IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

SEAN W. HARRINGTON,
Airman First Class (E-3), USAF
Appellant

Crim. App. No. 39825

USCA Dkt. No. 22-0100/AF

BRIEF ON BEHALF OF APPELLANT

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ISSUES PRESENTED

I.

WHETHER THE EVIDENCE IS LEGALLY SUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR COMMUNICATING A THREAT.

II.

DID THE MILITARY JUDGE ABUSE HIS DISCRETION BY REFUSING TO INSTRUCT THE MEMBERS OF THE MAXIMUM CONFINEMENT FOR EACH OFFENSE, WHICH ULTIMATELY RESULTED IN AN EXCESSIVE 14-YEAR SENTENCE?

III.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ALLOWING THE VICTIM'S PARENTS TO TAKE THE WITNESS STAND AND DELIVER UNSWORN STATEMENTS IN QUESTION-AND-ANSWER FORMAT WITH TRIAL COUNSEL.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals ("Air Force Court") had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866.[1] This Honorable Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

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[1] All references to the punitive articles are to the *Manual for Courts-Martial, United States* (2012 ed.) [2012 *MCM*] and *Manual for Courts-*

STATEMENT OF THE CASE

On March 11, May 6, and June 24 to July 1, 2019, at Cannon Air Force Base, New Mexico, a panel of officer members sitting as a general court-martial tried Appellant, Airman First Class (A1C) Sean W. Harrington. Consistent with his pleas, a military judge found Appellant guilty of two specifications of wrongful use of controlled substances on divers occasions in violation of Article 112a, UCMJ, 10 U.S.C. § 912a (2012).[2] (Joint Appendix (JA) at 143, 146.) Contrary to his pleas, the panel found him guilty of one charge and one specification of communicating a threat in violation of Article 134, UCMJ, 10 U.S.C. § 934 (2016). (JA at 143, 242.) The panel also found him not guilty of murder in violation of Article 118, UCMJ, 10 U.S.C. § 918 (2016), but guilty of the lesser included offense of involuntary manslaughter under

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Martial, United States (2016 ed.) [2016 *MCM*], as appropriate. Unless otherwise stated, all other references to the UCMJ, and all references to the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.) [2019 *MCM*].

[2] Also consistent with his pleas, the panel found Appellant not guilty of one charge and one specification of assault in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2016). (JA at 242.) This brief discusses this allegation in greater depth as part of the first issue presented.

Article 119, UCMJ, 10 U.S.C. § 919 (2016).[3] (JA at 242.) The panel sentenced him to 14 years' confinement, a dishonorable discharge, reduction to the grade of E-1, and a reprimand. (JA at 292.) The convening authority took no action on the findings or sentence. (JA at 68.) The Air Force Court affirmed the findings and sentence. (JA at 55.) Appellant moved for reconsideration and *en banc* reconsideration on November 9, 2021, which the Air Force Court denied. (JA at 57.) This Court granted review on March 14, 2022.

STATEMENT OF FACTS

1. Drug Use

Appellant pleaded guilty to divers use of cocaine and marijuana. (JA at 143.) During his *Care* inquiry he elaborated on his drug use, which occurred between 2014 and 2017. For cocaine, each use occurred after he was drinking and at off-base locations. (JA at 144.) For marijuana, he admitted to smoking the drug multiple times at off-base parties. (JA at 145.) Senior Airman (SrA) BI ("BI"), his friend and one-time roommate, testified in presentencing that he observed Appellant use cocaine

[3] The Government withdrew and dismissed a voluntary manslaughter charge prior to trial. (JA at 64.)

approximately 15 times and marijuana 10 to 15 times. (JA at 253.) In his unsworn statement, Appellant discussed how he confessed this drug use to the Air Force Office of Special Investigations (OSI) and later became a confidential informant (CI). (JA at 108.)

2. Communicating a Threat

SrA AB ("AB") moved in with Appellant and BI on June 15, 2017. (JA at 148-49.) On July 24, 2017, AB awoke at 1800 hours after staying up until about 0400 hours that morning. (JA at 150-51.) AB agreed to drive BI to an Alcoholics Anonymous (AA) meeting at 1900 hours. (JA at 151.) She believed that BI and Appellant drank heavily all day. (JA at 151-52.) When Appellant awoke alone at the home, he thought someone had "hog tied" him with a rope. (JA at 71.) Appellant began texting AB, who was still at the AA meeting; their conversation spans four pages. (JA at 69-72, 152.) Based on these text messages, the Government charged Appellant with communicating a threat under Article 134, UCMJ. (JA at 60.) The specification alleged that Appellant communicated a threat to injure AB by stating: "whoever the sick sadistic mf who did this I'm going to kill," and "Tell me who did it and I'll go easy on you." (*Id.*) When AB received the messages, she thought Appellant was being "an asshole"

and "pretty rude." (JA at 189.) Additional facts are found in Issue 1, *infra*.

3. Involuntary Manslaughter

Appellant and A1C MJ ("MJ") were members of the same unit. (JA at 108.) By the time they met, Appellant knew his Air Force career was ending because of his drug use, and he wanted to train MJ as his replacement. (*Id.*) They quickly became friends. (*Id.*) MJ and Appellant would regularly go hiking, play video games, listen to music, and drink alcohol together. (JA at 109.) MJ would also frequently sleep at Appellant's home. (*Id.*)

MJ and Appellant organized a barbeque for several friends on the Fourth of July, 2018. (JA at 209.) Over the course of that night, the group played drinking games and became intoxicated. (JA at 211-15.) One of the partygoers thought MJ and Appellant had a good relationship and did not see them argue. (JA at 221, 223.) By approximately 0100 hours on July 5, 2018, only MJ and Appellant remained at Appellant's home. (JA at 220.)

At approximately 0200 hours, Appellant called 9-1-1 to report that MJ was shot in the head. (JA at 227-28, 293.) Officers arrived to find

MJ lying on the garage floor with a single gunshot wound to the head. (JA at 231.) The police saw no signs of struggle in the garage. (JA at 232.)

That same morning, Appellant explained to local law enforcement that his handgun misfired (where the trigger is pulled but the weapon does not discharge) several times earlier in the night when he attempted to fire into the air for the Fourth of July. (JA at 238-239; 294 at 10:02:00-10:02:35.[4]) Law enforcement recovered three rounds of ammunition from the house with a light primer strike, which indicates a misfire. (JA at 233-35.) A Government expert tested Appellant's firearm and confirmed the firing issues; it failed five out of eight test fires. (JA at 238-39.)

Appellant told law enforcement that he vaguely recalled something MJ had said about hurting Appellant's dog, confirmed MJ had the gun, and described how it discharged when he took it from MJ. (JA at 294 at 10:02:50-10:03:15, 10:19:50-10:20:20.) Appellant explained that he thought the gun was pointed up sufficiently when he took the firearm away from MJ, and that he was confident because the gun had already

[4] The time stamps are from the internal clock within the video. The audio and video are out of sync in the original admitted exhibit.

misfired that night. (*Id.* at 10:20:20-10:21:40.) At trial, Dr. TH, an expert in forensic pathology and wound interpretation, testified that she agreed the cause of death was "undetermined" because the interview did not clarify "whether or not the gun was fully and completely in only the hands of [Appellant]." (JA at 240.)

MJ ultimately passed away from the gunshot wound on July 9, 2018. (JA at 73.) The panel later acquitted Appellant of MJ's murder, but convicted him of involuntary manslaughter. (JA at 242.)

Additional facts and the relevant portions of the Air Force Court's decision are provided below within each issue presented.

SUMMARY OF THE ARGUMENT

1. Appellant's Article 134, UCMJ, conviction for communicating a threat is legally insufficient.

Appellant's two "threats," when read together with the other text messages and placed in the context of AB's relationship with Appellant, did not communicate a threat under Article 134, UMCJ. No reasonable factfinder could determine that the Government met its burden of proof on the objective and subjective prongs of the offense.

The first charged threat—"whoever the sick sadistic mf who did this I'm going to kill"—fails on its face because Appellant did not direct the "threat" at AB, and the specification alleged a threat *to injure AB*.

The second charged threat—"Tell me who did it and I'll go easy on you"—is only a threat if read in isolation. In *United States v. Brown*, this Court made clear the centrality of context when interpreting the meaning of a potential threat. 65 M.J. at 227, 231 (C.A.A.F. 2007). Thus, for the objective prong, a reasonable person in AB's position would not understand Appellant's statements as threats; indeed, AB herself thought little of these messages, and relayed to BI that Appellant was merely being "rude." Nor can Appellant's alleged assault of AB later that night, *of which he was acquitted*, create a meaning in the messages not evident in the messages themselves.

As for Appellant's subjective intent, his intoxicated ramblings do not reflect an intent to threaten AB. Similarly, the acquitted conduct later in the evening cannot overcome the absence of evidence of intent at the time of the "threat." His conviction for communicating a threat under Article 134 is therefore legally insufficient.

2. The military judge erroneously denied a Defense-requested instruction to inform the members of the maximum punishment for each offense.

Appellant faced sentencing for involuntary manslaughter, divers cocaine use, divers marijuana use, and communicating a threat. The maximum confinement for these combined offenses was 20 years, but only 10 of these years was for the indisputable focus of the case: involuntary manslaughter. The Defense accordingly requested an instruction to clarify the maximum sentences so the members understood the 10-year limitation on confinement for the most serious offense. The military judge denied this request, mistakenly believing he was *prohibited* from informing the panel of the maximum confinement for each charge. The judge based his ruling on an easily distinguishable Army Court of Criminal Appeals (Army Court) case, *United States v. Purdy*, 42 M.J. 666 (A. Ct. Crim. App. 1995), and in the process ignored binding precedent allowing such an instruction. *See United States v. Gutierrez*, 11 M.J. 122, 123–24 (C.M.A. 1981).

The military judge's erroneous decision constituted an abuse of discretion under the test outlined in *United States v. Miller*, 58 M.J. 266, 270 (C.A.A.F. 2003) because the requested instruction was: (1) correct;

(2) not substantially covered in the main instruction; and (3) on such a vital point that the failure to issue the instruction seriously impaired Appellant's sentencing case. Indeed, the Circuit Trial Counsel (CTC) argued for "at least" 15 years' confinement. The military judge's abuse of discretion thus enabled the excessive 14-year sentence; one which suggests that Appellant's commission of involuntary manslaughter was so aggravated that it warranted the maximum term of confinement, *and* that his unexceptional drug use and communication of a threat by text message merited an *additional* four years of confinement. The military judge's abuse of discretion warrants setting aside the sentence.

3. The military judge abused his discretion when he allowed the victim's parents to deliver unsworn statements from the witness stand in question-and-answer format with trial counsel.

The military judge also abused his discretion by allowing MJ's parents to deliver unsworn statements *from the witness stand* in a question-and-answer format led by trial counsel. R.C.M. 1001(c) provides no authority for trial counsel's participation; it only contemplates the involvement of the victim's counsel or a victim's representative. The President chose additional language for an accused's unsworn statement in R.C.M. 1001(b), allowing the statement to "be made by the accused, by

counsel, or both." The absence of the same language for a victim unsworn statement is telling—only by turning this language into pure surplusage would the interpretation below survive.

In sanctioning the military judge's error, the lower court painted the victim's right of allocution with too broad a brush. Its decision also notably conflicts with a published opinion from the Army Court (*United States v. Cornelison*, 78 M.J. 739, 744 (A. Ct. Crim. App. 2019)), an unpublished opinion from a separate panel of the Air Force Court (*United States v. Bailey*, No. ACM 39935, 2021 CCA LEXIS 380, at *15 (A.F. Ct. Crim. App. July 30, 2021) (unpub. op.) (JA at 311), and even one of the judges on the panel below. (JA at 55 (Cadotte, J., concurring).)

The result of the military judge's abuse of discretion was a powerful and compelling counsel-driven question-and-answer session with the emotional parents of a deceased Airman. But a victim's right to an unsworn statement is not subject to trial counsel's stage management. The resulting 14-year term of confinement, excessive on its face, is indicative of the prejudicial impact of this statement. Accordingly, this Honorable Court should set aside the sentence.

ARGUMENT

I.

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR COMMUNICATING A THREAT.

Additional Facts

Most of the text conversation containing Appellant's "threats," admitted as Prosecution Exhibit 12, follows:

> [Appellant (APP)]: I'm tripping balls right now dafuw happen last night I'm hearing shit you are my light right now what happened
>
> AB: You did cocaine with Mario, and drank. That's all I saw.
>
> APP: I'm outside damn near naked wtf happened
>
> AB: Go inside, grab some water, and lay down on your stomach.
>
> APP: I did what lol
>
> APP: I'm fucked
>
> AB: You snorted cocaine off marios keys last night
>
> APP: All right where is everyone
>
> AB: [BI] and I are at the AA meeting.
>
> APP: Cool when you get home help me get out of the table I Would greatly appreciate it and good on him for maybe giving fuck I called him he didn't answer so good on you but seriously

> please whoever the sick sadistic mf who did this I'm going to kill.
>
> AB: What
>
> APP: Tell me who did it and I'll go easy on you.
>
> APP: Who the fuck hog tied med
>
> APP: And who the fuck took a bath probably [BI] you bastard
>
> APP: Who in the fuck went into my room and took my shit And tied me with it I'm fucking dead as serious who did it or who did you hit up
>
> AB: Wtf are you talking about
>
> APP: Who tied me up
>
> AB: On my way home
>
> APP: For you did anyone come over

(JA at 69-72 (errors in original).)

AB explained that her first reaction to the texts was "[Appellant] started, kind of, he was coming off of the drugs is what [she] thought it was." (JA at 152.) BI, who was with AB when she received the texts, said that she looked "annoyed." (JA at 189.) AB told BI that Appellant was being an "asshole" and "pretty rude," but did not relay that Appellant threatened her. (*Id.*) These two "threats"—"whoever the sick sadistic mf who did this I'm going to kill," and "Tell me who did it and I'll go easy on

you"—formed the basis of the Article 134, UCMJ, offense. (JA at 60.)

When BI and AB returned home, they found Appellant sitting in a chair on the patio, surrounded by rope, with his pistol on a table next to him. (JA at 153-54, 181.) AB claimed Appellant said he "was going to give [her] one more chance to tell him who [she] sent to the house." (JA at 155.) AB recalled how she "backed up and . . . [to her] it suddenly became real, all of the text messages that [she] was getting and kind of understanding what was going on, just clicked [ ] and [she] backed up, [she] freaked out." (*Id.*) She further alleged that Appellant turned the pistol to face her before BI grabbed it and placed it on top of the refrigerator. (JA at 156.) Afterwards, she asserted she screamed at BI and "screamed at [Appellant] [witness giggled]." (*Id.* (second alteration in original).) She claimed she was no longer afraid because the firearm was on top of the refrigerator, and because the next day OSI seized the weapon.[5] (JA at 157-58.)

BI was with AB the entire time and never saw Appellant touch the

[5] OSI never seized the weapon, which was apparently the same weapon as the involuntary manslaughter offense. (JA at 236-37.) An OSI agent testified that he was instructed to change the internal data page in the case file to indicate the weapon was seized, when it fact it was not. (JA at 236.)

weapon. (JA at 187, 197.) He also did not recall AB saying anything about Appellant pointing a gun at her that night. (JA at 193.) Additionally, he did not corroborate AB's assertion that Appellant said he "was going to give me one more chance to tell him who [AB] sent to the house." AB never told BI, with whom she was romantically involved, that she was afraid for her safety. (*Id*.)

AB claimed she told OSI about the threat the same night; however, neither OSI nor other law enforcement came to the home. (JA at 157.) At the time, AB was a CI for OSI. OSI Special Agent (SA) AD, AB's "handler," testified that AB texted her that "she came home to the gun like pointed in her direction." (JA at 201.) SA AD asked AB if she wanted to leave the home that night, but AB said "she and [BI] handled the situation." (JA at 200.) SA AD acknowledged that AB had "questionable" judgment, that AB tried to use her status as a CI when local law enforcement pulled over a car she was riding in, and that AB had withheld information from OSI when working as a CI, leading to AB's termination. (JA at 202, 204.)

On July 26, 2017, three days after the alleged "threats," AB invited Appellant to "[c]ome smoke with [her]." (JA at 72.)

The Specification of Charge IV alleged that:

> Airman First Class Sean W. Harrington . . . did . . .on or about 23 July 2017, wrongfully communicate to [AB] a threat to injure her by stating, "whoever the sick sadistic mf who did this I'm going to kill," and "Tell me who did it and I'll go easy on you," or words to that effect, and that said conduct was to the prejudice of good order and discipline in the armed forces.

(JA at 60.) The Defense filed a motion to dismiss this specification for failure to state an offense, arguing that the first statement, "whoever the sick sadistic mf who did this I'm going to kill," was not directed at AB. (JA at 128-30.) The military judge denied the motion. (JA at 136-39.) The panel convicted Appellant of the threat under Article 134, UCMJ, but acquitted him of the assault upon AB. (JA at 242.)

The Air Force Court declined to separate the two "threats," interpreting them together to conclude that:

> A reasonable reading of the text messages, as well as the context before, during, *and after* [Appellant] sent them, is that [Appellant] was going to kill those who tied him up; that he demanded AB provide him information about who besides her was involved in tying him up; and that AB providing him that information would result in her injury being less severe than death.

(JA at 25 (emphasis added).) When assessing whether Appellant intended a threat, the Air Force Court wrote that "the fact that [Appellant] soon thereafter confronted AB with a gun provides some

evidence that he meant his words to be perceived as a threat." (JA at 25.)

Standard of Review

Legal sufficiency is reviewed *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted).

Law

1. Communicating a Threat under Article 134, UCMJ

The elements of communication of a threat under Article 134, UCMJ, 10 USC § 934 (2016), as charged, are as follows:

> (1) That the accused communicated certain language expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future;
>
> (2) That the communication was made known to that person or to a third person;
>
> (3) That the communication was wrongful; and
>
> (4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces.

MCM, pt. IV, ¶ 110.b. (JA at 303).

The first element is an objective measure that evaluates the existence of a threat "from the point of view of a reasonable person." *United States v. Rapert*, 75 M.J. 164, 168 (C.A.A.F. 2016) (citations and

alterations omitted). "[This Court's] only concern is whether a reasonable factfinder could conclude beyond a reasonable doubt that a reasonable person *in the recipient's place* would perceive the contested statement by appellant to be a threat." *United States v. Phillips*, 42 M.J. 127, 130 (C.A.A.F. 1995) (citations omitted) (emphasis added).

When evaluating the objective prong, this Court has emphasized the importance of context:

> The words communicated certainly matter because they are the starting point in analyzing a possible threat. But words are used in context. Divorcing them from their surroundings and their impact on the intended subject is illogical and unnatural. Legal analysis of a threat must take into account both the words used and the surrounding circumstances. Without such a subtle examination absurd results might arise, defeating both the text and purpose of paragraph 110.b. of the *Manual for Courts-Martial*.

Brown, 65 M.J. at 231–32. This objective approach applies only to the first element, as "proof of the declaration of intent is different from proof of the intent itself." *See United States v. Shropshire*, 43 C.M.R. 214, 215 (C.M.A. 1971).

The third element, "which requires that a threat be 'wrongful,' is properly understood to reference the accused's subjective intent." *Rapert*, 75 M.J. at 169. While a statement may declare an intent to injure, the

"declarant's true intention, the understanding of the persons to whom the statement is communicated, and the surrounding circumstances may so belie or contradict the language of the declaration as to reveal it to be a mere jest or idle banter." *United States v. Gilluly*, 13 U.S.C.M.A. 458, 461 (C.M.A. 1963) (citations omitted). "The *MCM*'s requirement that the Government prove that an accused's statement was wrongful because it was not made in jest or as idle banter, or for an innocent or legitimate purpose, prevents the criminalization of otherwise 'innocent conduct,'. . ." *Rapert*, 75 M.J. at 169.

2. The Scope of Conduct Considered

In *United States v. Gutierrez*, where a panel convicted the appellant of stalking but acquitted him of rape, this Court assessed whether evidence from the acquitted rape offense could support the legal sufficiency of the stalking conviction. 73 M.J. 172, 173 (C.A.A.F. 2014). Because stalking requires a course of conduct, this Court reviewed three specific incidents between the victim and the appellant—the events surrounding the rape allegation and two other incidents where appellant came to the victim's home late at night and repeatedly rang the doorbell—as well as relevant text and phone messages. *Id.* at 175–76

(citing Article 120a(b)(1)(A)-(B), (b)(2), 10 U.S.C. § 920a(b)(1)(A)-(B), (b)(2)). The victim explained that on the night of the rape allegation, the appellant pushed his way into her home, kissed her against her will, and penetrated her vagina despite her efforts to push him away. *Id.* at 173.

This Court held that the "the offense of stalking contemplates consideration of evidence which covers the entire course of alleged unlawful conduct directed toward the victim," and that the conduct on the night of the rape allegation was "among the evidence of repeated occasions of discrete stalking conduct, as well as a pattern of repeated telephone calls and text messages from which the jury could infer both objective and subjective awareness of fear of bodily harm or sexual assault." *Id.* at 176. This Court did not elaborate on the specific conduct from the rape allegation that the members could consider.

In *United States v. Rosario*, members convicted the appellant of sexual harassment on divers occasions in violation of a Marine Corps order. 76 M.J. 114, 116 (C.A.A.F. 2017). However, the members acquitted him of two specifications of abusive sexual contact—touching the victim's ear with his tongue and her cheek with his mouth—and one specification of assault consummated by a battery for touching her hand

with his hand. Affirming the legal sufficiency of the sexual harassment conviction, this Court wrote:

> When the same evidence is offered at trial to support two different offenses, a Court of Criminal Appeals is *not necessarily precluded* from considering the evidence that was introduced in support of the charge for which the appellant was acquitted when conducting its Article 66(c), UCMJ, legal and factual sufficiency review for which the appellant was convicted.

76 M.J. at 118 (emphasis added). Like *Gutierrez*, each of the acquitted offenses could constitute part of the convicted offense: the assault and two abusive sexual contact allegations, even if not proven beyond a reasonable doubt, could still encompass conduct that met the definition of sexual harassment. *Id.* at 118. In other words, this Court drew a parallel with *Gutierrez*, because "the fact patterns of the convicted and acquitted behaviors *overlapped but were not identical*." *Id.* (emphasis added.)

Finally, in *United States v. Nicola*, a panel acquitted the appellant of sexually assaulting a victim while she was intoxicated in a shower, but convicted him of indecent viewing for looking at her while she was naked

and exposed in the shower. 78 M.J. 223, 230 (C.A.A.F. 2019).[6] Both the appellant and the victim testified that he entered the shower; the appellant, however, claimed he was only checking on the victim due to her intoxication. *Id.* He further testified that he never saw her "frontal area" when assisting her. *Id.* at 225. This Court ultimately rejected the notion that his acquittal for sexual assault meant the members disbelieved all of the victim's testimony about the shower incident; instead, it determined the panel "rationally could have believed that Appellant indecently viewed [the victim] in the shower even if it concluded that [her] testimony did not establish all of the elements of sexual assault beyond a reasonable doubt." *Id.* (citing *Rosario*, 76 M.J. at 117). Like *Rosario* and *Gutierrez*, the convicted and acquitted conduct overlapped.

[6] The court-martial also convicted the appellant of abusive sexual contact, a finding he did not challenge on appeal. *Id.*

Analysis

1. The first "threat" cannot support the conviction because Appellant expressed no threat to injure AB, as the charge required.

In its motion to dismiss for failure to state an offense, the Defense correctly identified how the first charged "threat"—"[w]hoever the sick sadistic mf who did this I'm going to kill"—was not directed at AB. (JA at 130.) Indeed, a cursory review of the text conversation demonstrates that Appellant did not believe AB tied him up. Rather, he repeatedly asked her who did it. (JA at 70-72.) He even asked her to "help [him] get out of the table" when she returned home. (JA at 71.) The threat, if it was a threat at all, was thus directed at whoever "tied him up." Consequently, no reasonable factfinder could find that Appellant communicated a threat *to injure AB* by texting the phrase "[w]hoever the sick sadistic mf who did this I'm going to kill."

The Air Force Court did not address this issue, instead concluding it could interpret both messages together. (JA at 25.) Appellant respectfully asks this Court to consider the plain language of the messages and conclude the first charged threat cannot support the conviction.

2. For the second message, the evidence fails both the objective and subjective elements of communicating a threat.

A. A reasonable person in AB's position would not perceive a threat.

In Appellant's second message to AB, he stated "tell me who did it and I'll go easy on you." (JA at 71.) For the objective element, the test is whether "the accused communicated certain language expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future." *MCM*, pt. IV, ¶110.b. (JA at 303). While "[t]he words communicated certainly matter because they are the starting point in analyzing a possible threat," words "are used in context" and "[d]ivorcing them from their surroundings and their impact on the intended subject is illogical and unnatural." *Brown*, 65 M.J. at 231; *see also United States v. Cotton*, 40 M.J. 93, 95 (C.A.A.F. 1994) (explaining that in evaluating the objective prong, "both the circumstances of the utterance and the literal language must be considered"). Thus, when assessing whether a reasonable person in AB's position would[7] perceive a threat, the context of Appellant and

[7] The CTC, in her argument, misstated the instructions when she argued "if a reasonable person *could* perceive it to be a threat" when the

AB's relationship is key.

AB and Appellant were roommates and friends. (JA at 148, 172.) While Appellant was clearly upset, he also seemed disoriented. (JA at 69-72, 152.) This very state belied the notion that AB would perceive a threat. *See United States v. Humphrys,* 22 C.M.R. 96, 101 (C.M.A. 1956) (Latimer, J., concurring) (deeming ostensibly threatening language nonthreatening because witnesses concurred that when the appellant made the statements he was "in a highly emotional, almost irrational state"). BI, who was romantically involved with AB at the time, recalled that she seemed annoyed by the texts, calling Appellant an "asshole" and "rude," and that she never relayed that Appellant threatened her. (JA at 189.) Similarly, AB never expressed fear for her safety to BI, even after the alleged assault later that night. (JA at 193-94.) This reaction reflects that AB did not view Appellant's language as threatening. Only by reading these messages completely out of context do they become a "present determination or intent to wrongfully injure the person." *See MCM*, pt. IV, ¶ 110.b. (JA at 303). Those words, when placed in the

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instruction is whether a reasonable person *would* perceive it to be a threat. (JA at 241 (emphasis added).) This misstatement sweeps potentially innocent conduct within the ambit of a threat.

context of two roommates and friends, are not a threat.

Even the language, "I'll go easy on you," is unclear. The phrase does not satisfy the required expression of "a present determination or intent to wrongfully injure the person, property, or reputation of another person." *MCM*, pt. IV, ¶ 110.b.(1) (JA at 303). The Air Force Court interpreted this to mean that Appellant would kill whomever tied him up, and that if AB "provid[ed] him that information [it] would result in her injury being less severe than death." (JA at 25.) Respectfully, this injects meaning not found in the plain language of the messages themselves.

B. No rational factfinder could conclude Appellant intended to threaten AB.

When assessing Appellant's subjective intent, this Court engages in a similar contextual analysis to the objective element. *See Brown*, 65 M.J. at 230 n.1 ("we find that analyzing whether the purpose behind a statement is threatening requires a similar examination as to assessing whether a statement itself is threatening"). Appellant, after consuming alcohol and drugs, reached out to AB in a confusing text exchange that, understandably, did not seem to scare or threaten her. (JA at 152, 189.)

Both the *MCM* and this Court's precedent recognize that "a

declaration made under circumstances which reveal it to be in jest or for an innocent or legitimate purpose . . . does not constitute [communicating a threat under Article 134]." *Rapert*, 75 M.J. at 169 (citations omitted). The exchange, placed in its context of their relationship as friends and roommates, is properly understood as Appellant agitated and seeking answers, but not threatening AB. Appellant was trying to figure out what happened and seemed still intoxicated. (JA at 69-72.) He joked with AB about the consequences of his drug use: "I did what lol. I'm fucked." (JA at 70.) He said "you are my light right now what happened." (*Id.*) He said "good on you" for answering the phone when others did not. (JA at 71.) AB's first concern was for his health, not her safety. (JA at 70.) Simply put, the evidence does not support Appellant's subjective intent to threaten AB. *Cf. Elonis v. United States*, 575 U.S. 723, 737–38 (2015) (explaining that the threatening nature of communication separates "legal innocence from wrongful conduct," and, consequently, "what [appellant] thinks matters").[8]

[8] Congress moved "Communicating a Threat" out of Article 134 and to a new Article 115 as part of the Military Justice Act of 2016. National

3. Post-hoc, acquitted conduct cannot fill the Government's evidentiary void.

The Air Force Court considered AB's allegation that Appellant confronted her with a firearm later that night—an offense the panel acquitted him of committing—as evidence of both his present intent at the time of the text messages and of the messages' meaning. (JA at 25.)

Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5427, 130 Stat. 2000 (2016). In so doing, Congress heightened the *mens rea* necessary to commit the offense of wrongfully communicating a threat. In the applicable version of Article 134, the *MCM* purports to allow conviction based on reckless conduct, while the current statute places the burden on the Government to prove specific intent or actual knowledge. *Compare* 2016 *MCM*, pt. IV, ¶ 110.c. (explaining that a communication is "wrongful" where the accused "acted recklessly with regard to whether the communication would be viewed as a threat"), *with* 2019 *MCM*, pt. IV, ¶ 53.c.(2) ("For purposes [of assessing wrongfulness], the mental state requirement is satisfied if the accused transmitted the communication for the purpose of issuing a threat or with knowledge that the communication will be viewed as a threat."). As the Drafter's Analysis explains, this change occurred to align the definition with the holdings of *Rapert* and *Elonis*, 575 U.S. 723. 2019 *MCM*, App. 17, at A17-9. This Court in *Rapert* interpreted the wrongfulness of a threat to require "that the speaker intended the statements as something other than a joke or idle banter, or intended the statements to serve something other than an innocent or legitimate purpose"—i.e. *not* recklessness. 75 M.J. at 169. *Elonis* stopped short of deciding whether recklessness would suffice for communication of a threat under the relevant statute. 575 U.S. at 740. Appellant raises this change in the law to underscore that affirming the conviction based on reckless disregard for how the threat is viewed under the subjective prong would render the conviction infirm under *Rapert* and constitutionally suspect under *Elonis*.

While a Court of Criminal Appeals (CCA) may consider acquitted conduct during its factual sufficiency review of another offense,[9] the Air Force Court exceeded this authority by erroneously transplanting Appellant's purported conduct from a later time (which the members justifiably disbelieved) to support his purported earlier-in-time intent to communicate a threat.

A. The lessons of Gutierrez, Rosario, *and* Nicola

This Court has held that an accused is "acquitted of offenses, not of specific facts, and thus to the extent facts form the basis for other offenses, they remain permissible for appellate review." *Rosario*, 76 M.J. at 117. But a review of what this Court has previously considered "facts" in this context shows key distinctions with this case.

In *Gutierrez*, the presented question was "[w]hether the evidence of stalking was legally sufficient where Appellant was acquitted of rape and the prosecution relied on the evidence of rape to prove stalking." 73 M.J. at 176 n.1. Answering in the affirmative, this Court found "the events surrounding the alleged rape were also part of a course of conduct that contributed to the stalking charge." *Rosario*, 76 M.J. at 114 (describing

[9] *See*, *e.g.*, *Rosario*, 76 M.J. at 117.

the facts in *Gutierrez*). In other words, independent of the rape acquittal, the fact that the appellant forced his way into the apartment could support a course of conduct necessary for the stalking offense. *See Guttierez*, 73 M.J. at 173, 175–76.[10]

Next, in *Rosario*, this Court approved the lower court's consideration of acquitted conduct—three instances of the appellant's physical contact with the victim—when assessing a sexual harassment conviction charged as a violation of a Marine Corps order. 76 M.J. at 114. Akin to *Gutierrez*, there was an overlap between the acquitted physical contact and the convicted sexual harassment, as each constituted unwanted sexual advances. *Id*. at 116. And while this Court ultimately determined that "a [CCA] is not necessarily precluded from considering evidence that was introduced in support of the charge for which the appellant was acquitted" in its sufficiency reviews,[11] it distinguished such circumstances from cases where a CCA relies on facts that are in direct

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[10] Notably, there was sufficient evidence to support a course of conduct in *Gutierrez* even if this Court declined to consider the rape allegation at all, as there were three separate incidents involving stalking behavior (in addition to repeated phone calls and messages). *See* 73 M.J. at 175–76; Article 120a(b)(2), 10 U.S.C. § 920a(b)(2) (2012) (defining "repeated" as "two or more occasions of such conduct").

[11] 76 M.J. at 117.

conflict with determinations by the court-martial. *Id.* at 118 (citing *United States v. Smith*, 39 M.J. 448, 449 (C.A.A.F. 1994)). In these latter cases, this Court opined that direct conflicts "provide[ ] a useful dividing line between what the lower court is entitled to consider and what it should not." *Id.* (citing *Smith*, 39 M.J. 448).

Finally, in *Nicola*, this Court found a conviction for indecent viewing legally sufficient despite the appellant's acquittal for a contemporaneous sexual assault. 78 M.J. at 230. This Court reasoned *inter alia* that the appellant's presence in the shower did not undermine the members' finding that the appellant did not sexually assault the victim. *Id.* But in any event, the acquitted and convicted conduct overlapped once again.

Several conclusions flow from these cases. First, while a CCA is "not necessarily precluded" from considering whether acquitted conduct supports the conviction of a separate offense, the lower courts remain constrained from considering facts that directly conflict with the findings of the court-martial. *Rosario*, 76 M.J. at 117–18 (citations omitted).

It is further notable that each of these cases involved a direct overlap of charged conduct. In *Gutierrez*, the rape allegation contained

facts directly supporting the stalking charge. In *Rosario*, the acquitted touching involved facts that directly supported the divers violations of the sexual harassment order. And in *Nicola*, the appellant's indecent viewing occurred contemporaneously with her allegation that he sexually assaulted her. Thus, they all involved considering the same facts as they related to two offenses that occurred at the same time.

Relatedly, none of these cases stands for the proposition that later conduct provides the necessary "context" within the meaning of *Brown* and its progeny. In *Brown*, and the cases cited therein, this Court focused on the events leading up to the threat. 65 M.J. at 231–32. The appellant in *Brown* also had a previous history of violent exchanges with his victim, and actually engaged in a violent outburst just minutes *prior to* uttering his contingent threat. *Id.* at 232.

B. Application

Applying these lessons to this case demonstrates the impermissibility of grafting Appellant's later-in-time conduct onto the charged communication of a threat. As a starting point, *Guttierez, Rosario*, and *Nicola* do not support the Air Force Court's reliance on future conduct for insight into earlier-time-time intent. Instead, they

involved offenses with overlapping facts, wherein the acquitted conduct occurred contemporaneously with the convicted conduct. That is far different from the present case, where there was no factual overlap between the charged gun incident and the earlier-in-time "threats."

This is not to say that searching in the future to find context for past crimes is always impermissible. But stepping forward in time is problematic for this offense because the threat is most accurately assessed at the time it is made and received. For example, the first element of communicating a threat requires evaluating the existence of the threat "from the point of view of a reasonable person." *Rapert*, 75 M.J. at 168. This point of view is necessarily shaped when the person receives the communication. And while past conduct (such as what occurred in *Brown*) or contemporaneous conduct (such as what happened in *Guttierez, Rosario*, and *Nicola*) could certainly influence how a reasonable person in that moment would view particular language, the same cannot be said regarding events that have yet to occur. For the latter to suffice, it would mean that language can transform from innocuous to criminal based on the occurrence of some indeterminate later event—a situation that appeared to occur here, as evidenced by AB's

lack of alarm to Appellant's messages and corresponding lack of fear in returning to their shared home a few hours later. (JA at 152-54, 189.)

Searching the future for intent also raises difficult questions regarding timing. For instance, how far forward could a reviewing court look to find evidence of an accused's subjective intent? A few seconds or minutes may be acceptable under certain circumstances, but the charged offenses here were hours apart. Would the same context be found if the charges were days or months apart? And what if some superseding cause—like a failing relationship—occurs between the offense and the acquitted conduct? Such an alteration could change the perceptions of both parties, potentially morphing a previously trivial message between friends into one of malice between enemies. Simply put, using future events to divine the subjective and objective prongs of communicating a threat is fraught with legal pitfalls, and stretches *Gutierrez*, *Rosario*, and *Nicola* too far.

But even if this Court is disinclined to bar prospective searches for a threat's context, the lower court nevertheless erred by relying on facts that directly conflict with the findings of Appellant's court-martial. Specifically, the Air Force Court characterized the acquitted conduct as

a "confront[ation] with a gun." (JA at 25.) Respectfully, this requires several logical leaps beyond "drawing all reasonable inferences in favor of the prosecution."

Not only does the panel's acquittal of the assault specification strongly suggest they disbelieved AB's testimony that Appellant pointed the gun at her, the evidence adduced at trial amply supports their skepticism. BI, who was present during the entirety of this encounter and—unlike AB—had no apparent credibility issues, denied Appellant *ever* touched his gun. (JA at 187, 197.) BI also failed to corroborate AB's claim that Appellant said he "was going to give [AB] one more chance to tell him who [she] sent to the house." (JA at 155.)

For her part, AB unconvincingly explained that she remained in the house after Appellant's purported behavior because BI placed the weapon on top of the refrigerator and she later took the clip, as though either were an impediment to retrieving the gun and reloading it. (JA at 156-57.) AB further claimed she yelled at BI and Appellant (whom she allegedly feared at that moment); yet, she laughed on the stand when saying this. (JA at 156 ("[witness giggled]").) And even after AB was supposedly left "terrified to be in [her] house" (JA at 157), she still invited

Appellant out for a smoke just three days later. (JA at 72.)

AB's communications with OSI that evening were also revealing in that she declined her handler's offer to reimburse her for staying elsewhere. (JA at 200.) This is hardly a decision one would expect from someone who claimed to be "freaking out" and "panicking," and whose "safety zone was threatened." (JA at 157.) Likewise, OSI's seemingly nonchalant response to the matter is telling. Surely if one of its CIs had been in any actual danger, it would have leapt into action. Yet, it essentially did nothing. This is almost certainly due to the fact that: (1) SA AD did not believe AB's description of the encounter was threatening enough to warrant a response; or (2) AB's poor reputation led SA AD to believe she was not telling the whole truth. (JA at 202-04.)

In sum, the members received ample evidence to either contradict AB's story or undermine her truthfulness. Consequently, this Court should not repeat the error of the lower court by using the acquitted assault allegation as evidence of Appellant's earlier-in-time intent. To do so strains the scope of this Court's precedents, ignores the members' verdict on the assault allegation and the evidence contradicting AB's claims, and allows Appellant's subjective intent to rest solely on his

uncorroborated conduct that occurred hours after his initial messages failed to alarm AB.

4. Conclusion

Appellant's rambling text messages to his roommate did not constitute a threat, either objectively or subjectively. AB's claim that Appellant pointed a weapon at her later in the evening, which the members justifiably disbelieved, cannot substitute for the lack of subjective intent at the time Appellant sent the charged messages. This Honorable Court should set aside the conviction as legally insufficient.

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION BY REFUSING TO INSTRUCT THE MEMBERS OF THE MAXIMUM CONFINEMENT FOR EACH OFFENSE, WHICH ULTIMATELY RESULTED IN AN EXCESSIVE 14-YEAR SENTENCE.

Additional Facts

1. The military judge's refusal of Defense-requested instructions.

The military judge sent draft sentencing instructions to counsel, which prompted the Defense to request an additional paragraph explaining the maximum punishment for each offense. (JA at 274.) The Circuit Defense Counsel (CDC) expressed concern that the members

could believe a 15-year sentence was permissible for involuntary manslaughter, when in fact the actual maximum punishment for involuntary manslaughter was only 10 years. (JA at 274-75.) In response, the military judge stated "[w]ell, they couldn't do that if that was the only charge available to them but again, under unitary sentencing, they actually can." (JA at 275.) The military judge explained that members are *never* instructed on individual maximum punishments under the unitary sentencing system. (JA at 275-76.) To support his decision, the military judge cited *United States v. Purdy*, 42 M.J. 666. (JA at 276.) The CTC later argued for "at least 15 years in prison" without differentiating by offense. (JA at 279.)

2. The Air Force Court's decision.

Appellant raised the military judge's abuse of discretion before the Air Force Court, which wrote that the issue "warrant[s] neither further discussion nor relief." (JA at 3 (citing *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).)

Standard of Review

Whether a military judge properly instructs the court members is a question of law reviewed *de novo*. *United States v. Hibbard*, 58 M.J. 71,

75 (C.A.A.F. 2003) (citation omitted). This Court reviews a military judge's denial of a requested instruction for an abuse of discretion. *United States v. Carruthers*, 64 M.J. 340, 345–46 (C.A.A.F. 2007).

Law

"The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense." Article 56(a), UCMJ, 10 U.S.C. § 856(a). "[A] court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces, taking into consideration," among other things, "the sentences available under this Chapter." Article 56(c), UCMJ, 10 U.S.C. § 856(c).

R.C.M. 1005(a) states that a military judge "shall give the members appropriate instructions on sentence." These instructions "should be tailored to the facts and circumstances of the individual case." R.C.M. 1005(a), Discussion. The three-pronged test for erroneous denial of instructions asks if: "(1) the requested instruction is correct; (2) it is not substantially covered in the main [instruction]; and (3) it is on such a vital point in the case that the failure to give it deprived [the accused]

of a defense or seriously impaired its effective presentation." *Miller*, 58 M.J. at 270 (citations and internal quotation marks omitted).

In *United States v. Gutierrez*, the military judge issued instructions on the maximum punishment for each of several offenses. 11 M.J. at 123–24. This Court's predecessor held it was permissible, under the *MCM* provision then in effect, to provide members with instructions on maximum punishments for individual offenses. *Id.* at 124.

Here, the military judge, apparently unaware of *Gutierrez*, cited *Purdy*, 42 M.J. at 666, a non-binding Army Court case. In *Purdy*, the military judge informed the members that a multiplicity ruling reduced the maximum punishment from 52 to 26 years; the Army Court held it was error for the military judge to so inform the members. *Id.* at 671.

While the Air Force Court did not explain its decision here, another panel of the Air Force Court took a different approach. In *United States v. Blackburn*, the appellant was convicted of one specification of sexual abuse of a child (15 years maximum confinement) and one specification of indecent recording (5 years maximum confinement). No. ACM 39397 (rem.), 2021 CCA LEXIS 212, at *1–2, 44 (A.F. Ct. Crim. App. April 30, 2021) (unpublished) (JA at 314-15, 332.) At trial, the appellant requested

the military judge instruct on the maximum confinement for each offense. (JA at 332.) The same military judge presided at Appellant's court-martial and over *Blackburn*, and rejected the same type of instruction on maximum confinement by offense in both cases. (JA at 1, 314, 332.) The trial counsel argued for 12 years' confinement, and the appellant received 5 years' confinement and a bad-conduct discharge. (JA at 314, 332.) On appeal, the appellant argued that the sexual abuse of a child specification had little aggravating evidence, and that the more serious offense was indecent recording. (JA at 332.) *Blackburn* recognized that *Gutierrez* was consistent with the military judge's ability to instruct the members on maximum punishments by offense, although it held this is not mandatory. (JA at 335-36.)

The maximum confinement in the present case was 10 years for involuntary manslaughter, 3 years for communication of a threat, 5 years for wrongful use of cocaine, and 2 years for wrongful use of marijuana. *MCM*, pt. IV, ¶ 44.e.(2), ¶ 110.e., ¶ 37.e.(1).

Analysis

The military judge erroneously believed he *could not* inform the members of maximum sentences by offense, which led to his rejection of

a justified Defense-requested instruction. This Court assesses such denied instructions using the three-prong test outlined in *Miller*, and Appellant meets each prong. Because this abuse of discretion yielded prejudice in the form of an excessive 14-year sentence, this Court should set aside the sentence.

1. The Defense-requested instruction was correct.

The Court of Military Appeals (CMA), interpreting a prior version of the *MCM*, permitted the practice of informing the members of the sentences by offense. *Gutierrez*, 11 M.J. at 124. Numerous courts have since cited *Gutierrez* for this proposition.[12] Indeed, another panel of the

[12] *See United States v. Cochran*, No. ACM 30714, 1996 CCA LEXIS 136, at *5 (A.F. Ct. Crim. App. April 29, 1996) (unpublished) (JA at 340) (disapproving of the tactic, but finding no plain error, where trial counsel informed the members of the maximum sentence for individual offenses, because "[o]nly the military judge should advise members regarding the maximum authorized punishment for specific offenses"); *United States v. Austin*, 1993 CMR LEXIS 414, at *10 (A.C.M.R. October 8, 1993) (unpublished) (JA at 347) ("It is not error for the military judge to instruct members on the maximum punishment for separate offenses, providing that they are instructed on the total maximum punishment, that only one sentence may be imposed, and the instruction does not mislead the members as to the total maximum punishment." (citing *Gutierrez*, 11 M.J. at 122)); *United States v. Matthews*, No. ACM 24468, 1984 CMR LEXIS 3190, at *4 (A.F.C.M.R. December 14, 1984) (unpublished) (per curiam) (JA at 350) (stating in dicta that "[a]lthough under military practice one sentence is imposed for all offenses at bar, a trial judge may

Air Force Court likewise concluded that *Gutierrez* permits such a practice, even if that panel stated the precedent does not require or encourage such an instruction. (JA at 335-36.)[13]

Against this authority stands the military judge's citation to *Purdy*, which he believed barred such an instruction. But *Purdy* does not advance the position the military judge believed it did; instead, it merely states that the members should not know the effect of a military judge's ruling that lowers the maximum punishment. 42 M.J. at 671.

Moreover, barring members from even considering maximum sentences runs counter to Congress' plain language in Article 56. Congress has directed that the punishment for an offense not exceed the maximum the President prescribes. Article 56(a), UCMJ. In a case such as this, where the maximum sentences do not align with the gravity of the specifications, failure to instruct on request invites the members to

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properly instruct the members as to the maximum imposable punishment for each offense where multiple offenses are before the court" (citing *Gutierrez*, 11 M.J. at 122)); *United States v. Johnston*, NMCM 84 1910, 1984 CMR LEXIS 3393, at *1 (N.M.C.M.R. October 31, 1984) (unpublished) (per curiam) (JA at 352) ("an instruction on the maximum sentence of each component of a composite sentence for several offenses is permissible" (citing *Gutierrez*, 11 M.J. at 122)).

[13] *Blackburn* concluded that the requested instruction failed the second and third prongs of the analysis in *Miller*. (JA at 336.)

adjudge a sentence in excess of the maximum. Further, the failure to instruct on this issue may induce members to adjudge a sentence counter to Article 56(c), which requires a sentence that is "sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline." The Defense-requested instruction was permissible under *Gutierrez*, consistent with Article 56, and neither *Purdy* nor any other authority states the instruction is *in*correct. The first prong is met.

2. The main instruction did not substantially cover the requested instruction.

Given the disproportionate nature of the offenses before the panel, a blanket maximum-sentence instruction for all offenses does not substantially cover the Defense-requested instruction. The severity of the drug and threat charges paled in comparison to the involuntary manslaughter charge, which from opening statement through findings was the indisputable focus of the Government's case. The litigated portion of the transcript stretches 731 pages—only 75 pages related to either the assault allegation or the communication of a threat (pages 345–420). And the drug charges encompassed just a brief *Care* inquiry, which the court later played for the members in presentencing. (JA at 252.)

When the military judge instructed the members that the maximum permissible unitary confinement term was 20 years, they would certainly not believe that their sentence for involuntary manslaughter should be the same (10 years) as the three other minor offenses. This is a curiosity of maximum sentences that acted to Appellant's severe prejudice. The military judge had the power to fix this problem and failed to do so despite the Defense's request. The unitary confinement instruction was the problem the Defense sought to solve; it could not be the solution. Thus, the main instruction cannot have substantially covered the requested instruction.

3. The maximum sentence for each offense was a vital point in a lopsided case like Appellant's, and the military judge's failure to issue the instruction seriously impaired Appellant's ability to present his sentencing case.

In a case like this, where the gravamen offense carries the same punishment as several indisputably less important charges, it is a vital point for the sentencing authority to understand the maximum punishment for the main offense. A review of what did, and did not, occur illustrates the point.

Because the military judge failed to give the correct instruction, the CTC could argue for "at least 15 years" of confinement with a straight

face. The sentencing argument unequivocally focused on the involuntary manslaughter charge, closing with the charge to "[t]hink about [MJ] when you go back there and we ask you that you give the accused a dishonorable discharge and at least 15 years in jail." (JA at 286.) Stated differently, it asks the members to "think about MJ" when they sentence Appellant to at least five years above the maximum for killing MJ. This unfairly exploited the military judge's error to mislead the members about punishment available for the most serious offense. It is hard to conceive of a scenario in which at least five years of confinement is a reasonable and just punishment for divers use of marijuana and cocaine and an incomprehensible, borderline "threat" by text message. But that is, in effect, what the CTC asked the members to do.

Next is what did not occur. The military judge's ruling precluded the Defense from making the eminently reasonable argument that 15 years of confinement is patently excessive given that involuntary manslaughter carries a maximum punishment of 10 years. This seriously impaired Appellant's sentencing case and satisfies the third prong of the *Miller* test.

4. Conclusion

The military judge's denial of the Defense-requested instruction meets the *Miller* test and represents an abuse of discretion. Because the military judge misunderstood the limits of his discretion, Appellant never had the opportunity for the panel to appreciate the full context when assessing a proper sentence. As a result, the members adjudged a sentence they likely would not have issued had they understood the maximum punishments. The prejudice of the military judge's error is evident in the sentence itself.[14]

III.

THE MILITARY JUDGE ABUSED HIS DISCRETION IN ALLOWING MJ'S PARENTS TO TAKE THE WITNESS STAND AND DELIVER UNSWORN STATEMENTS IN QUESTION-AND-ANSWER FORMAT WITH TRIAL COUNSEL.

Additional Facts

MJ's mother, Mrs. MJ, was designated MJ's legal representative under Article 6b, UCMJ, 10 U.S.C. § 806b. (JA at 142.) MJ's father,

[14] Appellant also raised sentence severity to the Air Force Court. (JA at 3.) The Air Force Court dispensed of this assignment of error in one paragraph and did not mention the implications of the military judge's sentencing error or the CTC's recommendation. (*Id.*)

Mr. MJ, was not. MJ's brother provided a written unsworn statement admitted as Court Exhibit 1. (JA at 140-41.) The Government notified the Defense that both parents would give unsworn statements through question-and-answer sessions with trial counsel. (JA at 246.) The CTC stated "they're testifying as [Article] 6[b] so it would be after the government rests." (JA at 245.) At that point, the Defense had not spoken with the family and only received "something of a proffer." (JA at 246.) The Defense objected, noting that R.C.M. 1001(c)(5) is specific on format and requires a written proffer.[15] (JA at 246.) The military judge agreed that the Rule required a written proffer, but stated that R.C.M. 1001(c) did not prohibit a question-and-answer format. (*Id.*) The CTC retorted that:

> I've given them an oral proffer. No one asked for a written proffer. If they would like me to throw together an email on this to proffer it. They also want to interview these people for an unsworn statement that they're not going to be able to cross-examine them on. They're going to be able to get the proffer themselves during the interview but certainly the government can put something together in a written format if that's what the defense is requesting.

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[15] The parties referred to R.C.M. 1001(c) (2019 *MCM*), the applicable Rule here. However, the case law often refers to R.C.M 1001A (2016 *MCM*), the pre-2019 predecessor to R.C.M. 1001(c). *See* 2019 *MCM*, App. 15, at A15-18 ("R.C.M. 1001(c) is new and incorporates R.C.M. 1001A of the MCM (2016 edition).").

(JA at 247.) The military judge allowed the question-and-answer session, subject to the written proffer requirement, citing R.C.M. 1001(c) and R.C.M. 801(a)(3). (JA at 248-49.)

Ms. MJ and the Assistant Trial Counsel (ATC) together gave her unsworn statement. (JA at 260-66; 296 at 0:00-15:45.) The ATC walked Mrs. M.J. through MJ's childhood and his decision to join the Air Force. (JA at 260–63.) The ATC then asked about how Mrs. MJ heard of the shooting, how she felt when she saw MJ, how her life was affected without MJ, and what she does to remember MJ every morning. (JA at 263-66.)

Mr. MJ and the CTC together gave his unsworn statement. (JA at 266-73; 296 at 16:00-31:53.) Similarly, the CTC began by walking through MJ's background. (JA at 266-270.) The CTC then directly asked about how Mr. MJ was notified about the shooting, what went through his head at the time, what it was like to have to wait to see MJ, whether he still talks to MJ, how the family dynamic changed after MJ's death, and whether he misses MJ. (JA at 270-73.)

Each parent gave their statements from the witness stand. JA at 243 (the military judge explaining that he would permit "witnesses [to]

sit in the actual witness chair, even though they are not providing sworn testimony"); *see also* JA at 286 (where the CTC asks the members to remember MJ's parents, and "[r]emember what they told you up on the stand"). After Mr. MJ's statement, the military judge said: "Sir, thank you for your *testimony*." (JA at 273 (emphasis added).)

The Air Force Court held it was not error for trial counsel to ask questions of the M.J.'s parents in question-and-answer format. (JA at 40.) In so doing, it recognized its holding was contrary to *Bailey*, 2021 CCA LEXIS 380, at * 15, and *Cornelison*, 78 M.J. at 741–42. (JA at 40.)

Standard of Review

Interpreting R.C.M. 1001 is a question of law reviewed *de novo*. *United States v. Barker*, 77 M.J. 377, 382 (C.A.A.F. 2018). This Court reviews a military judge's admission of victim impact statements for abuse of discretion. *See United States v. Hamilton*, 78 M.J. 335, 340 (C.A.A.F. 2019); *Barker*, 77 M.J. at 382–83. A military judge abuses his discretion when he makes a ruling based on an erroneous view of the law. *Barker*, 77 M.J. at 383 (citing *United States v. Lubich*, 72 M.J. 170, 173 (C.A.A.F. 2013)).

Law

The Government admits aggravation evidence under R.C.M. 1001(b)(4), while victims exercise their right to be reasonably heard under R.C.M. 1001(c). *See Barker*, 77 M.J. at 382. These categories are distinct. *See Hamilton*, 78 M.J. at 340. The right to be reasonably heard under R.C.M. 1001(c) "belongs to the victim, not the trial counsel." *See id.* at 342.

Victim unsworn statements under R.C.M. 1001(c) may be oral, written, or both, and a victim may not "be cross-examined by the trial counsel or defense counsel upon it or examined upon it by the court-martial." *See Barker*, 77 M.J. at 382 (citing R.C.M. 1001A(e) (2016 *MCM*)). Victim unsworn statements under R.C.M. 1001(c) do not constitute witness testimony. *See id.* R.C.M. 1001(c)(5)(B) states that "[u]pon good cause shown, the military judge may permit the crime victim's counsel, if any, to deliver all or part of the crime victim's unsworn statement."

In *Cornelison*, 78 M.J. at 741–42, the victim gave an unsworn statement in the form of a question-and-answer session with trial counsel. The Army Court found the military judge erred by allowing trial

counsel's participation in the unsworn statement, stating that the former R.C.M. 1001A does not contemplate trial counsel's participation. *Id.* at 744. It noted that "a crime victim's right to be heard under 1001A 'belongs to the victim, and is separate and distinct from the government's right to offer victim impact statements in aggravation.'" *Id.* (quoting *Barker*, 77 M.J. at 378.) It held that a question-and-answer session could be permissible, but that the victim's counsel must ask the questions. *Id.*

Similarly, in *Bailey*, 2021 CCA LEXIS 380, at *15 (JA at 311-12), another panel of the Air Force Court found clear and obvious error where the military judge allowed both trial and defense counsel to read the impact statements from three victims.

Analysis

The Government commandeered Mr. and Mrs. MJ's right of allocution, used it for its own ends, and then argued for a greater sentence based on victim impact. This error requires setting aside the sentence.

1. R.C.M. 1001(c) does not permit trial counsel to participate in a victim unsworn statement.

R.C.M. 1001(c) contemplates assistance with an unsworn statement only from a victim's representative or victim's counsel. *See*

R.C.M. 1001(c)(2)(A), (c)(5)(B). R.C.M. 1001(c)(5)(B) states that "[u]pon good cause shown, the military judge may permit the crime victim's counsel, if any, to deliver all or part of the crime victim's unsworn statement." The military judge and the Air Force Court opined that the Rules did not explicitly bar trial counsel's participation, thus a question-and-answer session was permissible. (JA at 40-41, 246.) Yet, this approach is contrary to the plain language of R.C.M. 1001(c) and other provisions of R.C.M. 1001.

A. Allowing trial counsel to drive victim unsworn statements runs counter to the language of R.C.M. 1001(c).

Under R.C.M. 1001(c)(5)(B), the military judge may only allow the crime victim's counsel to deliver the unsworn statement for good cause. Since R.C.M. 1001(c)(5)(B) does not mention trial or defense counsel, they would not fall under this provision. *Cf. United States v. McPherson*, 81 M.J. 372, 386 (C.A.A.F. 2021) (Ohlson, C.J., dissenting) (explaining that under the canon of construction *expressio unius est exclusio alterius*, the inclusion of a certain thing implies the exclusion of another). Thus, under the Air Force Court and military judge's interpretation, a crime victim's counsel would need to have good cause to deliver an unsworn statement, but a trial or defense counsel would not. *See* R.C.M. 1001(c)(5)(B).

The interpretation below also suggests trial and defense counsel, though not mentioned in the Rule, still may have greater participation than victim's counsel in unsworn statements. Under R.C.M. 1001(c)(5)(B), a victim's counsel's has authority to "deliver" the unsworn statement. A natural reading suggests "deliver" means reading on behalf of the victim, rather than a question-and-answer format. *But see Cornelison*, 78 M.J. at 744. Yet, under the interpretation below, while a victim's counsel could only "deliver" the statement, the trial or defense counsel could perform a question-and-answer session. It makes little sense that the Rule would exclude mention of trial or defense counsel, subject them to a lesser standard for involvement in an unsworn statement, and simultaneously give them expanded powers to conduct a question-and-answer unsworn statement.

B. Allowing trial counsel to participate in unsworn statements renders other portions of R.C.M. 1001 mere surplusage.

Allowing trial counsel-driven unsworn statements runs counter to the President's intent in drafting distinctions between an accused's and a victim's unsworn statement. For an accused's unsworn statement, it is common for a defense counsel and accused to use a question-and-answer format. R.C.M. 1001(d)(2)(C), which describes an accused's unsworn

statement, and R.C.M. 1001(c)(5)(A), which describes the victim's unsworn statement, follow:

R.C.M. 1001(d)(2)(C) (Accused)

(C) *Unsworn statement.* The accused may make an unsworn statement and may not be cross-examined by trial counsel upon it or examined upon it by the court-martial. The prosecution may, however, rebut any statements of facts therein. The unsworn statement may be oral, written, or both, and may be made by the accused, by counsel, or both.

R.C.M. 1001(c)(5)(A) (Victim)

(5) *Unsworn statement.*

(A) *In general.* The crime victim may make an unsworn statement and may not be cross-examined by trial counsel or defense counsel, or examined upon it by the court-martial. The prosecution or defense may, however, rebut any statements of fact therein. The unsworn statement may be oral, written, or both.

Both types permit statements that are "oral, written, or both"—yet the Rule for the accused *adds* "and may be made by the accused, by counsel, or both." (JA at 299-300.) This comparison makes it clear the President deliberately identified when a counsel-driven unsworn statement is permissible and when it is not. The President did not include this language in R.C.M. 1001(c)(5)(A). The Air Force Court and military judge essentially read this language into the Rule and, in doing so, violated the cannon against surplusage, as it would render another part of the same rule superfluous. *Cf. City of Chicago v. Fulton*, 141 S. Ct. 585, 591 (2021) ("The cannon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

2. Permitting trial-counsel driven unsworn statements is inconsistent with *United States v. Hamilton* and *United States v. Barker*.

This lower court's interpretation also engenders the same concerns this Court noted in *Hamilton*, 78 M.J. at 342 ("the right to be reasonably heard provided by R.C.M. 1001A (2016) belongs to the victim, not to the trial counsel") and *Barker*, 77 M.J. at 383 ("the R.C.M. 1001A process belongs to the victim, not to the trial counsel"). Granted, there is a distinction between *Hamilton* and *Barker*—where the victims did not participate at all—and the question-and-answer sessions here. Still, it is incongruous with *Hamilton* and *Barker* to give trial counsel *greater* control over a right that this Court unequivocally placed in the victim's hands. *See Hamilton*, 78 M.J. at 342; *Barker*, 77 M.J. at 383.

The CTC framed the issue as the Government's ability to keep the parents from going "off the rails." (JA at 248.) She argued to the military judge that they could respond to concerns about the unsworn statement going out of bounds if they "just [let] the mother, father, and brother get up and talk" by using question-and-answer format. (*Id.*) Further, she stated that "*we want the ability to control* that and we think that the best way to do that would be through a question and answer format." (*Id.*

(emphasis added).)

The CTC's remarks demonstrate a fundamental misunderstanding of the unsworn victim impact statement and betray the Government's possessory view of the victim's right to allocution. Each unsworn statement involved a trial counsel asking questions to elicit a specific type of victim impact that supported the CTC's sentencing argument, which repeatedly referenced MJ's parents. (JA at 279, 283-84.) If "going off the rails" is a purported concern, the better method is to follow the Rule as written: use a written proffer, excused only by the military judge for good cause. R.C.M. 1001(c)(5)(B). Uncertainty results from giving trial counsel enhanced, extra-textual powers to control a victim's right to be heard.

3. Practical problems further demonstrate the error of the decision below.

The military judge allowed an unsworn statement, delivered from the witness stand in question-and-answer format, to become the functional equivalent of testimony without the right of cross-examination. In addition to violating the Rules for Courts-Martial and standing contrary to the approach of other courts, practical problems flow from permitting trial counsel-driven unsworn statements.

First, the members could easily lose the distinction both between sworn and unsworn statements, and the weight afforded to each. It is impossible to know whether the members recognized the distinction between these unsworn statements and sworn testimony. One clear difference to practitioners is the oath, but the members may not have even realized the trial counsel failed to put the parents under oath—as they had for the previous 15 witnesses before the unsworn statements.

The military judge then thanked Mr. MJ for his *testimony*, further conflating that unsworn statement with sworn testimony. Though the military judge gave a standard unsworn statement instruction, this non-standard presentation undercuts the instruction's power. (JA at 260.)

A second problem is the written proffer requirement of R.C.M. 1001(c)(5)(B). The plain language of the rule excuses the written proffer requirement only for good cause. R.C.M. 1001(c)(5)(B). Here, the trial counsel grew upset because the Defense insisted upon a written proffer, as the rule required. (R. at 1084–86.) (JA at 247-49.) The CDC stated he received "something of a proffer," and it appears there was some discussion during a recess. (JA at 36 n.20, 246, 254.) Thus, it is uncertain if a written proffer within the meaning of the Rule even occurred here.

Such confusion about written proffers will recur if trial counsel is, in essence, the proponent of the unsworn statement. R.C.M. 1001(c)(5)(B) requires the "crime victim" to provide a written proffer "*to trial counsel* and defense counsel." (Emphasis added.) This provision is difficult to apply when, as is likely to occur, the trial counsel composes the questions, rather than the victim. Thus, to comply with this provision, the trial counsel would have to provide a written proffer to themselves. This is clearly not what the Rule contemplates, because it is not what the Rule permits.

Moreover, this invites the Government to use the question-and-answer session as a means to bypass the more clinical dissection that occurs for written statements. For instance, MJ's brother provided an unsworn statement that underwent substantial revisions before publication to the members. (JA at 256-59.)

4. The military judge's error prejudiced Appellant.

A. This Court should adopt the "harmless beyond a reasonable doubt" standard in its prejudice analysis.

Harmless beyond a reasonable doubt is the appropriate standard for assessing prejudice from an erroneously accepted unsworn statement. In *Barker* and *Hamilton*, this Court reviewed the abuse of discretion for

harmless error. *See* 77 M.J. at 384; 78 M.J. at 343. But, in *Hamilton*, this Court noted that the errors were not raised constitutionally; therefore, the appropriate standard for prejudice analysis was not squarely presented to the Court. 78 M.J. at 343 n. 10.

This Court has only addressed whether the introduction of *evidence* was harmless error or harmless beyond a reasonable doubt. The application to other "matters" introduced in presentencing remains unanswered. *See United States v. Tyler*, 81 M.J. 108, 113 (C.A.A.F. 2021) (referencing R.C.M. 1001(g)). This Court's precedent indicates that a military judge's error in presentencing has constitutional dimensions—specifically, due process and the right to a fair trial—if the Government puts evidence in front of the sentencing authority that should have been excluded, yielding a harmless beyond a reasonable doubt analysis. *United States v. Jerkins*, 77 M.J. 225, 228 (C.A.A.F. 2018); *United States v. Pope*, 63 M.J. 68, 75 (C.A.A.F. 2006). By contrast, if a military judge erroneously excludes evidence offered by the defense, the error is nonconstitutional, and harmless error applies. *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005).

Generally speaking, unsworn statements are likely to invoke victim

impact under R.C.M. 1001(c)(2)(B) as opposed to mitigation under R.C.M. 1001(c)(2)(C). As such, the matters presented to the sentencing authority are much more likely to adversely affect an accused than benefit him or her, and in essence, be more akin to Government evidence than defense evidence. This is especially true here, where the trial counsel formulates the questions and drives the unsworn statement. Thus, when the Government controls the unsworn statement to generate its desired result, the appropriate prejudice analysis should treat the improper presentencing matters similar to improperly admitted Government evidence.

B. Whether this Court assesses prejudice under a harmless beyond a reasonable doubt or a harmless error standard, Appellant has demonstrated material prejudice.

The prejudice here flows from the CTC harnessing the improper victim impact statements and asking for a greater punishment: "Remember the J[]'s. Remember what they told you *up on the stand* and think about what they don't have, what they will never be able to get back." (JA at 286 (emphasis added).) The value of words coming from parents of the deceased would carry great weight with the members.

Merely reading the transcript of their unsworn statements fails to

capture the power of these statements; Appellant asks this Court to listen to the audio of their unsworns.[16] The unsworns are very emotional and utterly compelling. And without the trial counsel's intervention and direction, they may not have happened. It appears the parents had not prepared a written unsworn. It is therefore uncertain what would have happened if trial counsel had not taken control. They may have provided a brief, less effective version of the unsworn. Or they may have provided a written unsworn statement, like MJ's brother. Court Exhibit 1, from MJ's brother, certainly captures the gravity of his loss, but has nowhere near the impact of the live statements from MJ's parents.

5. Conclusion

The military judge and the Air Force Court wrongly interpreted R.C.M. 1001(c) to allow trial-counsel driven unsworn statements. The impermissible manner by which those words came before the members

[16] For Mrs. MJ, the most compelling moments come at 8:15 (her confrontation with the First Sergeant about seeing MJ), 9:00 (her reaction to seeing MJ in the hospital), 10:12 (her comments on life without MJ), and 15:00 (her describing how she can still hear MJ's chuckle, which she performs). (JA at 296.) For Mr. MJ, the key moments are at 26:30 (when he comes home to Mrs. MJ crying), 30:00 (his comments about life without MJ), and 31:40 (when asked if he misses MJ and begins crying). (*Id.*)

likely had a dramatic effect on Appellant's lengthy sentence. The error here dovetails with the military judge's abuse of discretion in failing to provide the defense-requested instructions. The extreme sentence—14 years when the maximum sentence for the major offense of involuntary manslaughter was only 10 years—undermines any argument that the error had no effect. This Honorable Court should set aside the sentence and order a rehearing.

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I certify that an electronic copy of the foregoing was sent via electronic mail to the Court and served on the Government Appellate Division on April 13, 2022.

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