pdf).

addressing Article 91's provisions, a statutory change is not necessary."[131] Congress apparently followed the Military Justice Review Group's recommendation and did not amend Article 91 in MJA 2016.

Ultimately, the text of Article 91 remains the same today as it did in 1951, and is even in a very similar form to what existed in 1917. Despite overhauling the UCMJ in 2016 with at least implicit knowledge that issues existed with ensuring its statutory language covered communication technology, Congress did not change Article 91. This congressional silence is evidence that Congress does not intend Article 91 to cover disrespect in deportment that occurs via remote, non-contemporaneous communication technology. And it is the province of Congress, not this Court, to amend the statute through plain language in order to give notice of such an intent.

Additionally, Congress' declination to change the *Manual*'s narrowing language with respect to the elements applicable to this offense is important to this Court's analysis. This Court has assigned significant weight to the length of time provisions have remained unchanged in the *Manual for Courts-Martial*,[132] and this

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[131] JA 0201 (*Id.* at 728).

[132] *See Davis*, 47 M.J. at 486 ("The Manual has indicated that an unloaded firearm is not a dangerous weapon since 1951. Congress could have changed this concept at any time if it disagreed. The President could change it easily as well.") (citations omitted); *see also Czeschin*, 56 M.J. at 349 (finding significant that the language in

Court should do the same here given that both the execution-of-office and "within sight or hearing" elements have remained untouched since they were explicitly delineated in the 1951 *Manual for Courts-Martial*.[133] Neither Congress nor the President has taken action to change these elements in the intervening seven decades.

G. The contemporaneity requirement is vital to ensure the accused has notice of what conduct is criminalized under Article 91 and any ambiguity must be construed in favor of Chief Brown.

Finally, if this Court still finds Article 91 ambiguous despite the above analysis, this Court should narrowly construe this statute in accordance with both the vagueness doctrine and the rule of lenity and resolve that ambiguity in Chief Brown's favor. "Where a statute's literal scope . . . is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts."[134] A broad interpretation of Article 91 that places the execution-of-office requirement at the time a text message is read, as opposed to sent (as is charged here), would make it nearly impossible for members to send off-duty messages in jest without fear that the

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the 1969 *MCM* did not appear in the 1951 *MCM*, which was "promulgated in conjunction with implementation of the UCMJ").

[133] JA 0189 (*MCM 1951*, para. 170.d).

[134] *Parker v. Levy*, 417 U.S. 733, 752 (1974) (internal quotation marks and citations omitted).

recipient might later read it while on duty. Suddenly their jocularity would become criminal. This rule would have an unnecessary chilling effect on servicemembers' freedom of expression, even within their personal relationships with other servicemembers.

Similarly, "the rule of lenity's teaching [is] that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor."[135] "[M]uch like the vagueness doctrine, it is founded on 'the tenderness of the law for the rights of individuals' to fair notice of the law."[136] If Article 91 is taken to mean that a sophomoric text message can become criminal disrespect the moment it is *eventually* seen or heard by a petty officer in the execution of office, this would create an absurd form of springing criminality that could conceivably last forever, defying even the statute of limitations provision within the UCMJ. No servicemember would expect Article 91 to mean that a text message they send to a recipient who is off duty or on leave would suddenly become criminal if the recipient waits to read it until they return to duty days or weeks later. This Court should provide clarity that ribbing between enlisted members only becomes

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[135] *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019).
[136] *Id.* (internal citations omitted); *see also Santos*, 553 U.S. at 514 ("This venerable rule . . . vindicates the fundamental principle that no citizen should be held accountable or a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed.").

criminal disrespect in deportment under Article 91 if it occurs within the alleged victim's physical proximity and range of sensory perception while he or she is in the execution of office.

2. There is insufficient evidence to show the charged acts of disrespect by deportment occurred within the sight, hearing, or presence of the alleged victims while they were in the execution of their office.

As discussed earlier, the Government charged Chief Brown with disrespect in deportment, or disrespect by acts, by composing and sending memes via text message.[137] Therefore, the Government was required to prove each victim was "in the execution of his [or her] office" at the time he composed or sent the memes. The Government was also required to prove that Chief Brown's acts in composing and sending the memes occurred "within sight or hearing" and "in the presence of" the alleged victims. Even when viewed "in the light most favorable to the prosecution," the evidence is insufficient to support that a rational trier of fact could "have found all the essential elements beyond a reasonable doubt."[138] Chief Brown's convictions are legally insufficient as to the execution-of-office, sight or hearing, and presence requirements.

[137] JA 0012 (Charge Sheet).
[138] *See United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (citations omitted).

A. The record does not support that the victims were in the execution of their office at the time of the charged acts of disrespect in deportment.

The Government was required to prove the alleged victims were each engaged in a specific "act or service required or authorized by treaty, statute, regulation, the order of a superior, or military usage" at the time Chief Brown created and sent the memes pertaining to them.[139] But it failed to do so. At trial, four different witnesses testified that the Chief's Mess text message group was used not only to coordinate work-related matters, but also for non-work-related purposes such as: "friendly conversations,"[140] to share jokes[141] and memes,[142] and to provide some "levity."[143] No one was ordered to participate in this group text.[144] And the evidence shows that other photos and memes were shared within the group text.[145] In fact, one of the witnesses, Chief J.S., testified that he had personally acquired the high school photo of Chief S.C. that Chief Brown used to make one of the memes, and gave it to Chief Brown, asking "if he had any ideas how [they]

[139] *See* JA 0181*(MCM 2019*, pt. IV, para. 15.c.(3)(f)).
[140] JA 0078.
[141] JA 0059.
[142] JA 0140.
[143] JA 0030.
[144] JA 0118.
[145] *See* JA 0064, 0145-0146; JA 0165 (Def. Ex. A (Chief S.C. sending a photo of young Chief Brown to the group)); JA 0164 (Pros. Ex. 10 (Chief J.S. sending a meme to the group)).

could tease" Chief S.C. with it.[146] Indeed, after Chief Brown sent the yearbook meme about Chief S.C., she responded by sending a childhood picture *of Chief Brown* with a mocking caption to the group chat as "a joke."[147] The evidence shows joking was commonplace within this Chief's Mess. Thus, even when viewing this evidence in the light most favorable to the prosecution, no reasonable fact-finder could find that a person was always in the execution of office when viewing messages within the Chief's Mess group text.

While the Military Judge's special findings correctly listed and defined the "in execution of office" element of this offense, his factual findings fail to show how or why any of the victims were actually in the execution of their office at the time of the charged acts. Under R.C.M. 918(b), military judges may make special findings as to "matters of fact reasonably in issue." Those findings must be made with some level of specificity. "The need to have trial judges set forth their conclusions of law and determinations of fact has always been viewed as a method of insuring compliance with the law, and for effecting justice."[148] To the extent the Military Judge's special findings here fail to adequately address the very elements

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[146] JA 0044.
[147] JA 145-46; JA 165 (Def. Ex. A).
[148] *United States v. Truss*, 70 M.J. 545, 546 (A. Ct. Crim. App. 2011) (quoting Lee D. Schinasi, *Special Findings: Their Use at Trial and on Appeal*, 87 Mil. L. Rev. 73, 75 (Winter 1980) (citing *Norris v. Jackson*, 76 U.S. 125 (1870))).

already under scrutiny for legal insufficiency, this failure should factor in favor of Chief Brown in this Court's review.[149]

Of note, while the Military Judge's special findings fail to show how or why any of the victims were in the execution of their office at the time of the charged acts, they *do* define the time of the charged offense. Specifically, the Military Judge defined the time of the offenses (and thus the relevant time for the in execution of office analyses) as the time Chief Brown communicated (i.e. sent) the memes.[150]

Charge I, Specification 1 – Chief J.D.

At trial, Chief J.D. testified that he *received* the meme related to him while he was staying with the *Polar Star* in dry dock.[151] But the Government produced no evidence as to when this meme was created or sent, nor how long elapsed between the message being sent and Chief J.D. viewing it. Indeed, the Military Judge specifically asked Chief J.D. if he knew when it was sent, but Chief J.D. could not remember.[152] Another witness, Chief J.S., testified that the meme was

[149] *See United States v. Orben*, 28 M.J. 172. 175 (C.M.A. 1989) (noting that one of the purposes of a military judge's special findings is to "permit an informed appellate review").
[150] JA 0168, 0170, 0172 (Special Findings at 3 para. (c)(5), 5 para. (c)(5), 7 para. (c)(5)).
[151] JA 0083.
[152] JA 0092.

not provided in the course of work and was "somebody trying to be funny."[153] No reasonable fact-finder could determine Chief J.D. was in the execution of his office at the time the meme was *created or sent* based on the scant evidence produced at trial.

The lack of evidence here is also apparent from the Military Judge's special findings. The Military Judge found Chief Brown's disrespectful deportment occurred "at the time MKC Brown communicated the digital photograph."[154] Next, the Military Judge summarily concluded Chief J.D. "was *then* in the execution office," but did not make any finding as to when the message was sent, what Chief J.D. was doing when the message was sent, or even where Chief J.D. was located at the time the message was sent.[155]

In summary, the Military Judge explicitly defined the time of the offense as the time Chief Brown "communicated" (i.e., sent) the message. [156] There was no evidence whatsoever in the record to establish when the message was sent, or what Chief J.D. was doing at that undefined time. This absence of evidence renders the conviction legally insufficient. The only evidence in the record concerns generally where Chief J.D. was located when he viewed the message (which was *not* the

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[153] JA 0031.
[154] JA 0168 (Special Findings at 3 para. 5).
[155] JA 0168 (Special Findings at 3 para. 5) (emphasis added).
[156] JA 0168 (Special Findings at 3 para. 5).

timeframe referenced by the Military Judge in his special findings). This evidence is legally insufficient to establish that Chief J.D. was in execution of office *at the time of* the offense.

Charge I, Specification 2 – Chief S.C.

There is a similar lack of evidence regarding whether Chief S.C. was in the execution of her office at the time her respective meme was created or sent. The meme introduced by the Government at trial related to Chief S.C. did not have a time or date stamp.[157] No witness testified regarding when the meme was sent or received, and Chief S.C. testified it was *not possible* she was on duty when she viewed the message.[158] Indeed, she testified that she "definitely wasn't" on duty when she viewed it.[159] In fact, Chief S.C. explained she was not even co-located with the ship during the relevant time period, but was actually on convalescent leave for a medical procedure.[160] Although she did testify that she worked remotely during some of her convalescent leave, she never stated that she was working remotely when the meme was created or sent (or received).[161] No reasonable fact-finder could conclude that Chief S.C. was in the execution of her office when the

[157] JA 0073; JA 0162 (Pros. Ex. 5).
[158] JA 0124.
[159] JA 0124.
[160] JA 0149.
[161] JA 0124-0125.

meme was created or sent (at some unknown time) simply because she sometimes checked the Chief's Mess group text (which was used for both work-related and non-work-related communications) or sometimes worked remotely while otherwise in a non-duty status.

The Military Judge's special findings also reflect the absence of evidence on this element. He found that Chief Brown's disrespectful deportment relevant to this specification occurred "at the time MKC Brown communicated the digital photograph."[162] But the Military Judge once again summarily found Chief S.C. was "*then* in the execution of her office" without making any findings as to when the text message was created or sent, where she was at the time, or what she was doing. [163] The Military Judge did not find Chief S.C. was "engaged in any act or service required or authorized by treaty, statute, regulation, the order of a superior, or military usage" at the time Chief Brown sent the message.[164]

In summary, the Military Judge explicitly defined the time of the offense as the time Chief Brown "communicated" (i.e., sent) the message.[165] There was no evidence whatsoever in the record to establish when the message was sent, or what

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[162] JA 0170 (Special Findings at 5 para. 5).
[163] JA 0170 (Special Findings at 5 para. 5) (emphasis added).
[164] *See* JA 0181 (*MCM 2019*, pt. IV, para. 15.c.(3)(f)); *see also Glaze*, 11 C.M.R. at 172.
[165] JA 0170 (Special Findings at 5 para. 5).

Chief S.C. was doing at that undefined time. This absence of evidence renders the conviction legally insufficient. The only evidence in the record about Chief S.C. viewing the message (which was *not* the timeframe referenced by the military judge in his special findings) was that Chief S.C. was "definitely" off duty and on convalescent leave. This evidence is legally insufficient to establish that Chief S.C. was in execution of office *at the time of* the offense.

Charge I, Specification 4 – Senior Chief K.B.

Finally, the evidence is insufficient to prove Senior Chief K.B. was in the execution of his office at the time the meme pertaining to him was sent. While the evidence suggests that this meme was sent on July 19, 2019 at 1939, Senior Chief K.B. himself testified that this time was "outside working hours."[166] Nor is there any evidence of where Senior Chief K.B. was located or what he was doing at the time to evince that he was then in execution of office. The Government never even asked those questions.

Additionally, the evidence produced at trial indicated this message was a joke: even Senior Chief K.B. testified that he found it "funny."[167] This testimony shows why more specific findings were required here: the dual purposes of the

[166] JA 0107.
[167] JA 0107.

Chief's Mess group text made it entirely possible for a joking message to be sent to the group that is unrelated to any sort of official business by the recipient. Even when viewed in the light most favorable to the prosecution, there is no evidence suggesting Senior Chief K.B. was "engaged in any act or service required or authorized by treaty, statute, regulation, the order of a superior, or military usage" at the time the meme was sent.[168]

The Military Judge's special findings as to Specification 4 follow the same pattern as for the first two specifications.[169] Again, the Military Judge found that Senior Chief K.B. was "*then* in the execution of his office" without making any findings regarding where Senior Chief K.B. was located or what he was doing at the time the message was sent.[170]

In summary, the Military Judge again explicitly defined the time of the offense as the time Chief Brown communicated (i.e., sent) the message. [171] There was no evidence whatsoever in the record to establish what Senior Chief K.B. was doing at that time. This absence of evidence renders the conviction legally insufficient. The only evidence in the record about Senior Chief K.B. viewing the

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[168] *See* JA 0181 (*MCM 2019*, pt. IV, para. 15.c.(3)(f)); *see also Glaze*, 11 C.M.R. at 172.
[169] JA 0172 (Special Findings at 7 para. 5).
[170] JA 0172 (Special Findings at 7 para. 5) (emphasis added).
[171] JA 0172 (Special Findings at 7 para. 5).

message (which was *not* the timeframe referenced by the Military Judge in his special findings) was that it was outside of working hours. This evidence is legally insufficient to establish that Senior Chief K.B. was in execution of office *at the time of* the offense.

B. The evidence is legally insufficient to find that the Government proved Chief Brown's disrespect occurred "within sight or hearing" and "in the presence of" the alleged victims.

No evidence was produced at trial that placed the alleged victims within any sort of physical proximity to Chief Brown's acts of creating and sending each meme. In fact, there is no evidence whatsoever as to where Chief Brown was located at the time of these alleged acts. Thus, no reasonable fact-finder could conclude that Chief Brown created or sent the memes within the sight, hearing, or presence of the alleged victims.

Unsurprisingly, the Military Judge's special findings also fail to support a finding that Chief Brown's conduct was "used toward and within sight or hearing" or "in the presence of" the alleged victims. While the Military Judge correctly noted that the elements of each offense required that "the accused's behavior was used toward and within sight or hearing" of the respective victims, he never stated in his special findings that the behavior was, in fact, used toward and within the sight or hearing of the respective victims, nor did he explain how he interpreted

and applied these requirements.[172] The Military Judge failed to address this element in either the "Definitions applicable to this offense" section or "Findings of the Court" section of his special findings.[173] Likewise, the Military Judge correctly defined "disrespect by acts" to require presence,[174] but he failed to make any findings as to how Chief Brown's deportment occurred "in the presence of" the alleged victims.

Accordingly, the Military Judge's special findings fail to support a finding that the Government proved these elements beyond a reasonable doubt. And there is no evidence in the record to make up for this shortcoming in the Military Judge's special findings. As discussed earlier in sections (1)(B) and (1)(C), "toward and within sight or hearing" and the definition of "disrespect by acts" both require that the accused's acts occur within the physical proximity and range of sensory perception of the victim. The record contains no evidence that Chief Brown was "within sight or hearing of" or "in the presence of" Chief J.D., Chief S.C., or Senior Chief K.B. when he created or sent each text message.

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[172] JA 0166, 0169, 0171 (Special Findings at 1 para. (a)(3), 4 para. (a)(3), 6 para. (a)(3)).
[173] JA 0167, 0169, 0171-0172 (Special Findings at 2, 4, 6-7).
[174] JA 0167, 0169, 0171 (Special Findings at 2 para. (b)(4), 4 para. (b)(4), 6 para. (b)(4)).

C. The lower court affirmed Chief Brown's conviction based on grounds directly contradictory to both the Military Judge's special findings and the charging language.

With regard to the alleged victims' being "in execution of office," the lower court held that they were in execution of office at the time they "viewed the messages"[175] because they were "authorized" and "expected, to use the Chief's Mess text message group to communicate about work-related matters."[176] In other words, the lower court defined the time of the offense as the time of the *viewing*. This directly contradicts the Military Judge's special findings and the language charged in the specifications, which explicitly define the time of the offense as the time of the *creation* and *sending* the memes.[177]

Appellant is not aware of any authority to affirm the legal sufficiency of convictions based on a factual and legal analysis that directly contradicts the charging language and the analysis articulated in the special findings.[178] Neither

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[175] JA 0006 (*Brown*, 47 M.J. at 708 ("Thus, when the victim chief petty officers *viewed the messages* that Appellant placed within their sight, whether they were at home or aboard the cutter, they were in the execution of their office.")) (emphasis added).
[176] JA 0006 (*Id.*).
[177] JA 0168, 0170, 0172 (Special Findings at 3 para. (c)(5), 5 para. (c)(5), 7 para. (c)(5)); *see also* JA 0012 (Charge Sheet).
[178] *See McMurrin*, 69 M.J. at 597 (special findings are subject to the same appellate review as a general finding of guilt and are reviewed for legal sufficiency *de novo)*; *see also Truss*, 70 M.J. at 547; JA 0197 (*Jones*, 2009 WL 1508418, at *3 (citing *Washington*, 57 M.J. at 399)). Affirming legal sufficiency based on a factual and

the record nor the Military Judge's special findings contained any evidence whatsoever as to what the victims were doing at the time the messages were sent, which was the time-frame the Military Judge explicitly stated he considered controlling. As the evidence was legally insufficient in that regard, the lower court substituted the time of viewing. This alternate framing, however, expressly contradicted the Military Judge's special findings. It is illogical to affirm legal sufficiency on the basis that a reasonable fact-finder *could* have found criminal liability under a certain analysis, when we know conclusively that the fact-finder engaged in a different analysis.

Furthermore, this somewhat ironic confusion within the lower court's own opinion demonstrates the problem with diluting the well-reasoned narrowing language requiring physical proximity and contemporaneity for Article 91 disrespect. This an almost too-perfect illustration of the temporal (and proximity) problems caused by a broad reading of this offense.

Conclusion

For the foregoing reasons, Chief Brown respectfully requests this Court set aside the findings and sentence as to Charge I, Specifications 1, 2, and 4.

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legal analysis that directly contradicts that articulated in the special findings is not in keeping with this standard of review.

Scott Hockenberry
Civilian Appellate Defense Counsel
Daniel Conway and Associates,
Attorneys-at-Law
12235 Arabian Place
Woodbridge, VA 22912
Ph: (586) 930-8359
Fax: (210) 783-8255
hockenberry@militaryattorney.com
www.mcmilitarylaw.com
CAAF Bar No. 37385

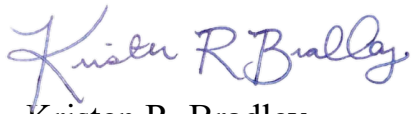
Kristen R. Bradley
LCDR, USCG
Appellate Defense Counsel
Navy and Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
Ph: (202) 685-8588
kristen.r.bradley@uscg.mil
CAAF Bar No. 37650

CERTIFICATE OF FILING AND SERVICE

I certify that on November 16, 2022, the foregoing was delivered electronically to this Court, and that copies were electronically delivered to the Appellate Government Division.

CERTIFICATE OF COMPLIANCE WITH RULES 24(c) AND 37

The undersigned counsel hereby certifies that: 1) This brief complies with the type-volume limitation of Rule 24(c) because it contains 12,687 words; and 2) this brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word with Times New Roman 14-point typeface.



Kristen R. Bradley
LCDR, USCG
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Suite 100
Washington Navy Yard, D.C. 20374
Tel: (202) 685-8588
Kristen.R.Bradley@uscg.mil
CAAF Bar No. 37650