

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

UNITED STATES
Appellee

v.

Specialist (E-4)
FRANK J. BARBOSA
United States Army
Appellant

SUPPLEMENT TO PETITION FOR
GRANT OF REVIEW

Crim. App. Dkt. No. 20240538

USCA Dkt. No. 26–0175/AR

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

Issue Presented

**WHETHER THERE IS A SUBSTANTIAL BASIS IN LAW TO
QUESTION APPELLANT’S PLEA OF GUILTY TO SEXUAL
HARASSMENT.**

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2024). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (a)(3) (2024).¹

¹ Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in Appendix B.

Reasons to Grant Review

This Court has not had the opportunity to address the elements and definitions of sexual harassment subsequent to the enumeration of sexual harassment as a standalone prohibited offense under Article 134, UCMJ. Pursuant to internal Rule 21(b)(5)(A), this Court should settle whether a single act may be so severe that it would create an intimidating, hostile, or offensive working environment.

As well, when this Court and the Courts of Criminal Appeals previously analyzed sexual harassment, it was under the framework of policy violations that lead to charges under to Article 92, UCMJ. This Court should address the far more stringent nature of the criminal offense of sexual harassment, especially as it applies to the terminal element of prejudice to good order and discipline and discredit to the armed forces. Appellant's concession that his act was contrary to SHARP policies brings into question whether his act was of such magnitude that it was prejudicial to good order and discipline and was service discrediting.

Appellant urges this Court to reverse and remand to the Army Court with instructions to consider Appellant's plea to sexual harassment under a more stringent, but clearer lens when it analyzes whether his sole act could legally constitute sexual harassment.

Statement of the Case

On November 7, 2024, a military judge sitting as a general court-martial convicted Appellant, in accordance with his pleas, of one specification of sexual harassment and two specifications of assault consummated by a battery, in violation of Articles 134 and 128, Uniform Code of Military Justice, 10 U.S.C. § 934, 928 (2024) [UCMJ]. (R. at 113–14).² The same day, the military judge sentenced Appellant to ten months of confinement and to receive a bad-conduct discharge. (R. at 148). On November 20, 2024, the convening authority approved the findings and sentence, and disapproved Appellant’s request to commute the sentence. (Action).³ On November 25, 2024, the military judge entered judgment. (Judgment).

On February 12, 2026, the Army Court affirmed the findings and sentence. *United States v. Barbosa*, ARMY 20240538, 2026 CCA LEXIS 83 (A. Ct. Crim. App., Feb. 12, 2026) (contained in App’x A). Appellant was notified of the Army Court’s decision. In accordance with Rule 19 of this Court’s Rules of Practice and Procedure, on April 14, 2026, the undersigned appellate defense counsel filed a Petition for Grant of Review, while seeking leave to file the Supplement to the

² Specification 1 of Charge I was originally charged as a violation of Article 120. (Charge Sheet). Appellant pled not guilty to the original charge, but guilty to a separate offense in violation of Article 128 by constructive referral. (R. at 86).

³ The Statement of Trial Results erroneously included a reprimand as part of Appellant’s sentence. The Army Court corrected the STR. (App’x A).

Petition for Grant of Review separately, as well as a motion to file out of time. On April 29, 2026, this Court denied Appellant's motion to file out of time and denied Appellant's petition as moot. On May 1, 2026, Appellant moved this Court to reconsider its decision. On May 12, 2026, this Court granted Appellant's reconsideration motion, accepted Appellant's petition, and ordered the supplement to be filed by June 2, 2026. The undersigned counsel hereby file the Supplement to the Petition for Grant of Review under Rule 21.

Statement of Facts

A. Appellant Sent a Single Picture of His Genitalia to SPC L.R. in an Attempt to Move the Friendship to a Sexual Relationship.

Appellant met Specialist (SPC) L.R. in early January 2023 while both were stationed at Mihail Kogalniceanu Airbase in Romania. (R. at 41; Pros. Ex. 1. [Stipulation]). They were in the same battalion, but not the same immediate unit, as SPC L.R. was a medic and Appellant was an infantryman. (R. at 42; Stipulation). They did not interact on any regular basis within their respective working environments. (R. at 42–43).

The two exchanged phone numbers and texted as casual acquaintances. (R. at 43–44). On January 10, 2023, Appellant texted a single picture of his genitalia to SPC L.R. in what appeared to be—utilizing context from facts developed during the plea colloquy—an inappropriate attempt at moving the friendship toward a romantic relationship. (R. at 48; Stipulation). It was not sent for any other reason

but Appellant’s misguided attempt to seek a sexual relationship with SPC L.R. (R. at 47–48).

Appellant described his reasoning behind sending the picture as, “It was nothing special” and “I wanted to send it for my own gratification and just self-enjoyment.” (R. at 45, 47). Appellant did acknowledge that since SPC L.R. had not requested the picture, it *could* be perceived as “shocking” if she received it “out of the blue.” (R. at 49, 51).

After she received the picture, Appellant believed SPC L.R. thought it was “unwelcome” and she told him, “along the lines of, ‘don’t send anything like that again.’” (R. at 48–49). But other than that admonishment, the messages between Appellant and SPC L.R. remained “non-memorable” and “innocuous.” (R. at 44–45). Appellant complied with SPC L.R.’s request to not send any similar messages, and the two continued on as friends. About a week later, the two even went on a day trip together to the local town so SPC L.R. could get a tattoo. (Stipulation, p. 3).

B. Appellant’s Guilty Plea and Providence Inquiry Included Substantial Discussion About Potentialities and “Could Have” Language.

The Government charged appellant with sexual harassment for sending the single picture. (Charge Sheet). The Government alleged the act “was so severe, repetitive, or pervasive” that a reasonable person would perceive, and SPC L.R.

did perceive “an intimidating, hostile, or offensive working environment.”

(Charge Sheet).

The military judge, during the providence inquiry, focused a large portion of the colloquy on the fact that Appellant only sent a single picture, “So, it cannot be repetitive. Neither does it appear it could be pervasive...the act itself must have been severe.” (R. at 49).

The military judge then utilized the fact that SPC L.R. could have been around Appellant and Soldiers from his company to define a “working environment.” (R. at 51). While it was apparently “routine” that SPC L.R. provided medical services to members of Appellant’s company, no evidence was introduced that SPC L.R. was so affected by Appellant’s picture that she ceased conducting her normal duties or treated Appellant any differently. There is no evidence in the record that anyone but Appellant and SPC L.R. knew of this picture until the subsequent investigation into Appellant’s other misconduct.

The military judge finalized his questions about the work environment by asking Appellant whether he agreed SPC L.R. may have been “offended” to work in the same area as the person who sent her an image—“which we have discussed as being *potentially* severe”—and that it could have “*potentially* traumatized her.” (R. at 51, 53) (emphasis added). Appellant concurred.

The colloquy ended with several questions—long form queries from the military judge that were often met with monosyllabic agreement by Appellant—about how Appellant’s alleged sexual harassment could have impacted good order and discipline and about how it could have been service discrediting. Without further inquiry into how appellant actually knew the answer, the military judge accepted when Appellant stated, “It directly affected her, Your Honor, and it lowered her morale.” (R. at 57). The military judge followed this with, “Did it, you think, impact her ability to provide medical support to your company?” (R. at 57). Like prior questions, this “you think” question was met with a “yes,” and no further explanation occurred. (R. at 57).

Standard of Review

This Court reviews the decision of a military judge to accept a plea of guilty for an abuse of discretion and questions of law arising from the guilty plea de novo. *United States v. Byunggu Kim*, 83 M.J. 235, 238 (C.A.A.F. 2023) (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)).

“Questions about the meaning of statutes, including the meaning of the UCMJ’s punitive articles, are questions of law that this Court reviews de novo.” *United States v. Strong*, 85 M.J. 58, 63 (C.A.A.F. 2024) (quoting *United States v. Mays*, 83 M.J. 277, 279 (C.A.A.F. 2023)).

Law

As charged in Appellant’s case, the elements of sexual harassment under Article 134, UCMJ, are: (1) that the accused knowingly made sexual advances, demands or requests for sexual favors, or knowingly engaged in other conduct of a sexual nature; (2) that such conduct was unwelcome; (3) that, under the circumstances, such conduct was so severe, repetitive, or pervasive that a reasonable person would perceive, and a certain person did perceive, an intimidating, hostile, or offensive working environment; and (4) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.⁴

This Court has yet to prescribe a test or guidance for analyzing sexual harassment under Article 134. However, when this Court previously analyzed sexual harassment as a violation of Article 92 (via the services’ varying regulations and policies), it adopted a totality of the circumstances test that outlined objective and subjective prongs. *See United States v. Brown*, 55 M.J. 375, 386–87 (C.A.A.F. 2001) (analyzing whether the appellant’s acts “were so severe or pervasive that a

⁴ Sexual harassment was created as an offense by the National Defense Authorization Act for Fiscal Year 2022 (Pub. L. 117–81, div. A, title V, §539D, Dec. 27, 2021, 135 Stat. 1699). It was implemented by Executive Order 14062, Jan. 26, 2022.

reasonable person would perceive that the remarks created a hostile or abusive environment, and the victim perceived them as such”) (internal quotations omitted)).

This aligns with Supreme Court precedent. The Supreme Court has analyzed sexual harassment claims under Title VII of the Civil Rights Act of 1964, but the Coast Guard Court of Criminal Appeals has succinctly described why the interpretation of a civil statute (Title VII) directly informs the analysis’s by Courts of Criminal Appeals pertaining to criminal sexual harassment cases:

We are, however, guided by a longstanding interpretive principle: When a statutory term is obviously transplanted from another legal source, it brings the old soil with it. In the same vein, the United States Supreme Court has articulated that it is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.... When drafters transplanted this language, including terms of art such as ‘intimidating, hostile, or offensive working environment,’ into [the regulation], the borrowed terms brought with them the ‘old soil’ of decades of their application and interpretation in federal courts. We can presume that by choosing to employ the EEOC’s definition of ‘sexual harassment,’ the order’s drafters knew and adopted the cluster of ideas...attached to each borrowed word in the body of learning from’ the Title VII context from which it was taken.

United States v. Truitt, 84 M.J. 721, 724–25 (C.G. Ct. Crim. App., Jul. 2, 2024) (quoting *Taggart v. Lorenzen*, 587 U.S. 554, 560 (2019); *Hall v. Hall*, 584 U.S. 59, 73 (2018); *Fed. Aviation Admin. v. Cooper*, 566 U.S. 284, 292 (2012); and *Molzof v. United States*, 502 U.S. 301, 307 (1992)).

Similar to what this Court outlined in cases such as *Brown*, the Supreme Court has explained, “a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998) (citing *Harris v. Forklift Sys.*, 510 U.S. 17, 21–22 (1993)). The Supreme Court directed lower courts to “determine whether an environment is sufficiently hostile or abusive by ‘looking at all the circumstances,’ including the ‘frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.’” *Id.* at 787–88 (quoting *Harris*, 510 U.S. at 23).

Further, while Title VII is not a criminal statute and is merely instructive, the Supreme Court did clarify that many acts would not even rise to the level of creating civil liability, as the Act “does not prohibit ‘genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.’” *Id.* at 788 (quoting *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998)). “A recurring point in these opinions is that...isolated incidents (unless extremely serious) will not amount to discriminatory changes in the...conditions of employment.” *Id.* (quoting *Oncale*, 523 U.S. at 82).

Argument

A. “Potentially Severe” is not Severe and Appellant’s Sole Act Did Not Create an Offensive or Intimidating Work Environment.

In a poor attempt at turning a casual acquaintanceship into a sexual relationship, Appellant made an inauspicious choice and sent an “unwanted” picture of his genitalia to SPC L.R. Appellant does not dispute this act was inappropriate. But it did not constitute sexual harassment.

Upon receipt of the picture, SPC L.R. told Appellant not to send a similar picture again. Appellant complied and the personal relationship between Appellant and SPC L.R. did not appear to change or be altered. No evidence was introduced that proved the relationship was affected.

The government presented no evidence that SPC L.R. was so offended by the picture that her daily work routine shifted in the slightest, let alone that the picture created an intimidating, hostile, or offensive work environment. Appellant speculated—via short answers to the military judge’s long-form questions—that such an unwelcome picture might create that type of environment, but this Court cannot be satisfied that it did. Such evidence, minus Appellant’s simple concurrences, was not placed before the military judge.

Rather, the evidence before the military judge was: Appellant sent the picture, SPC L.R. rebuffed his advances in the course of male-female interactions (even if Appellant’s act was a morally condemnable instance of flirtation), and

most importantly, the relationship between the two continued unchanged. In fact, only a week later, SPC L.R. invited Appellant to accompany her to the local town so she could get a tattoo.

It was not until Appellant's later misconduct that SPC L.R.'s personal view of Appellant changed. Her unsworn statement to the trial court focused entirely on the assault committed by Appellant. (App. Ex. VI). There is no mention of the picture or alleged offensive working environment that was created by the unsolicited picture.

Appellant's case is devoid of evidence that the single picture was so severe that it actually created an intimidating, hostile, or offensive working environment for SPC L.R. There is no testimony or evidence detailing her perception, and Appellant's testimony describes both innocuous messaging after the picture and a continued friendship. Contrast this to a case such as *United States v. Carson*, where one of the victims testified specifically to feeling "shocked" and "bothered" by the appellant's exposure of his penis at work, and that she felt like "a victim." 57 M.J. 410, 411 (C.A.A.F. 2002).

Here, the military judge and Appellant continuously used words such as "potentially" shocking or traumatizing. That is not legally sufficient. If this Court utilizes a similar two-prong test (objective and subjective perception) as it has prior to the new Article 134 enumeration, then SPC L.R.'s subjective perception is

essential. Left unproven, this Court should question Appellant's guilty plea. As well, an objective observer would certainly acknowledge Appellant's picture was morally inappropriate, but as the Supreme Court noted, "intersexual flirtation" should not be confused for "discriminatory conditions of employment." *Oncale*, 523 U.S. at 81. One inappropriate picture, sent as flirtation, is not sexual harassment. Appellant acknowledged the mistake and complied with SPR L.R.'s request to not send anything similar; the friendship continued unaffected. This is inconsistent with a workplace that was alleged to have been utterly transformed by the "severe" picture into a hostile and offensive environment.

B. A Violation of Policy Does Not Automatically Equate a Criminal Act.

This Court has not yet addressed the terminal element of sexual harassment under the auspices of Article 134. This case presents a vehicle for this Court to address the element and provide guidance to the field. In that vein, Appellant's answers to the military judge did not suffice to prove that his act was either prejudicial to good order and discipline or a discredit to the armed services.

The military judge focused a large portion of the colloquy as to the terminal element on why Appellant believed his acts were prejudicial or discrediting. Appellant stated that his knowledge and attendance at the Army's SHARP⁵ trainings was why he knew sexual harassment was against policy. But a single act

⁵ Sexual Harassment/Assault Response and Prevention.

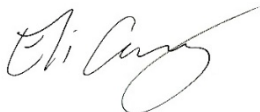
in violation of a policy does not automatically equal a prejudicial or discrediting act. The military judge failed to cement core facts that would support either portion of the terminal element, especially considering sexual harassment is criminal statute, not a policy violation.

Further, the military judge's reliance on Appellant being in the same battalion as SPC L.R. to constitute the same working environment is tenuous. It creates an issue of law as to what size of unit may constitute a working space. There is little information on the record as to how often SPC L.R. ever interacted with Appellant or his unit for her job. It was presumed by the military judge and Appellant that she would have difficulty providing medical services to members of Appellant's unit, but that is purely speculative and unsupported by the record.

This Court should also address what constitutes a working environment. The military judge's finding that a battalion—a large unit normally comprised of nearly 1,000 Soldiers—satisfied the conviviality of a normal workplace stresses the definition of the term. A battalion is far too large and all-encompassing for Appellant's acts to have had an adverse effect on 1,000-plus Soldiers. This Court should provide guidance as to the parameters of what constitutes a workplace.

Conclusion

This Court should grant Appellant's petition for grant of review because it is an opportunity to address a novel area of law and prescribe a current test of review for sexual harassment cases under the newly enumerated offense.



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Appendix A: Army Court Decision

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
MORRIS, JUETTEN, and MURDOUGH
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist FRANK J. BARBOSA
United States Army, Appellant

ARMY 20240538

Headquarters, Fort Campbell
John R. Maloney, Military Judge
Lieutenant Colonel John C. Olson, Jr., Special Trial Counsel

For Appellant: Colonel Frank E. Kostik, Jr., JA; Lieutenant Colonel Kyle C. Sprague, JA; Major Kelsey Mowatt-Larssen, JA; Captain Eli M. Creighton, JA (on brief).

For Appellee: Colonel Richard E. Gorini, JA; Major Vy T. Nguyen, JA; Captain Teri'el M. Dixon, JA (on brief).

12 February 2026

SUMMARY DISPOSITION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

MURDOUGH, Judge:

We will not disturb a finding of guilt entered pursuant to a guilty plea unless there is a substantial basis in fact or law to do so. *E.g. United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). Finding none here, we affirm the appellant's convictions, though we address a procedural discrepancy between the plea and findings caused by the military judge errantly granting a government motion to dismiss excepted language and an error in the Statement of Trial Results that led to an *ultra vires* reprimand.

As we have said before, and reiterate here, "when an accused submits, and the government accepts, a plea agreement to plead guilty to a specification by exceptions and substitutions, the government should not make, and the military judge should not grant, a motion to dismiss the excepted language prior to the entry

of findings.” *United States v. Hurd*, ARMY 20240033, 2025 CCA LEXIS 374, at *1 (Army Ct. Crim. App. 6 Aug. 2025) (summ. disp.).

A military judge, sitting as a general court-martial, convicted appellant, pursuant to his pleas, of two specifications of assault consummated by a battery and one specification of sexual harassment in violation of Articles 128 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 928, 934 [UCMJ]. Consistent with the terms of a plea agreement, the military judge sentenced appellant to a bad-conduct discharge and to be confined for 10 months.

Before addressing the merits of appellant’s case, we must first turn to another error that necessitates correction. As noted *supra*, appellant was sentenced to a bad-conduct discharge and to be confined for 10 months. However, the Statement of Trial Results, incorporated into the judgment, reflects that the military judge also sentenced appellant to be reprimanded. The sentence announced on the record does not include a reprimand. Regrettably, this mistake was not corrected, and the convening authority punitively reprimanded appellant “pursuant to the sentence of the court-martial.” This reprimand, dated 20 November 2024, is included in the certified record of trial. We find the convening authority’s reprimand to be an *ultra vires* action and void *ab initio*. We further correct the Statement of Trial Results in our decretal paragraph and remind all involved, irrespective of the nature or manner of their involvement in the judicial process, to be cognizant of the need for accuracy in the records of courts-martial proceedings.

BACKGROUND

The only specification at issue on appeal is the sexual harassment specification. Appellant sent an unsolicited and unwelcome photograph of his erect penis to the victim, one of his battalion’s medics.

Originally charged with sending “pictures of his penis” (emphasis added), appellant and the referral authority entered into an agreement by which appellant agreed to plead to sending a single image, excepting the word “pictures” and substituting therefor the word “picture.”¹ The specification, both as alleged and as pled, alleged in relevant part that:

such conduct was unwelcome; and under the circumstances was so severe, repetitive, or pervasive that a reasonable person would perceive, and [the victim] did perceive, an intimidating, hostile, or offensive working environment; and that such conduct was to the prejudice of good order

¹ This word-for-word substitution produced a syntactically awkward, but legally adequate, phrasing of the *actus reus*: “by sending [the victim] picture of his penis”.

and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

During the providence inquiry, appellant initially acknowledged that the photograph was unwelcome, and “if any one [*sic*] outside of the armed forces knew conduct like that was going on around [*sic*], it would bring a lot of discredit to the armed forces.” He also told the military judge that he knew his conduct was unwelcome because the victim responded by saying words to the effect of “don’t send anything like that again”

When the military judge asked how a reasonable person would perceive his conduct sending the photograph, appellant acknowledged it would be “shocking” and “create issues in the unit.” After further inquiry, he stated he believed “the result of the picture” produced a hostile and offensive work environment for the victim. He later stated it directly affected the victim and lowered her morale, to include her ability to provide medical support for his company. He also acknowledged that this conduct was contrary to Army policy, making his conduct prejudicial to good order and discipline and that “the public would look down on” his conduct.

After accepting the plea, the government moved to dismiss “the excepted word ‘pictures’ of Specification 1 of Charge II.”² Without objection from the appellant, the military judge granted the motion. He then announced a general finding “Of Charge II and its Specification: Guilty.”

LAW AND DISCUSSION

A. Sufficiency of the Plea to Sexual Harassment

Appellant submits two assignments of error, that the sexual harassment specification is legally insufficient and that the military judge erred by accepting the appellant’s plea to this specification. “The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *United States v. Smith*, 83 M.J. 350, 359 (C.A.A.F. 2023) (internal quotation marks omitted) (citation omitted). In a guilty plea, the factual basis for the conviction is the accused’s statements presented to the military judge during the providence inquiry. Rule for Courts-Martial [R.C.M.] 910(e); see also *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996); *United States v. Inabinette*, 66 M.J.

² The plea agreement directed the trial counsel to move to dismiss “the charges and specifications to which [appellant pled] not guilty.” The plea agreement is silent as to this excepted language. This motion to dismiss also dismissed the other specification of Charge II, leaving Specification 1 as the sole specification of Charge II.

320, 321-22 (C.A.A.F. 2008). Thus, appellant’s second assignment of error eclipses the first. We will only set aside an appellant’s plea if the record demonstrates “a ‘substantial basis’ in law and fact for questioning the guilty plea.” *Prater*, 32 M.J. at 436.

Appellant asserts his statements made during the providence inquiry and entered via his stipulation of fact were conclusory and insufficient to establish that his conduct created an intimidating, hostile, or offensive work environment. He also contends that neither satisfied either terminal element – that his conduct was both prejudicial to good order and discipline or service-discrediting.

We disagree. The military judge’s inquiry adequately established that not only *could* his conduct have created an intimidating, hostile, or offensive work environment for a fellow soldier, but appellant believed that it actually did.³ With regard to conduct prejudicial to good order and discipline, appellant acknowledged it impacted his victim’s morale and concomitantly her ability to perform her military duty, and furthermore violated a service regulation, the purpose of which was to maintain morale and unit cohesion. *See Manual for Courts-Martial, United States* (2019 ed.), pt. IV, ¶ 91.c.(2)(b) (noting that conduct prejudicial to good order and discipline may result from a “breach of a custom of the Service,” many of which “are now set forth in regulations of the various armed forces.”). Finally, service-discrediting conduct is prospective; it is not necessary to establish that the public was actually aware of appellant’s conduct, only that his conduct “would have tended to bring discredit upon the service had the public known of it.” *United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011) (citation omitted).

Appellant’s statements to the military judge adequately established a factual basis for his belief that he was guilty of each essential element of the offense, and there is no substantial basis in fact or law to question the providence of his plea.

B. The errant announcement of findings

When the government made, and the military judge granted, the motion to dismiss the excepted word “pictures” from Specification 1 of Charge II, “that language ceased to exist before the court-martial.” *Hurd*, 2025 CCA LEXIS 374, at *4-5. Then the military judge announced a general finding of guilt that accounted for neither the excepted nor substituted words. We again remind military judges: a court cannot dismiss excepted language and yet enter a guilty finding for substituted language. Rule for Courts-Martial 918(a)(1)(c) only permits a court to enter a finding of guilty for substituted words or figures if it also enters a finding of not guilty for the excepted words or figures.

³ The military judge’s inquiry probed each separate element of the disjunctive; he inquired how appellant’s conduct was intimidating, offensive, and hostile.

Nonetheless, “[i]t is ‘abundantly clear’ that the appellant, [referral] authority, and both parties intended that the appellant plead to, and be found guilty of, the substituted language” *Hurd*, 2025 CCA LEXIS 374, at *6 (quoting *United States v. Mahnke*, ARMY 20210533, 2022 LEXIS 566, at *7 (Army Ct. Crim. App. 30 Sept. 2022) (summ. disp.)). Thus, appellant suffers no prejudice if, as a matter of judicial economy, we affirm the finding of “guilty by exceptions and substitutions” that is reflected in the Statement of Trial Results and incorporated in the judgment of the court. *See id.*

CONCLUSION

The findings as reflected in the Statement of Trial Results and incorporated in the judgment, are AFFIRMED⁴. The word “pictures,” originally alleged in Specification 1 of Charge II and purportedly dismissed without prejudice pending completion of final appellate review, is DISMISSED WITH PREJUDICE.⁵

The sentence of ten months’ confinement and a bad-conduct discharge is AFFIRMED. The Statement of Trial Results is corrected to remove the indication that the appellant was sentenced to a punitive reprimand. We order restored all rights, privileges, and property of which the appellant may have been deprived by reason of the erroneous issuance of a punitive reprimand.

Senior Judge MORRIS and Judge JUETTEN concur.

FOR THE COURT:


JAMES W. HERRING, JR.
Clerk of Court

⁴The Statement of Trial Results is amended as follows to conform with the original charge sheet: the word “breast” in Specification 1 of Charge I on the Statement of Trial Results is amended to read “breasts,” and the language reflecting the guilty finding of Specification 1 of Charge II is amended to add a semicolon after the word “penis.”

⁵ Had the military judge correctly announced the finding by exceptions and substitutions, he would have found appellant not guilty of this excepted word.

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

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

I. WHETHER SPECIFICATION 1 OF CHARGE II IS LEGALLY SUFFICIENT.

II. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ACCEPTING APPELLANT'S PLEA WHEN THE MILITARY JUDGE SPECIFICALLY STATED THAT APPELLANT'S CONDUCT WAS NEITHER REPETITIVE NOR PERVASIVE, YET DID NOT EXCEPT OUT THESE WORDS WHEN HE ACCEPTED APPELLANT'S PLEA.

III. IN LIGHT OF *UNITED STATES V. MALONE*, WHETHER DEFENSE COUNSEL WERE INEFFECTIVE.

Certificate of Compliance with Rules 24(c) and 37

1. This Supplement to the Petition complies with the type-volume limitation of Rule 24(c) because it contains 3,288 words.
2. This Supplement to the Petition complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Barbosa, Crim. App. Dkt. No. 20240538, USCA Dkt. No. 26-0175/AR was electronically filed with the Court and Government Appellate Division on June 1, 2026.



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