IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	Crim. App. No. 40354
Airman First Class (E-3) **LEO J. NAVARRO AGUIRRE** United States Air Force *Appellant*.	)	USCA Dkt. No. 24-0146/AF
	)	10 January 2025

BRIEF ON BEHALF OF THE UNITED STATES

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

ISSUES PRESENTED

I.

WHETHER APPELLANT'S CONVICTION FOR WRONGFUL AMBIEN USE IS LEGALLY AND FACTUALLY SUFFICIENT WHEN: (1) HE HAD A VALID PRESCRIPTION FOR AMBIEN, AND (2) THE BASIS FOR HIS CONVICTION WAS A MEDICALLY-KNOWN SIDE EFFECT.

II.

WHETHER APPELLANT'S GUILTY PLEA FOR RECKLESS DRIVING WAS PROVIDENT WHEN HE TOOK HIS PRESCRIBED DOSE OF AMBIEN, FELL ASLEEP IN HIS BED, AND THE "NEXT THING [HE] REMEMBERED IS BEING BEHIND THE WHEEL OF HIS [CAR]."

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d), UCMJ. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

At a general court-martial, a military judge convicted Appellant, consistent with his pleas, of the following offenses: one charge and one specification of failure to obey a lawful order in violation of Article 92, UCMJ; one charge and one specification of wrongful use of oxycodone in violation of Article 112a, UCMJ; and one charge and one specification of reckless driving in violation of Article 113, UCMJ. (JA at 24-28.) A panel of officer and enlisted members convicted Appellant, contrary to his pleas, of one charge and one specification of wrongful use of Ambien in violation of Article 112a, UCMJ; one charge and one specification of assault consummated by a battery in violation of Article 128, UCMJ; and one specification of aggravated assault in violation of Article 128, UCMJ. (Id.) A military judge, sitting alone, sentenced Appellant to a reprimand, reduction to E-1, forfeiture of all pay and allowances, two years and two months of confinement, and a bad-conduct discharge. (JA at 28.) The convening authority approved Appellant's requested waiver of the automatic forfeitures for six months for the benefit of his spouse. (JA at 28.) The convening authority approved the

rest of Appellant's sentence and took no action on the findings. (Id.) AFCCA affirmed the findings and sentence. (JA at 19.)

STATEMENT OF THE FACTS

Without a plea agreement, Appellant pleaded guilty to the following specification of reckless driving (except the words "and aerosol inhalants"):

> In that [Appellant]…did within the state of Washington, on or about 1 October 2021, physically control a vehicle, to wit: a passenger car, in a reckless manner by causing the vehicle to block traffic and swerve on public roadways and by driving the vehicle after using Zolpidem (a Schedule IV substance commonly referred to as Ambien) and aerosol inhalants.

(JA at 22.) Then A panel of officer and enlisted members found Appellant guilty of the following offense of wrongful use of Ambien:

> In that [Appellant]…did, in or around the state of Washington, on or about 1 October 2021, wrongfully use Zolpidem, commonly referred to as Ambien, a Schedule IV controlled substance.

(JA at 20.) Per trial defense counsel's request, the military judge told the panel members that Appellant pleaded guilty to reckless driving under the influence of Ambien, but the panel members did not know the substance of Appellant's admissions made during the Care[1] inquiry. (JA at 85.)

[1] United States v. Care, 40 C.M.R. 247 (C.M.A. 1969) (requiring the military judge to make a finding that the accused made a knowing, intelligent, and a conscious waiver to accept the guilty plea).

First Care Inquiry – Reckless Driving

Appellant pleaded guilty to reckless driving after consuming Ambien. (JA at 71.) The military judge provided the elements and the explanations of the offense, such as vehicle, physically controlling, and recklessness. (JA at 71-72.) Appellant told the military judge that he understood the elements and explanations of the offense. (JA at 72.)

During the Care inquiry, Appellant explained that on 1 October 2021 he "drove his car in a reckless manner after using Ambien." (JA at 72.) Appellant noted that he had a valid prescription for Ambien dated 30 September 2021. (Id.) At his apartment, he took one Ambien pill as prescribed around 1430 to go to sleep. (JA at 72-73.) Then the next thing he remembered was being behind the wheel of his car. (JA at 73.) Appellant's vehicle was running and parked in the wrong parking spot, and he had his foot on the gas pedal "revving the engine" that caused his car to overheat. (JA at 73.) Next, appellant explained that a police car was behind him, and he eventually spoke with the police officers. (Id.) He told the officers that he was not drunk, but that he had taken Ambien. (Id.)

Appellant at first stated that he did not remember driving his car, but he reviewed the statements of witnesses and the police. (JA at 73.) Thus, Appellant knew that his vehicle was "seen recklessly weaving and blocking traffic." (Id.) Appellant also explained that witness statements confirmed that he was swerving

on and off roads, switching lanes, and "that the swerving is what eventually led [him] to swerve onto the sidewalk and hit the lamppost." (JA at 77.) Appellant did remember that he noticed "fresh damage to the front bumper of [his] vehicle" that was not there before. (JA at 73.) Given these facts, Appellant admitted that he "did, in fact drive [his] car in a reckless manner as the evidence [he] reviewed [said]." (Id.)

The military judge asked Appellant clarifying questions, and Appellant continued to explain to the military judge why he was guilty of reckless driving. Appellant affirmed that he took Ambien "after arriving home from work" to sleep. (JA at 78.) And he was still in the same clothes that he had been wearing at work, Occupational Camouflage Pattern uniform (OCPs), minus the blouse. (Id.) Appellant agreed with the military judge that the Ambien caused him not to remember being in control of the vehicle. (Id.)

Next, the military judge questioned Appellant about his mental state of recklessness. Appellant believed he was reckless because he "was not in complete control of [his] faculties." (JA at 79.) Appellant stated that he was driving recklessly because swerving on the road, blocking traffic, riding on top of a sidewalk, and hitting the lamppost was unsafe for himself and others. (Id.) Then Appellant affirmed that the Ambien could have impacted Appellant's ability to

safely control the vehicle. (Id.) When Appellant came to, he remembered feeling dazed, groggy, and slow. (JA at 80.)

Appellant told the military judge that he pleaded guilty voluntarily and of his own free will. (JA at 81.) The military judge accepted Appellant's plea of guilty and advised him that he could request to withdraw his guilty plea at any time before his sentence was announced. (JA at 82.)

Contested Findings – Wrongful use of Ambien

The following evidence was presented before the panel members to prove Appellant's wrongful use of Ambien.

Specialist MD's Testimony

The prosecution called Specialist MD, and he testified to the following facts. On 1 October 2021, around 1800, Specialist MD was driving home from work, following his wife who drove in a separate vehicle. (JA at 88-89.) While driving, Specialist MD saw Appellant in his vehicle stopped at a green light. (JA at 89.) Drivers started honking out of frustration given that Appellant's vehicle was stalled at a green light. (Id.) Specialist MD described that Appellant's vehicle swerved in and out of lanes, and classified it as "reckless driving at first sight." (Id.) Appellant would slow down, speed up and then slow down, and then speed up again. (JA at 90.) While driving, Specialist MD saw Appellant attempt to pass Specialist MD's wife into a lane with oncoming traffic. (JA at 91.) When

Specialist MD was turning into a lane to drive to his apartment, he noticed that Appellant's vehicle "just stopped." (JA at 92.)

Next, Specialist MD stepped out of his car and approached Appellant's vehicle. (JA at 92.) Specialist MD saw that Appellant wore his OCPs minus the OCP blouse. (Id.) Appellant was smiling, rocking back and forth in the driver's seat. (Id.) Specialist MD mentioned that Appellant was probably high. (Id.) He also noticed that Appellant had an aerosol can on his lap. (JA at 92-93.) After this interaction, Appellant drove away. (JA at 93.)

Officer MC's Testimony

Officer MC, from Pierce County Washington, also testified. (JA at 94.) At around 1800, Officer MC responded to "a traffic complaint, [a] possible DUI." (JA at 95.) Officer MC spoke to Appellant, and Appellant admitted that he took Ambien and huffed Dust Off – an aerosol. (JA at 97.) Also Officer MC noted that Appellant was wearing his uniform. (JA at 97.) Officer MC explained that he did not have any probable cause to arrest Appellant, but notified Appellant's supervisor of the traffic stop. (JA at 98.) At this point, Officer MC explained that there was nothing further to investigate since there was no collision with another vehicle and no evident signs of illegal drug use under Washington state law. (Id.)

Case Paralegal's Testimony

The government's case paralegal, Airman First Class ASM, testified that she took pictures of Appellant's vehicle 75 days after the incident to gather evidence. (JA at 102, 104.) When she looked through Appellant's car window, she saw Appellant's Ambien prescription label. (JA at 40, 102.)

Expert Testimony

Dr. CS, an expert witness in toxicology testified on behalf of the prosecution. (JA at 105.) A prescription for Ambien, as Dr. CS explained, would have instructed the patient to take the medication just before "one desires to go to sleep." (JA at 108.) Dr. CS also testified to the following facts. Ambien is a medication that assists a person in getting a full night's rest, rather than sleep for a short time. (JA at 109.) The purpose of Ambien is to put the user to sleep and stay asleep. (Id.) Ambien can be misused and abused outside of its normal use when the user takes more Ambien than prescribed or if it was used with other intoxicants. (Id.) It is possible to overdose on Ambien. (Id.) Ambien is a senses suppressant, which can turn "off pieces of your body that are quite important." (Id.)

BW, a nurse practitioner, testified on behalf of defense. Nurse BW testified to the following facts. Appellant was prescribed Ambien on 30 September 2021. (JA at 113.) She would instruct patients to take Ambien 30 minutes before

bedtime and about seven to eight hours before they planned to wake up. (JA at 116-17.) But taking Ambien two hours before bedtime would not invalidate the prescription and consider it illegal use. (JA at 117.) Nurse BW did admit however that users can abuse their prescriptions for Ambien by taking Ambien "at a time when they are not trying to go to sleep, but rather trying to have some other effect." (JA at 117-18.) There is a whole list of different effects that people might experience after taking Ambien, such as complex sleep behaviors, but they are not common. (JA at 115.) Complex sleep behaviors, including "sleep-driving," while not fully awake may occur following the use of Ambien. (JA at 41.)

Appellant's Work Shift

First Sergeant, Master Sergeant EP, testified that on 1 October 2021 Appellant worked a normal duty day ranging from 0630 to 1630. (JA at 110.) Appellant was not on a swing or night shift.

Defense's First R.C.M. 917 Motion

After the prosecution and defense presented their cases, trial defense counsel moved for a finding of not guilty under R.C.M. 917 for the specification of wrongful use of Ambien. (JA at 119.) Trial defense counsel stated that the prosecution did not provide any evidence during its case-in-chief that Appellant wrongfully used Ambien given that he received a valid prescription for it. (Id.) The crux of trial defense counsel's argument was that Nurse BW testified that

Ambien can be taken two hours before sleep and that would not invalidate the prescription. (JA at 120.)

Trial counsel disagreed and made the following arguments requesting the military judge deny the motion. The proper use of Ambien was to be taken right before bed to sleep through the night. (JA at 119.) At around 1800, during the traffic stop, Appellant admitted to law enforcement that he used Ambien after getting off work. (Id.) Appellant was in his vehicle and still in his work clothes. (Id.) Thus, trial counsel claimed that there was "evidence to suggest that this was not being taken for its proper use of being used in order to go to sleep." (JA at 119-20.) There was also evidence that Appellant was huffing while using Ambien, and therefore Appellant "abus[ed] these two substances together in order to get high, not in order to go to sleep." (JA at 120.) Viewing the evidence in the light most favorable to the prosecution, trial counsel made the final point:

> It is circumstantial evidence, but there is absolutely, Your Honor, evidence here to suggest that accused is in this situation attempting to get high. That the accused is not using this for the purpose of going to sleep as he's going on some sort of joy ride with aerosol cans in the back and his prescription in there, and again, in his military uniform shortly after getting off of work.

(JA at 123.)

The military judge denied the defense's motion. (JA at 124.) He found that the government introduced some evidence, taken together with all reasonable

inferences, that could tend to establish the element of wrongfulness. (Id.) The testimony of Specialist MD, Officer MC, Master Sergeant EP, and Airman First Class ASM established the way Appellant was driving, the time of day it was, what he was wearing, as well as his work schedule. (Id.) And when viewing this evidence in the light most favorable to the prosecution, the military judge found that this evidence could reasonably tend to establish the element of wrongfulness. (Id.)

Military Judge's Instructions & Findings

The military judge instructed the members on wrongful use of a controlled substance: "Use of a controlled substance is not wrongful if the controlled substance is prescribed by the doctor and the use of the substance is for the medical purpose prescribed. However, if a prescribed substance is used for a purpose other than that for which it is prescribed, it is wrongful." (JA at 127-28.) The panel members found Appellant guilty of wrongful use of Ambien. (JA at 130.)

Defense's Second R.C.M. 917 Motion

After the announcement of findings, trial defense counsel asked the military judge to reconsider his prior R.C.M. 917 ruling. (JA at 131.) Trial defense counsel mentioned that all parties agreed that Appellant had a valid Ambien prescription, but once again argued that the evidence did not prove that Appellant's Ambien use was wrongful. (Id.) Trial defense counsel stated that there was ample

evidence to show that Appellant used Ambien as prescribed – to sleep – but happened to wake up in his car hours later. (JA at 131-32.) Appellant's counsel noted that he was found not guilty of wrongfully using aerosol inhalants and found not guilty of reckless driving under the influence of aerosol inhalants. (JA at 132.)

On the other hand, trial counsel argued that the panel members found that Appellant did not take Ambien to go to sleep because the evidence showed that Appellant was not at home, but still in his military uniform. (Id.) So in the light most favorable to the prosecution the facts supported a finding of guilty beyond a reasonable doubt that Appellant was not trying to take a nap or go to sleep. (Id.)

Contrary to trial defense counsel's request, the military judge did not consider Appellant's Care inquiry. And he denied defense's motion for a finding of not guilty under R.C.M. 917 and 917(f). (JA at 136.) The military judge articulated that Ambien should be taken exactly as prescribed right before bedtime, and a user should not take Ambien if they cannot get a full night sleep. (Id.) In sum, the military judge found that the prosecution did introduce some evidence which taken together could establish that Appellant used Ambien wrongfully – "for a purpose other than that for which it was prescribed." (JA at 136.)

Second Care Inquiry – Reckless Driving

Although the military judge denied defense's second motion for a finding of not guilty, he was still concerned about Appellant's initial Care inquiry as it related to the possible Ambien side effect of sleep-driving. (JA at 137.) The issue then became whether Appellant voluntarily had physical control of the vehicle. (JA at 140.) The military judge reopened Appellant's Care inquiry before presentencing proceedings commenced. (JA at 140.)

The military judge specifically asked Appellant why he believed that he was in control of a vehicle and whether it was voluntary. (Id.) Appellant affirmed that when he was in control of the vehicle, he was under the influence of the drug Ambien. (JA at 141-42.) Appellant then explained that even though he had no memory of driving, he was still in control of the vehicle because he had "to get to the point where [he] was, [he] had to put some kind of shoes on, get [his] car keys, get in [his] car, start [his] car." (JA at 141.) Again, Appellant explained that his review of witness testimony proved that he was the one in control of the vehicle. (Id.) When Appellant's memory kicked in, it did not feel like he was waking up from sleep, but felt more like a blackout from drinking alcohol. (Id.) Appellant understood that Ambien "was pretty potent stuff." (Id.) And Appellant explained that he remembered that his car was running low on gas, and he remembered thinking about getting gas. (JA at 142.) With this said, Appellant described that it

was possible that he went out and drove voluntarily "to prepare for the night to get gas." (Id.) Appellant admitted that his motivation behind driving was to get gas. (Id.)

During this colloquy with the military judge, Appellant admitted that, based on the statements of witnesses, he was aware that he was at the stoplights, he was aware of the other vehicles honking, he was able to drive back home, and he knew that the music was playing in his vehicle. (JA at 141, 143.) Since Appellant's music did not play automatically from his phone, Appellant believed he must have turned the music on. (JA at 141.) Appellant agreed that based on the complexity of his actions, he did not believe he was asleep while driving and believed that his actions were voluntary. (JA at 141.) After this inquiry, the military judge found that Appellant's plea of guilty was "made voluntarily, with full knowledge of its meaning and effect," and found his plea of guilty provident. (JA at 143.) The military judge once again told appellant that he could request to withdraw his plea at any time before the announcement of his sentence. (Id.)

Throughout the contested findings and two Care inquiries, no party presented evidence that Appellant was actually sleep-driving. Only the FDA fact sheet and testimony mentioned that sleep-driving as an uncommon side effect.

SUMMARY OF THE ARGUMENT

Legal Sufficiency - Wrongful use of Ambien

Viewed in the light most favorable to the prosecution, a reasonable factfinder could find beyond a reasonable doubt that Appellant wrongfully used Ambien. There was no dispute that Appellant used Ambien. But the evidence proved that his use was wrongful. Ambien is prescribed to help an individual sleep through the night. But Appellant took Ambien after work while still in his uniform, and huffed aerosol inhalants all while driving his vehicle – a purpose other than that for which Ambien was prescribed for. Evidence revealed that one should take Ambien seven to eight hours before intending to wake up, and typically 30 minutes before sleep. (JA at 116-17.) Testimony suggested that Appellant used Ambien after work ended at 1630, at some time before 1800, while he was still in his duty uniform operating his vehicle. (JA at 92, 97.) Thus, a rational factfinder could have concluded that Appellant did not use Ambien to sleep through the night, and therefore his use was wrongful.

Further, this Court should not consider the Care inquiry in its legal sufficiency review. Evidence not presented at trial cannot be used to support or reverse a conviction. United States v. Bethea, 46 C.M.R. 223, 225 (C.M.A. 1973). Considering the Care inquiry for one offense in a legal sufficiency review of a separate offense would deprive the government of the opportunity to challenge the

veracity of claims that Appellant raises for the first time on appeal. It would allow an appellant to put his own story before an appellate court to claim he is not guilty of an offense without being subject to the crucible of cross-examination. Such a practice would undermine the very nature of our adversarial military justice system.

Considering the low standard for legal sufficiency, a reasonable factfinder could have found all the elements for wrongful use of Ambien beyond a reasonable doubt based on the evidence presented. This Court should find Appellant's conviction for wrongful use of Ambien legally sufficient and affirm the decision of the Air Force Court of Criminal Appeals.

Guilty Plea – Reckless Driving

The providency of Appellant's plea comes down to whether: 1) he was awake and driving voluntarily but did not remember it; or 2) there is a substantial basis to believe Appellant was sleep-driving and therefore he did not act voluntarily. Because Appellant admitted that he was awake and voluntarily controlling his vehicle, despite his lack of memory, he negated any defense of sleep-driving.

Once the issue of sleep-driving, or automatism, was raised during contested findings, the military judge acted diligently and reopened the Care inquiry. Although there was a potential inconsistency raised, the military judge resolved it

by establishing through further inquiry that Appellant was not sleep-driving. Appellant's admissions proved that he committed the actus reus and had the necessary mens rea for reckless driving. Appellant admitted that when he first remembered the incident it "*didn't feel like waking up from sleep*. It [felt] more like I just wasn't storing what was going on. Kind of feels like a blackout from drinking alcohol." (JA at 141.) (emphasis added.) Appellant also believed that because of the complex actions he took during the drive, he was not asleep while behind the wheel. (JA at 141.) These statements established that Appellant was awake and that his actions were voluntary.

Further, Appellant admitted that he acted recklessly because he drove after taking Ambien while feeling "dazed, groggy, slow…[and] could see how it could affect [his] ability to safely drive." (JA at 80.) Accordingly, Appellant agreed that he was reckless in that he had the culpable disregard for the foreseeable consequences to others.

Although the military judge reopened the Care inquiry because the defense of automatism, or in other words sleep-driving, was raised during contested findings, the defense did not apply. The Care inquiry established that Appellant voluntarily controlled the vehicle in a reckless manner. The military judge did not abuse his discretion in accepting the guilty plea once he resolved the potential inconsistency raised during contested findings.

After the military judge resolved the potential inconsistency, there was nothing left in the record to create a substantial basis to question Appellant's guilty plea. On the merits, there was no expert testimony to connect Appellant's actions to sleep-driving. The record only established that sleep-driving was a possible, but rare, side effect of taking Ambien. Appellant had the opportunity to withdraw his plea and put on a defense of sleep-driving. Instead, his admissions made during the Care inquiry negated any such defense. This Court should decline Appellant's "invitation . . . to speculate post-trial as to the existence of facts which might invalidate [his] guilty pleas." United States v. Johnson, 42 M.J. 443, 445 (C.A.A.F. 1995).

The military judge resolved any potential inconsistencies and therefore there was no substantial basis to question Appellant's plea – especially given the lack of evidence linking Appellant's actions to sleep-driving. Appellant's admissions to the military judge revealed that he was aware of his actions, even though he lacked memory of the finer details. But the lack of memory does not invalidate a plea so long as an accused is convinced of his guilt after assessing the evidence against him. United States v. Jones, 69 M.J. 294, 299 (C.A.A.F 2007).

For these reasons, the military judge did not abuse his discretion in accepting Appellant's plea of guilty. This Court should find Appellant's plea provident and affirm the decision of the Air Force Court of Criminal Appeals.

ARGUMENT

I.

APPELLANT'S CONVICTION FOR WRONGFUL AMBIEN USE IS LEGALLY SUFFICIENT.

Standard of Review

This Court reviews issues of legal sufficiency de novo. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Analysis

A. A reasonable factfinder could find beyond a reasonable doubt that Appellant wrongfully used Ambien.

Given that this Court is bound to draw every reasonable inference in the record in favor of the prosecution, this Court should find Appellant's conviction for wrongful use of Ambien legally sufficient. A conviction is legally sufficient when "considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." United States v. Young, 64 M.J. 404, 407 (C.A.A.F. 2007) (quotation and citations omitted). Under this standard, this Court must draw every reasonable inference from the evidence in favor of the prosecution. United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). The standard for legal sufficiency is "a very low threshold to sustain a conviction." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019).

The elements of wrongful use of Ambien in violation of Article 112a, UCMJ, are: 1) that the accused used a controlled substance; and 2) that the use by the accused was wrongful. Manual for Courts-Martial, United States (MCM), part. IV, para. 50.b.(2)(a)-(b) (2019 ed.). The Manual defines wrongful use as "without legal justification or authorization." MCM, pt. IV, 50.c.(5).

1. Evidence, viewed in the light most favorable to the government, proved beyond a reasonable doubt that Appellant used Ambien wrongfully.

Appellant's Ambien use was wrongful. There were four key reasonable inferences to support the government's case.

First, the prosecution elicited evidence that Ambien should be taken right before sleep and seven to eight hours before waking up. (JA at 117.) Even the defense's witness, Nurse BW, explained that Ambien is used typically 30 minutes before a user wants to go to bed and not used before a short nap. (JA at 116.) Even though evidence revealed that one should take Ambien in the evening before bedtime, a law enforcement officer testified that he found Appellant in his vehicle around 1800 under the influence of Ambien. (JA at 96-97.) With these facts, it would be reasonable for a factfinder to conclude that Appellant must have taken the Ambien before 1800, and before 1800 would be too early for Appellant to be intending to go to sleep – especially when Appellant was not working a swing or night shift. *See* Young, 64 M.J. at 407. This Court must draw this reasonable inference in favor of the government. *See* Barner, 56 M.J. at 134.

Second, the prosecution also showed panel members pictures of the Ambien prescription label in Appellant's car – an indication that Appellant took Ambien in his vehicle after he picked up the prescription and before he returned home. (JA at 40.) Also, there was a picture of a bottle in a brown paper bag that was in Appellant's car. (JA at 37.) A rational factfinder could believe that this was a bottle containing the Ambien, given that the prescription label was also in the vehicle.

Third, witnesses found Appellant still in his military uniform, after the duty day – another fact that could tend to prove that Appellant took Ambien after work, before he got home. (JA at 92.) It was reasonable to infer that a person who was planning to sleep through the night and wanted to get restful sleep would not normally remain in his or her utility duty uniform. Thus, the fact that Appellant was found driving in his uniform supported that he did not take Ambien for the purpose of getting a restful night sleep.

Fourth and finally, Appellant did not work a swing or mid shift, instead he worked a typical duty day that ended at 1630. This disproved that Appellant had to take Ambien during the daytime to fall asleep earlier to get up for a late night shift. (JA at 110.)

The prosecution presented substantial evidence that taken together proved that Appellant did not use Ambien for the purpose to sleep through the night.

Thus, drawing every inference in the light most favorable to the prosecution, a reasonable factfinder could have found Appellant's use of Ambien wrongful.

2. The presence of aerosol inhalants in Appellant's vehicle was other evidence to prove that Appellant's Ambien use was wrongful.

Appellant admitted to law enforcement that he was huffing Dust Off. (JA at 96-97.) It was the prosecution's theory that Appellant was abusing Ambien and other substances, such as Dust Off, to get high. (JA at 120.) Although Appellant was found not guilty of using aerosol inhalants with the intent to alter his mood or function, these facts were still relevant to the specification of wrongful use of Ambien. The presence of aerosol inhalants together with Ambien use suggested that Appellant used Ambien for a purpose other than prescribed – he was getting high by taking Ambien with inhalants. *See* MCM, pt. IV, ¶50.c.(5). Thus, it could be reasonable for the factfinder to conclude that Appellant used Ambien wrongfully.

3. Appellant was not sleep-driving and therefore he did not suffer from an uncommon side effect of Ambien. A reasonable factfinder could find that Appellant was awake.

On appeal, Appellant highlights the side effect of sleep-driving to argue that his Ambien use was not wrongful. (App. Br. at 14.) But whether Appellant was sleep-driving is irrelevant to whether he wrongfully used Ambien. Appellant could have wrongfully used Ambien and then sleep-driven; or he could have used the prescription properly and then sleep-driven. Other evidence, such as the time of

use and what Appellant was wearing determined whether his use was wrongful. The potential side effect of Ambien had no relevance on whether Appellant's use was wrongful.

In any event, Appellant's prescribing physician testified that the side effects on the prescription warning label are uncommon. (JA at 115.) Appellant highlights no evidence that connects him to sleep-driving other than referencing an uncommon side effect. Also, there was no expert testimony that linked Appellant's behavior with sleep-driving. In fact, evidence suggested otherwise. Appellant physically appeared as if he were not dressed to sleep through the night, but as if he went for a joyride after work instead since he was dressed in his OCPs and surrounded by Dust Off cans. A more reasonable explanation for Appellant's actions was that he took Ambien after work, while still in uniform, to alter his mood or feel other side effects other than to fall asleep. A reasonable factfinder could have accepted that explanation and found Appellant's Ambien use wrongful on that basis.

This Court is not tasked with determining whether the evidence at trial established guilt beyond a reasonable doubt, but whether, after reviewing the evidence in the light most favorable to the government, any rational factfinder could have found the essential elements of wrongful use of Ambien beyond a reasonable doubt. Jackson v. Virgina, 443 U.S. 307 318-19 (1979). And

considering this low standard for legal sufficiency, a reasonable factfinder could have determined that the government proved Appellant wrongfully used Ambien.

B. This Court should reject Appellant's invitation to consider the Care inquiry when determining legal sufficiency.

This Court should not consider Appellant's Care inquiry in its legal sufficiency review. This Court's predecessor endorsed this proposition many decades ago in Bethea, 46 C.M.R. at 225. Evidence not presented at trial cannot be used to support or reverse a conviction. Id. The reason is that the prosecution and defense are entitled to "challenge the admissibility of the evidence according to the accepted rules of law, and each has a right to test the trustworthiness and probative value of proffered evidence by cross-examination, and by other evidence." Id. With this notion in mind, this Court continued to find that the review of findings "was limited to the evidence presented at trial." United States v. Beatty, 64 M.J. 456, 458 (C.A.A.F. 2007).

In Beatty, this Court took one step further to distinguish between findings review and sentence appropriateness review under Article 66(c), UCMJ. The "entire record" for sentence appropriateness review "has been understood to include not only evidence admitted at trial, but also matters considered by the convening authority in his action on the sentence." Id. In other words, in a legal sufficiency review, a reviewing court is bound to the evidence presented during

contested findings and is distinguishable from other Article 66, UCMJ, reviews that may include a reviewing court to consider the "entire record." *See* id.

Simply put, this Court cannot consider Appellant's Care inquiry in its legal sufficiency review. More recently, this Court in United States v. Leipart reiterated this concept. 2024 CAAF LEXIS 439, at *15-16 (1 August 2024, C.A.A.F.). Although the factfinder can be aware of mixed pleas, it cannot rely on an accused's guilty plea and related statements to find an element of a contested offense. Id.

Still Appellant argues that this Court must consider the "entire record," including the Care inquiry, as required by Article 66, UCMJ, because a Court of Criminal Appeals may affirm findings of guilty based on the "entire record." (App. Br. at 21.) This argument sidesteps well-established precedent that mandates an appellate court to only consider evidence before a factfinder during a legal sufficiency review. *See* Beatty, 64 M.J. at 458; Bethea, 46 C.M.R. at 225.

Appellant cites United States v. Jessie, 79 M.J. 437 (C.A.A.F. 2020) to support his argument that this Court must consider the entire record in its legal sufficiency review. (App. Br. at 21.) Although Jessie defines "entire record," the opinion did not discuss the notion of the "entire record" as it relates to legal sufficiency or even factual sufficiency review. Instead, Jessie addressed an appellant's constitutional challenge that his confinement facility's visitation rules violated his First and Fifth Amendment rights because it deprived him of contact

with his biological children. Id. at 438. Jessie reiterated that appellants, on appeal, can supplement the "entire record" to present evidence of claims of cruel and unusual punishments. Id. at 444. Thus, Appellants reliance on Jessie is misplaced. And Appellant has provided no justification under a stare decisis analysis for why precedent such as Beatty and Bethea should be overturned, such as articulating the cases' unworkability, any intervening events, reasonable expectations of service members, and the risk of undermining public confidence in the law. *See* United States v. Blanks, 77 M.J. 239, 242 (C.A.A.F. 2018) ("[A]dherence to precedent is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.").

Appellant's ambition for this Court to consider the Care inquiry is contrary to the essence of Bethea. Bethea explained why it is pivotal for a reviewing court to only consider the evidence presented before the factfinder: because each party has the right to cross-examination and to challenge the trustworthiness of the evidence. 46 C.M.R. at 225. To consider Appellant's Care inquiry on appeal, would deprive the government of the ability to assess and refute Appellant's assertions made during the Care inquiry as it related to his wrongful use of Ambien.

Put another way, Appellant should not get the chance on appeal to introduce new evidence not before the factfinder, such as the Care inquiry, to challenge the wrongful use of Ambien that was litigated at trial. The prosecution had no opportunity at trial to challenge Appellant's statements made during the Care inquiry that he took Ambien at home. If Appellant wanted this theory before the panel members, he could have taken the stand during trial on the merits and testified that he took Ambien at home before going to bed. Instead, he chose not to testify, as was his constitutional right to do so, and avoided the crucible of cross-examination. But on appeal, Appellant should not have the chance to challenge a conviction relying on testimony not subject to cross-examination and not considered by the factfinder. The prosecution had no means to challenge the trustworthiness of such evidence. Thus, it is not fair to the government on appeal for this Court to consider Appellant's Care inquiry in a legal sufficiency review.

Further, Appellant's request to use the Care inquiry could create precedent that would be disadvantageous to future appellants. If an appellant's statements in a guilty plea can be considered in a legal sufficiency review for another specification, then the government can also rely on an appellant's admissions to support a conviction – despite the appellant having been deprived of the opportunity to put forth a defense at trial. No court would allow this occurrence, given the constitutional implications. That is precisely why this Court's precedent

only limits legal sufficiency review to the facts presented to the factfinder – to provide both parties the opportunity to challenge such evidence.

This Court's precedent states that in a legal sufficiency review an appellate court can only consider evidence presented at trial before the factfinder. Beatty, 64 M.J. at 458. For these reasons, this Court should not consider Appellant's Care inquiry and should instead find Appellant's conviction for wrongful use of Ambien legally sufficient based on the evidence that was introduced by the parties on the merits.

II.

APPELLANT'S GUILTY PLEA FOR RECKLESS DRIVING WAS PROVIDENT, AND THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN ACCEPTING IT.

Standard of Review

This Court reviews a military judge's decision to accept a plea of guilty for an abuse of discretion. United States v. Forbes, 78 M.J. 279, 281 (C.A.A.F. 2019) (citation omitted). In reviewing the providence of a plea, a military judge abuses his discretion only when there is "a substantial basis in law and fact for questioning the guilty plea." United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008) (internal quotation marks and citation omitted). "[T]he military judge's determinations of questions of law arising during or after the plea inquiry are reviewed de novo." Id. at 321. "[A]ppellant bears the burden of establishing that

the military judge abused that discretion, i.e., that the record shows a substantial basis in law or fact to question the plea." United States v. Phillips, 74 M.J. 20, 21-22 (C.A.A.F. 2015) (citation omitted).

Law and Analysis

The providency of Appellant's plea of guilty comes down to whether: 1) he was awake and acted voluntarily but did not remember driving; or 2) there was a substantial basis to believe he was driving while asleep and therefore he did not voluntarily operate the vehicle. Appellant admitted that he was awake while recklessly driving his vehicle. Thus, Appellant's plea of guilty to reckless driving was provident because he admitted to facts that demonstrated that he physically controlled his vehicle while awake despite his lack of memory. Based on the entirety of the facts in the record, the military judge did not abuse his discretion in accepting the guilty plea.

A providence inquiry into a guilty plea must establish that the accused himself believes he is guilty and "the factual circumstances as revealed by the accused himself objectively support that plea." United States v. Higgins, 40 M.J. 67, 68 (C.M.A.1994) (citation omitted); *see also* United States v. Davenport, 9 M.J. 364, 366-67 (C.M.A. 1980) (explaining that an accused's admissions during a plea colloquy must establish a factual predicate to support his plea of guilty). In reviewing the providence of a guilty plea, this Court considers an appellant's

colloquy with the military judge, as well as any inferences that may be reasonably drawn from it. United States v. Carr, 65 M.J. 39, 41 (C.A.A.F. 2007).

Appellant pleaded guilty to reckless driving. The elements of reckless driving are: 1) the accused was operating or in physical control of a vehicle; and 2) that while operating or in physical of a vehicle the accused did so in a reckless manner. MCM, pt. IV, ¶51.b.(1)-(2)(A). The Manual defines reckless as a culpable disregard for the foreseeable consequences. MCM, pt. IV, ¶51.c.(7).

For this Court to find the plea improvident, Appellant bears the burden of "establishing that the military judge abused that discretion, i.e., that the record shows a substantial basis in law or fact to question the plea." *See* Phillips, 74 M.J. at 21-22. On appeal, Appellant has not pointed to anything in the record to establish that he was, in fact, sleep-driving, invalidating his plea of guilty. Thus, there was no substantial basis in law and fact for questioning Appellant's guilty plea.

A. After the issue of sleep-driving was raised in contested findings, the military judge prudently reopened the Care inquiry.

In accordance with R.C.M. 910(e) and 910(h), the military judge reopened the Care inquiry given that he was concerned with a potential defense of automatism – sleep-driving. (JA at 137.) R.C.M. 910(e) establishes that a military judge must not accept a plea of guilty unless the military judge is satisfied that there is a factual basis for the plea. If any potential defense is raised by other

matters, the military judge should explain such a defense to the accused, and the military judge should not accept the plea unless the accused admits facts that negates the defense. R.C.M. 910(e), Discussion. Further R.C.M. 910(h) states that if there were statements by the accused or any evidence presented that may conflict with a plea of guilty, the military judge shall inquire into the providence of the plea. If an accused, after entering a guilty plea, sets up a matter inconsistent with the plea, the court shall proceed as though he pleaded not guilty. Article 45(a), UCMJ.

The military judge wanted to ensure that there was no substantial basis to question the element that Appellant was in conscious, physical control of his vehicle. (JA at 140.) The mere fact that the military judge reopened the Care inquiry demonstrated that he understood his role to inquire further about a possible defense. The "possible defense" standard is the threshold for inquiring into a potential affirmative defense during a guilty plea colloquy. United States v. Hayes, 70 M.J. 454, 458 (C.A.A.F. 2012). This standard is a "lower threshold than a prima facie showing because it is intended as a trigger to prompt further inquiry pursuant to Article 45, UCMJ," and Care. Id. Moreover, the "possible defense" standard ensures "the acceptance of a guilty plea be accompanied by certain safeguards to insure the providence of the plea, including the delineation of the elements of the offense charged and admission of factual guilt on the record" are in

line with Article 45, UCMJ. Id. (citing Care, 40 C.M.R. at 250). Here, the military judge did just what is required by this Court's precedent. The potential sleep-driving side effect came to light during contested findings, which required further inquiry.

B. The military judge resolved the potential inconsistency during the Care inquiry, because he established that Appellant was not sleep-driving.

Crucial in this appeal was whether Appellant suffered from automatism that would have negated the actus reus and mens rea of his reckless driving offense. Automatism is an "action or conduct occurring without the will, purpose, or reasoned intention," "behavior carried out in a state of unconsciousness or mental disassociation without full awareness," and "[the] physical and mental state of a person who, though capable of action, is not conscious of his or her actions." United States v. Torres, 74 M.J. 154, 156 n.3 (C.A.A.F. 2015) (quoting Black's Law Dictionary 160 (10th ed. 2014)). In Appellant's case, the relevant "state of unconsciousness" would have been sleep-driving.

An accused "cannot be held criminally liable in a case where the actus reus is absent because the accused did not act voluntarily, or where the mens rea is absent because the accused did not possess the necessary state of mind when he committed the involuntary act." Torres, 74 M.J. at 157. In Torres, this Court adopted the approach that automatism can negate actus reus because "[a] person is not guilty of an offense unless his liability is based on conduct that includes a

voluntary act…." 74 M.J. at 158 (citing Model Penal Code § 2.01(1)). Here, the military judge understood this concept and was aware that an unconscious act would not render Appellant's conduct criminal. He said:

> I do have some concerns about your client's Care inquiry to the extent that some of the information in Defense Exhibit Alpha refers to a possible side effect of Ambien being sleep driving. Voluntary intoxication is generally not a defense to general intent crimes. However, there is, as recognized by the CAAF, something of a defense of automatism, so if someone has sort of involuntary action, so if they have a seizure or an involuntary act, then there's no reason for the law to criminalize that.

(JA at 137.) For the following reasons, Appellant in the first and second Care inquiries negated any defense of automatism, such as sleep-driving.

1. Appellant was not suffering from automatism; he was awake and therefore voluntarily committed the actus reus.

Appellant, who waived a trial of the facts, provided the military judge a factual predicate through his own admissions to establish that he was awake and voluntarily physically controlled the vehicle – the actus reus required. After consulting his defense counsel, Appellant told the military judge that he was voluntarily in physical control of the vehicle. (JA at 140.) While Appellant did not have a full grasp or memory of what occurred, Appellant affirmed that his actions were voluntary because he knew he had to take certain steps to take control of the car, such as getting the car keys and turning the engine on. (JA at 141.) He also recalled that music was playing in the car, and he must have turned the music

on, since it did not automatically play from his phone. (Id.) Appellant believed that based on the number of things he had to do and their complexity, he was not asleep when he was doing them. (Id.) And Appellant believed that he had gone out driving to get gas (JA at 142), which showed purposeful reflection before voluntarily getting behind the wheel to accomplish a task.

Appellant also explained that his memory kicked back in and it "*didn't feel like waking up from sleep*. It [felt] more like I just wasn't storing what was going on. Kind of feels like a blackout from drinking alcohol. Like a slide show and there [were] just some slides missing." (Id.) (emphasis added.) This demonstrated that he did not suffer from sleep-driving or automatism. Appellant was awake, not asleep, when he drove the car.

In the end, Appellant's admissions proved that he acted voluntarily when he engaged in a series of complex actions for the purpose of getting gas, all after knowingly taking Ambien and knowing it's potential side effects. Notably, Appellant's statements also negated any defense of sleep-driving because, as Appellant described, when he came to, it did not feel like he was asleep but rather he suffered from a blackout – he was not "storing what was going on." (JA at 141.)

Appellant now claims that he was not qualified to opine on whether he was awake, because that was left better to experts. (App. Br. at 34.) But if Appellant

wanted to contest whether he was awake, he could have withdrawn his guilty plea and put on a sleep-driving defense with expert testimony. Even after consulting with his trial defense counsel, Appellant did not do this. Instead, his admissions proved that he voluntarily committed the actus reus. Accepting Appellant's guilty plea based on his admission was within the range of reasonable choices available to the military judge, and the military judge did not abuse his discretion in doing so.

2. Automatism did not negate Appellant's mens rea.

Next, Appellant alleges that the defense of automatism – sleep-driving – negated the mens rea of recklessness. (App. Br. at 25-26.) In Torres, this Court left open the question whether automatism negates the mens rea of an offense. 74 M.J. at 157. Assuming for the sake of argument that sleep-driving could negate Appellant's intent to commit the crime, his argument fails.

As described above, Appellant did not suffer from automatism or sleep-driving. The record as a whole showed that Appellant was awake while he was driving.

Further, the military judge properly applied the correct definition of recklessness, and Appellant admitted to substantial facts during his Care inquiry to meet the requisite mens rea. The military judge defined recklessness to Appellant:

> Culpable disregard for the foreseeable consequences to others. Reckless means that your manner of operation or control of the vehicle was under all the circumstances of such a heedless nature that it actually or imminently made it dangerous to the occupant or occupants of the vehicle or to the rights or safety of others or of another.

(JA at 72.)

Appellant admitted that he drove after taking Ambien – likely to get gas – despite knowing it was a potent drug that could affect his driving. (JA at 141-42.) Appellant admitted that he felt "dazed, groggy, slow…[and] could see how it could affect [his] ability to safely drive." (JA at 80.) Appellant further admitted that his operation of the vehicle was reckless because he was swerving on the road, blocking traffic, riding up a sidewalk, and hitting a lamp post – all of which were unsafe for himself and others. (JA at 77, 79.) These facts established the necessary mens rea. It showed culpable disregard for the foreseeable consequences to others when Appellant drove after taking Ambien with full knowledge of its potential effects on his driving. Knowingly operating a vehicle while he was "dazed," "groggy," and "slow" – which caused Appellant to swerve, block traffic, ride up onto a sidewalk and collide with a lamp post – was conduct of such a headless nature that it was imminently dangerous to the safety of himself and others. In sum, Appellant's admissions established that he had the necessary mens rea to drive recklessly.

After the military judge reopened the Care inquiry, Appellant's admissions established both that he voluntary committed the actus reus and had the necessary mens rea required for reckless driving. For these reasons, the military judge did not abuse his discretion in finding Appellant's plea provident.

C. After the military judge resolved any potential inconsistencies, there was no substantial basis in the record to question the plea.

Although the military judge reopened the Care inquiry, the evidence of sleep-driving was weak from the very beginning. Even though the military judge found that the evidence presented about sleep-driving met the low threshold of it being a "possible defense," does not mean that on appeal, Appellant has met the much higher burden of showing a substantial basis in law or fact to question his guilty plea.

To start, there was no actual evidence in the record to say that Appellant was sleep-driving. There was no expert testimony or any explanation of what sleep-driving looks like in practice or how it can be recognized. There was no testimony that Appellant exhibited the symptoms associated with sleep driving. Nothing linked Appellant himself to sleep-driving. In fact, the record established that sleep-driving is an extremely rare side effect of taking Ambien. Moreover, witness testimony on the merits for the contested charges supported the conclusion that Appellant was awake. Specialist MD testified that when he encountered Appellant

stopped in a turn lane, Appellant was rocking back and forth and smiling, appearing to be high – not asleep. (JA at 92.)

Even though sleep-driving may have been a possible defense, it was easy for the military judge to ensure there was no substantial basis to question the plea through Appellant's own admissions that he was awake while driving, not asleep. Also, at the time the military judge reopened the Care inquiry, Appellant could have withdrawn his guilty plea and put on a sleep-driving defense. He chose not to – most likely because he and his defense counsel knew from pretrial preparations that the evidence would not ultimately support such a defense.

Now, despite admitting at trial that he believed he was awake while driving, on appeal, Appellant argues that he was sleep-driving and therefore cannot be guilty of recklessly operating at vehicle. In the past, this Court has declined an appellant's "invitation . . . to speculate post-trial as to the existence of facts which might invalidate an appellant's guilty pleas." Johnson, 42 M.J. at 445. This Court should decline to speculate here that there were facts to support that Appellant was sleep driving. Everything else in the record, from the lack of expert testimony to witness testimony to Appellant's own admissions, points in the opposite direction.

At bottom, even though the military judge noted the possible defense of automatism,[2] neither Appellant, nor his counsel, ever expressed the same reservations. Never once during the plea colloquy did Appellant himself or through counsel suggest any potential defenses. And Appellant did not withdraw his guilty plea before the announcement of sentence – an indication that Appellant pleaded guilty because he in fact believed he was guilty. After reopening the Care inquiry, there was no substantial basis in the record to question Appellant's guilty plea. Thus, the military judge did not abuse his discretion in accepting Appellant's plea of guilty.

D. Appellant's lack of memory did not invalidate the plea.

Appellant suggests throughout his brief that he had memory issues and therefore could not recall the details of that day – calling his guilty plea into question. (App. Br. at 30, 33, 34.) A valid guilty plea requires an accused to admit his guilt and articulate facts that objectively establish his guilt. Davenport, 9 M.J. at 366-67. Appellant's inability to recall the specific facts underlying his offense without assistance did not render his guilty plea improvident. *See* United States v. Moglia, 3 M.J. 216, 218 (C.M.A. 1977). This Court has held that if an accused is personally convinced of his guilt based on the assessment of the government's

[2] Appellant states that the military judge did not consider the defense of automatism, but that is simply not the case. (App. Br. at 27.) The military judge reopened the Care inquiry recognizing the defense of automatism. (JA at 137.)

evidence, the "inability to recall the specific facts underlying his offense without assistance does not preclude his guilty plea from being provident." Jones, 69 M.J. at 299. Here, Appellant's guilty plea was provident because it was reckless to drive after taking Ambien. And Appellant's Ambien use explained why he did not remember the entire incident. But Appellant's lack of memory of the details of what occurred when he took control of the vehicle had no effect on his plea of guilty.

With this said, Appellant still argues that the military judge and the Air Force Court of Criminal Appeals disregarded the medically known side effects of amnesia or memory loss, which invalidated the plea. (App. Br. at 34, 35.) In other words, Appellant argues that the military judge erred by accepting Appellant's statements that his actions were voluntary because Appellant's memory was compromised and therefore, he could not evaluate whether he was acting voluntarily. But contrary to Appellant's assertions, the military judge did properly apply the law to the facts. The military judge correctly recognized that there was "no requirement that someone had a memory of their conduct to plead guilty to it, but…the acts must have been voluntary." (JA at 138.) Appellant stated several times that he reviewed witness statements and relied on those statements to provide a factual basis to show that his acts were voluntary, establishing that he was convinced of his guilt – a proposition this Court has endorsed. *See* Jones, 69 M.J.

at 299, (JA at 73, 75, 77, 141). In sum, Appellant's lack of memory did not invalidate his guilty plea. His admissions established a factual predicate to support his plea, and there was no substantial basis in the record to question that factual predicate. Thus, Appellant's plea of guilty was provident, and the military judge did not abuse his discretion.

CONCLUSION

Appellant's conviction for wrongful use of Ambien was legally sufficient. A reasonable factfinder could have found beyond a reasonable doubt that Appellant's Ambien use was wrongful because evidence proved that he did not take it before going to sleep through the night. Also, Appellant's plea of guilty for reckless driving under the influence of Ambien was provident. The military judge did not abuse his discretion in accepting Appellant's plea because Appellant's statements proved that he physically controlled the vehicle while awake negating any defense of automatism.

The United States requests that this Honorable Court deny Appellant's requested relief and affirm the decision of the Air Force Court of Criminal Appeals.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and the Air Force Appellate Defense Division on 10 January 2025.

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