

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

UNITED STATES,
Appellee,

v.

DERRICK E. BRADDY,
Master Sergeant (E-7),
United States Air Force,
Appellant.

Crim. App. Dkt. No. 40810

USCA Dkt. No. 26-0255/AF

SUPPLEMENT TO THE PETITION FOR GRANT OF REVIEW

JOHN M. FREDERICKS, Capt, USAF
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
John.Fredericks.2@us.af.mil
U.S.C.A.A.F. Bar No. 37723

Counsel for Appellant

Filed on August 6, 2026

INDEX

Table of Authorities	ii
Error Assigned for Review	1
Statement of Statutory Jurisdiction.....	1
Statement of the Case.....	2
Statement of Facts.....	3
Reasons to Grant Review.....	7
I. Standard of Review.....	8
II. Under 10 U.S.C. § 920b, the term “indecent conduct” must be interpreted through its statutory context, which establishes it as a catch-all category that excludes communication of indecent language to avoid statutory surplusage.....	8
A. The meaning and scope of “indecent conduct” is neither plain nor unambiguous and requires context to understand.....	9
B. The statute’s context shows indecent language was never meant to be captured by indecent conduct under 10 U.S.C. § 920b(c).....	11
Conclusion	19

Table of Authorities

Cases

<i>Barnhart v. Sigmon Coal Co., Inc.</i> , 534 U.S. 438 (2002).....	9
<i>Nitro-Lift Techs., L.L.C. v. Howard</i> , 568 U.S. 17 (2012).....	12
<i>RadLAX Gateway Hotel, LLC v. Amalgamated Bank</i> , 566 U.S. 639 (2012).....	13
<i>Robinson v. Shell Oil Co.</i> , 519 U.S. 337 (1997).....	9
<i>United States v. Christian</i> , 63 M.J. 205 (C.A.A.F. 2006)	16
<i>United States v. Galvin</i> , 2026 CCA LEXIS 266 (A.F. Ct. Crim. App. June 5, 2026).....	17
<i>United States v. Grostefon</i> , 12 M.J. 431 (C.M.A. 1982).....	1
<i>United States v. Harrington</i> , 83 M.J. 408 (C.A.A.F. 2023)	8
<i>United States v. King</i> , 71 M.J. 50 (C.A.A.F. 2012)	11
<i>United States v. King</i> , 78 M.J. 218 (C.A.A.F. 2019)	8
<i>United States v. Lopez de Victoria</i> , 66 M.J. 67 (C.A.A.F. 2008)	8
<i>United States v. McPherson</i> , 73 M.J. 393 (C.A.A.F. 2014)	8, 9, 11
<i>United States v. Mendoza</i> , 85 M.J. 213 (C.A.A.F. 2025)	7, 8, 12, 16
<i>United States v. Miller</i> , 86 M.J. 188 (C.A.A.F. 2025)	13, 15
<i>United States v. Moore</i> , 86 M.J. 308 (C.A.A.F. 2026)	12
<i>United States v. Robinson</i> , 77 M.J. 294 (C.A.A.F. 2018)	8
<i>United States v. Sager</i> , 76 M.J. 158 (C.A.A.F. 2017)	12, 16
<i>United States v. Suarez</i> , 86 M.J. 65 (C.A.A.F. 2025)	9

Statutes

10 U.S.C. § 866.....	1
10 U.S.C. § 867.....	1
10 U.S.C. § 920.....	2, 11, 13, 14, 15
10 U.S.C. § 920b.....	1, 2, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19
James M. Inhofe NDAA for Fiscal Year 2023, Pub. L. No. 117-263 (2022).....	1
NDAA for Fiscal Year 2012, Pub. L. No. 112-81 (2011).....	13, 14
NDAA for Fiscal Year 2022, Pub. L. No. 117-81 (2021).....	2
Servicemember Quality of Life Improvement and NDAA for Fiscal Year 2025, Pub. L. No. 118-159 (2024).....	7
William M. (Mac) Thornberry NDAA for Fiscal Year 2021, Pub. L. No. 116-283 (2021).....	1

Other Authorities

Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 183 (2012).....	12
<i>Conduct</i> , BLACK’S LAW DICTIONARY (12th ed. 2024).....	10
Eugene Volokh, <i>Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones</i> , 90 Cornell L. Rev. 1277-1348 (2005).....	10

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

UNITED STATES,
Appellee

v.

DERRICK E. BRADDY,
Master Sergeant (E-7),
United States Air Force,
Appellant

**SUPPLEMENT TO THE
PETITION FOR GRANT
OF REVIEW**

Crim. App. Dkt. No. 40810

USCA Dkt. No. 26-0255/AF

Filed August 6, 2026

Error Assigned for Review¹

Whether Congress established separate theories of liability under 10 U.S.C. § 920b for sexual abuse of a child involving indecent conduct and indecent communication, rendering Appellant’s conviction legally insufficient.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d).² This Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2018).

¹ Appellant personally raises six issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). App. B.

² The version of Article 66, UCMJ, as codified in the 2018 edition of United States Code and as amended by the William M. (Mac) Thornberry National Defense Authorization Act [NDAA] for Fiscal Year 2021, Pub. L. No. 116-283, § 542(b), 134 Stat. 3388, 3611 (2021), and the James M. Inhofe NDAA for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395, 2582 (2022), applies in this case. The amendment of Article 66(d)(1), UCMJ, enacted by section 539E of the NDAA for Fiscal

Statement of the Case

On 21 October 2026 and 16-20 December 2025, Appellant was tried by a general court-martial composed of a military judge alone at Scott Air Force Base, Illinois. Trial Tr. 1, 168, 301, 506, 793, 945. Appellant was found guilty, contrary to his pleas, of one charge and three specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b.³ Trial Tr. 300, 945; Entry of J.

The military judge sentenced Appellant to reduction in pay grade to E-1, confinement for sixty months, and a dishonorable discharge. Trial Tr. 985; Entry of J. The convening authority took no action on the findings, deferred the reduction in pay grade until the date the military judge signed the Entry of Judgment, and waived automatic forfeitures for a period of six months, or release from confinement, or

Year 2022, Pub. L. No. 117-81, § 539E, 135 Stat. 1541, 1700 (2021), applies only to cases in which all findings of guilty are for offenses occurring after December 27, 2023. *Id.* at § 539E(f), 135 Stat. at 1706. Hence, that amendment is inapplicable to this case.

³ Appellant was found not guilty, consistent with his pleas, of one specification of sexual abuse of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b, one charge and one specification of service discrediting conduct in violation of Article 134, UCMJ, 10 U.S.C. § 934, and one charge and one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920. Trial Tr. 300, 945; Entry of J. Additionally, one specification of sexual abuse of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b was withdrawn and dismissed without prejudice. Trial Tr. 174; Entry of J.

expiration of term of service, whichever is sooner. Convening Authority Decision on Action.

At the AFCCA, Appellant raised three assignments of error, which the AFCCA consolidated as two issues: “(1) whether the findings of guilty are factually sufficient; and (2) whether Specification 3 of Charge I is legally sufficient,” the second of which is the subject of Appellant’s petition to this Court. App. A at 2; *see* App. A at 18-23 (the AFCCA’s discussion of issue two). The AFCCA found no error and affirmed the findings and sentence. *Id.*

Statement of Facts

Appellant’s convictions arise from accusations made by his niece, EH, relating to two incidents that allegedly happened at Appellant’s home in 2022 when EH was around 12 years old. Trial Tr. 401-21; 443-86. Appellant and JC, Appellant’s sister and EH’s mother, lived near each other and often took care of each other’s children. Trial Tr. 444, 681, 696. The two incidents took place during separate periods when EH stayed at Appellant’s home near Scott AFB. Trial Tr. 696, 699.

According to EH, the first incident took place in Spring 2022 when she was 11 or 12 years old. Trial Tr. 404, 432-33. EH alleged that she fell asleep on Appellant’s couch and woke up with her right arm stretched out to her right, her right palm facing upwards, and her fingers wrapped around what she thought was a penis moving back and forth in her hand. Trial Tr. 408-10. EH did not open her eyes at

any time during this incident. Trial Tr. 410:3-6, 461-62. EH believed the object in her hand was a penis because it felt “[l]ike a bone with like skin on it” or like a “wrist.” Trial Tr. 410:7-10, 466:7-13. EH believed the penis to be Appellant’s because she felt his “calcified, like dry” hands make her fingers curl around his penis and heard his “heavy breathing” during the back and forth movement. Trial Tr. 409-10. EH testified that she fell back asleep while the object was still in her hand. Trial Tr. 412:4-11.

EH testified that the second incident took place a couple of months later when Appellant allegedly made two inappropriate statements during a game of “truth or dare.”⁴ Trial Tr. 412-22, 443-61; Charge Sheet, Jan. 10, 2024 (Charge I, Specifications 3 and 4). In June 2022, EH stayed at Appellant’s home for two weeks. Trial Tr. 444. One evening near the end of her stay, EH asked Appellant if she could try soju, an alcoholic beverage. Trial Tr. 697. Appellant had never provided EH alcohol before but knew he was allowed to under state law and he had an agreement with EH’s mother that he could provide EH alcohol. Trial Tr. 697-99; *see* Trial Tr. 650-51. Appellant, over the course of a couple of hours, periodically went to EH’s room and provided EH with approximately six servings of soju, diluted with ginger ale, and served in a shot glass. Trial Tr. 700-01. Appellant had a breathalyzer at home

⁴ “Truth or Dare” is a popular verbal party game where players must choose between answering a question honestly or performing a task.

and tested EH to ensure she was not intoxicated. Trial Tr. 701-03. Appellant stopped providing EH soju when it read “0.06.” Trial Tr. 702-03.

At approximately 2100, after Appellant had stopped providing EH soju, Appellant checked on his daughter and EH before they went to bed. Trial Tr. 706. During that check-in, EH told Appellant she was bored and that she wanted to play a game. *Id.* EH decided she wanted to play “Truth or Dare.” *Id.* During that game, Appellant dared EH to spin around, stand on her hands, and do a somersault, and EH dared Appellant to spin around in circles. Trial Tr. 419-21, 707. At some point, Appellant dared EH to “[t]ake a pair of your underwear and put them on over your shorts,” to cosplay a cartoon character. Trial Tr. 708, 756. However, EH remembered it differently, and testified that Appellant said, “I dare you to take your underwear off, but you can put your shorts back on.” Trial Tr. 419. EH declined to perform the dare and they moved on with the game. Trial Tr. 419, 709. The Government charged Appellant’s dare as sexual abuse of a child involving indecent *conduct*:

In that [Appellant], did, at or near Scott Air Force Base, Illinois, between on or about 1 June 2022 and on or about 30 June 2022, commit a lewd act upon [EH], a child who had not attained the age of 16 years, by engaging in indecent conduct, to wit: daring [EH] to take her pants and underwear off, intentionally done in the presence of [EH], which conduct amounted to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

Charge Sheet, Jan. 10, 2024 (Charge I, Specification 3).

EH testified that Appellant subsequently asked her to tell a “truth,” specifically, “What is the type of porn you watch?” Trial Tr. 419-20. Appellant denied that he ever asked EH that question during the game of Truth or Dare and explained that he asked her a similar question that evening in a different context. Trial Tr. 710, 757-58. That evening, Appellant and EH were discussing how JC checked EH’s brother’s phone and found pornography on it. Trial Tr. 758. EH ridiculed her brother for it, calling it “weird porn.” *Id.* In response, Appellant said, “Hey, well, what kind of weird porn do you watch?” to teach EH to not criticize others for activities she may also participate in. *Id.* JC also asked EH and her other children questions about their pornography habits. *Id.* The Government charged Appellant’s question to EH as sexual abuse of a child for *communicating indecent language*:

In that [Appellant], did, at or near Scott Air Force Base, Illinois, between on or about 1 June 2022 and on or about 30 June 2022, commit a lewd act upon [EH], a child who had not attained the age of 16 years, by intentionally communicating indecent language to her, to wit: asking what kind of pornography she watches, with an intent to gratify his sexual desires.

Charge Sheet, Jan. 10, 2024 (Charge I, Specification 4).

Reasons to Grant Review

Congress established separate theories of liability under 10 U.S.C. § 920b for sexual abuse of a child involving indecent conduct and indecent communication, rendering Appellant’s conviction legally insufficient.

This case presents an unresolved question regarding the scope and definition of “indecent conduct” within 10 U.S.C. § 920b(c), *Sexual Abuse of a Child*. The AFCCA incorrectly interpreted 10 U.S.C. § 920b,⁵ holding that “‘conduct’ includes verbal acts,” and that “verbal requests” can be properly charged as indecent conduct, rather than communication of indecent language. App. A at 22. The AFCCA’s holding renders 10 U.S.C. § 920b’s definition of indecent language “devoid of significance” and “mere surplusage,” and creates a new legal test for “verbal request,” where none was needed. App. A at 23. The AFCCA’s holding also allows the Government to ignore Congress’ creation of separate theories of criminal liability and charge any communication of indecent language as indecent conduct. *See United States v. Mendoza*, 85 M.J. 213, 218-23 (C.A.A.F. 2025). The AFCCA based its legal sufficiency review on this error. App. A at 18-23. This Court should grant review to clarify the scope and definition of “indecent conduct” within

⁵ Appellant was convicted of violating the version of 10 U.S.C. § 920b in place in 2022, which defined “lewd act” in subsection (h). 10 U.S.C. § 920b(h) (2018). Since then, the definition of “lewd act” has not changed, but it is now located in subsection (g). 10 U.S.C. § 920b(g). *See* Servicemember Quality of Life Improvement and NDAA for Fiscal Year 2025, Pub. L. No. 118-159, 138 Stat. 1904 (2024) (codified at 10 U.S.C. § 920b).

10 U.S.C. § 920b(c) and remand this case to the AFCCA to apply correct legal principles to its legal sufficiency review.

I. Standard of Review

This Court reviews “the legal sufficiency of convictions de novo.” *United States v. Harrington*, 83 M.J. 408, 414 (C.A.A.F. 2023) (citing *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019)). “A conviction is legally sufficient if, ‘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.’” *Id.* (quoting *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018)).

II. Under 10 U.S.C. § 920b, the term “indecent conduct” must be interpreted through its statutory context, which establishes it as a catch-all category that excludes communication of indecent language to avoid statutory surplusage.

Whether 10 U.S.C. § 920b establishes separate and distinct theories of criminal liability is a matter of statutory interpretation. *Mendoza*, 85 M.J. at 218. “This Court reviews questions of statutory interpretation de novo.” *Id.* (citing *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008)). “The first step in statutory interpretation cases ‘is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.’” *Id.* (quoting *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014)). “[I]f the statutory language is unambiguous and the statutory scheme is coherent

and consistent,” the inquiry is done. *McPherson*, 73 M.J. at 395 (quoting *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002)). “Whether the statutory language is ambiguous is determined ‘by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.’” *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

10 U.S.C. § 920b creates four separate theories of criminal liability for sexual abuse of a child. 10 U.S.C. § 920b(c) (2018). The AFCCA incorrectly interpreted the statute to allow certain forms of communication of indecent language to be prosecuted as indecent conduct. Because the AFCCA relied on an incorrect interpretation of the law when conducting its legal sufficiency analysis, the AFCCA’s decision should be reversed and the case remanded. *See United States v. Suarez*, 86 M.J. 65, 74 (C.A.A.F. 2025).

A. The meaning and scope of “indecent conduct” is neither plain nor unambiguous and requires context to understand.

10 U.S.C. § 920b criminalizes, in part, sexual abuse of a child. 10 U.S.C. § 920b(c) (2018). The statute states: “Any person subject to this chapter who commits a lewd act upon a child is guilty of sexual abuse of a child and shall be punished as a court-martial may direct.” *Id.* Congress defined the four types of “lewd acts” in the statute:

(5) Lewd act.-The term “lewd act” means-

(A) any sexual contact with a child;

(B) intentionally exposing one’s genitalia, anus, buttocks, or female areola or nipple to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person;

(C) *intentionally communicating indecent language* to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; *or*

(D) *any indecent conduct*, intentionally done with or in the presence of a child, including via any communication technology, that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

10 U.S.C. § 920b(h)(5) (2018) (emphasis added); *see* 10 U.S.C. § 920b(g)(5) (same definitions).

As the AFCCA pointed out, “The common understanding of ‘conduct’ includes verbal acts.” App. A at 22 (citing *Conduct*, BLACK’S LAW DICTIONARY (12th ed. 2024) (defining “conduct” as “[p]ersonal behavior, whether by action or inaction, *verbal* or nonverbal; the manner in which a person behaves; collectively, a person’s deeds” (emphasis added))). However, debate on the difference between verbal acts (i.e., speech) and conduct in legal understanding has spanned decades and remains unresolved. *See* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 Cornell L. Rev. 1277-1348 (2005). Even this Court has left it

an open, ambiguous question, holding that “‘language’ *can* be, or be part of, ‘conduct’ in a particular case.” *United States v. King*, 71 M.J. 50, 52-53 (C.A.A.F. 2012) (emphasis added) (finding it “unnecessary to address” whether language is part of conduct for the purposes of Article 120(k), UCMJ, 10 U.S.C. § 920(k)). Because of the longstanding debates on what the word “conduct” encompasses and the unanswered question of whether there is overlap between “conduct” and “language” for the purposes of sexual abuse of a child, the meaning and scope of “indecent conduct” is neither plain nor ambiguous.

Therefore, more than the plain text is required to answer this question. “[T]he specific context in which that language is used, and the broader context of the statute as a whole” are required and demonstrate that for 10 U.S.C. § 920b(c), conduct does not include language. *McPherson*, 73 M.J. at 395.

B. The statute’s context shows indecent language was never meant to be captured by indecent conduct under 10 U.S.C. § 920b(c).

Context shows that Congress provided four different theories of criminal liability for sexual abuse of a child, without an overlap between them. *See* 10 U.S.C. § 920b(c). As discussed below, multiple canons of statutory construction show that “any indecent conduct” is a catch-all for lewd acts not otherwise captured in 10 U.S.C. § 920b(h)(5)(A)-(C). Therefore, the AFCCA erred in its interpretation of the law, and incorrectly performed its legal sufficiency review.

1. 10 U.S.C. § 920b(h)(5)’s disjunctive “or” provides four separate theories of criminal liability.

“Congress’s use of the disjunctive ‘or’ and applying the ‘ordinary meaning’ canon of statutory construction . . . reflect[s] separate theories of liability.” *Mendoza*, 85 M.J. at 219 (citing *United States v. Sager*, 76 M.J. 158, 161-62 (C.A.A.F. 2017)). That disjunctive “or” is present here: “The term ‘lewd act’ means . . . (C) intentionally communicating indecent language . . . *or* (D) any indecent conduct.” 10 U.S.C. § 920b(h)(5) (2018) (emphasis added). Therefore, “intentionally communicating indecent language” and “indecent conduct” are “separate theories of liability.” *Mendoza*, 85 M.J. at 219. Separate theories of criminal liability exist to criminalize separate criminal actions. *See, e.g., United States v. Moore*, 86 M.J. 308, 312 (C.A.A.F. 2026) (explaining the multiple and separate theories of criminal liability for sexual assault). The disjunctive “or” helps explain that the different paragraphs under 10 U.S.C. § 920b(h)(5) capture different criminal conduct.

2. Congress’ delineation of three specific forms of sexual abuse of a child implies that 10 U.S.C. § 920b(h)(5)(D)’s “any indecent conduct” is meant to be a catch-all.

Generalia specialibus non derogant is the “ancient interpretive principle that the specific governs the general” and applies “to conflict between laws of equivalent dignity.” *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 21 (2012); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183 (2012) (discussing *generalia specialibus non derogant*). “[T]his canon is

particularly true when there is a comprehensive statutory scheme and the drafters have purposely addressed specific concerns with specific solutions.” *United States v. Miller*, 86 M.J. 188, 195 (C.A.A.F. 2025) (citing *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012)).

10 U.S.C. § 920b identifies three specific lewd acts, followed by a general lewd act, “any indecent conduct.” By identifying three specific acts, Congress addressed specific concerns about the prevalence of child abuse. The order in which Congress listed the lewd acts in is informative: sexual contact, intentional exposure, intentional communication of indecent language, and then “any indecent conduct.” 10 U.S.C. § 920b(h)(5) (2018). The first three acts identify specific forms of sexual abuse of a child, identifying specific *actus rei*. The general act, listed last in the statute, does not identify a specific *actus reus* nor an intent requirement, and appears to serve as a catch-all to encompass any other indecent conduct that could harm children that does not fall within one of the three proscribed acts in subsections (h)(5)(A)-(C).

Congress’ intent to specify lewd acts can be interpreted from the legislative history of 10 U.S.C. § 920b. Congress enacted this statute on 31 December 2011, creating a separate statute for sexual crimes involving children. NDAA for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1407-09 (2011) (codified at 10 U.S.C. § 920b). Before Congress created 10 U.S.C. § 920b, 10 U.S.C. § 920, *Rape, sexual*

assault, and other sexual misconduct, captured all military sexual crimes, including those against children. *See* 10 U.S.C. §§ 920(b) (Rape of a child), 920(d) (Aggravated sexual assault of a child), 920(f) (Aggravated sexual abuse of a child), 920(g) (Aggravated sexual contact with a child), 920(i) (Abusive sexual contact with a child), 920(j) (Indecent liberty with a child) (2006). It also included a subsection for a criminal “indecent act,” which was without reference to a victim or age of a victim. *Id.* at § 920(k).

In the 2012 NDAA, Congress removed all child sex crimes from 10 U.S.C. § 920 and moved them to 10 U.S.C. § 920b, *Rape and sexual assault of a child*. NDAA for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1407-09 (2011) (codified at 10 U.S.C. § 920b). Importantly, the definition for “lewd act” significantly changed in the move. In the 2008 version, “lewd act” only encompassed what is now referred to as “sexual contact.” *Compare* 10 U.S.C. § 920(t)(10) (2006) (defining “lewd act” as “intentional touching” or “intentionally causing another person to touch”), *with* 10 U.S.C. § 920b(h)(5)(1) (2018) (listing “sexual contact” as one type of “lewd act”). Additionally, the updated definition of “lewd act” encompasses what was previously called “indecent liberty,” which included indecent exposure and “communication of indecent language.” *Compare* 10 U.S.C. § 920(t)(11) (2006) (defining “indecent liberty” as indecent exposure or indecent communication),

with 10 U.S.C. § 920b(h)(5)(B)-(C) (2018) (adding indecent exposure and communication of indecent language as two separate subcategories included in the definition of a “lewd act”). Lastly, Congress added “indecent conduct” with a qualifier that it be “done with or in the presence of a child” at the end of the definitions of “lewd act.” *Compare* 10 U.S.C. § 920(k) (2006) (criminalizing “[i]ndecent act[s]”), *with* 10 U.S.C. § 920b(h)(5)(D) (2018) (defining “lewd act” to include indecent conduct with children).

Congress had an opportunity in the 2012 NDAA, and in years since, to expand the definition of “indecent conduct” to include indecent speech, language, or communication, yet it declined to do so. Instead, it specified that communication of indecent language is a separate crime, separately codified under 10 U.S.C. § 920b(h)(5)(C).

Congress created a “comprehensive statutory scheme” and “purposely addressed specific concerns with specific solutions.” *Miller*, 86 M.J. at 195. The specific concerns were sexual contact, indecent exposure, and communication of indecent language—that is why Congress gave those crimes specific theories of criminal liability. However, Congress understood that not all lewd acts with children would be captured within those three theories, so it created a catch-all provision, “any indecent conduct.” The specific governs the general, and any conduct falling into

those three categories is to the exclusion of others. Indecent conduct does not include the communication of indecent language.

3. The AFCCA’s holding renders “communicating indecent language” surplusage.

For questions of statutory interpretation, the Court “typically seeks to harmonize independent provisions of a statute.” *United States v. Christian*, 63 M.J. 205, 208 (C.A.A.F. 2006). To achieve that goal, “this Court employs the surplusage canon, which requires ‘that, if possible, every word and every provision is to be given effect and that no word should be ignored or needlessly be given an interpretation that causes it to duplicate another provision or to have no consequences.’” *Mendoza*, 85 M.J. at 218 (quoting *Sager*, 76 M.J. at 161).

The AFCCA’s interpretation of 10 U.S.C. § 920b ignores other words and needlessly gives an “interpretation that causes it to duplicate another provision or to have no consequences.” *Id.* By finding that Appellant’s “dare” constituted conduct, the AFCCA has now allowed all indecent language to be prosecuted as indecent conduct, contrary to Congress’ intent and the context of the statute. App. A at 23. The AFCCA attempted to draw a line, holding, “While ‘language’ can be, or be part of, ‘conduct’ in a particular case, not all language itself is conduct. For example, language communicating a desire, thought, or an observation is unlikely to be conduct.” App. A at 23 (citation modified). The AFCCA applied this holding to the facts here:

The specification does not merely charge language, but instead charges the “dare,” *which is the verbal act of a challenge*. In making the “dare,” Appellant was not merely communicating language *but rather was actively engaging in “conduct” by making a verbal request* to EH to take her shorts and underwear off. In other words, the gravamen of the offense is the act of the verbal request itself (*daring* EH to take off her pants and underwear), not the indecency of the language (pants and underwear). Appellant completed his “conduct” by making the verbal request itself.

App. A at 22-23 (emphasis added). But “[j]ust because you paint a zebra black and call it a pony does not mean that you are then feeding hay to a pony.” *United States v. Galvin*, 2026 CCA LEXIS 266, at *24 (A.F. Ct. Crim. App. June 5, 2026).

First, the AFCCA’s holding that “the gravamen of the offense is the act of the verbal request itself (*daring* EH to take off her pants and underwear), not the indecency of the language (pants and underwear)” does not make sense. App. A at 23. Surely the gravamen of the offense is the fact that the entirety of the statement was communicated to a child. For example, if Appellant had instead allegedly stated, “[T]ake your underwear off, but you can put your shorts back on,” the “I dare you to” (i.e. the “request”) is removed, making it more akin to a “command.” But the gravamen of the offense remains: an adult communicated indecent language to a child. The dare makes no difference.

Secondly, the AFCCA’s holding creates an illusory and ambiguous rule, contrary to Congress’ intent. The focus on “the verbal act of a challenge” being a dividing line between language and conduct is untenable, especially in light of the

AFCCA’s other holding that “language communicating a desire, thought, or an observation is unlikely to be conduct.” App. A at 22-23. If Appellant had instead allegedly said, “I [desire] you to take your underwear off, but you can put your shorts back on,” then under the AFCCA’s holding, the language is unlikely to be conduct. Trial Tr. 419. Likewise, if Appellant had said, “I think you should” or “it would be fun if” EH performed the action, under the AFCCA’s holding, the language is unlikely to be conduct. The line in the sand that “making a verbal request” does not constitute conduct conflicts with the AFCCA’s own holding about exceptions to their own rule. App. A at 23.

Even if the AFCCA’s holding contemplates evaluating those slight alterations in the communication of language as conduct (i.e., “I desire,” “I think you should,” or “it would be fun if”), it still added another legal test where none is needed. The holding now asks courts to evaluate whether indecent language is inviting a challenge or not. Congress already captured Appellant’s alleged misconduct in 10 U.S.C. § 920b(h)(5)(C); there is no need to create a grey area in the law when Congress has already painted it black and white.

Creating this additional grey area effectively renders 10 U.S.C. § 920b(h)(5)(C) surplusage, allowing prosecutors to charge indecent language as indecent conduct, thereby reducing their burden to achieve the same sentencing

landscape. Significantly, 10 U.S.C. § 920b requires communication of indecent language to be done “with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person.” 10 U.S.C. § 920b(h)(5)(C) (2018). “[I]ndecent conduct” does not require such proof of intent. *Id.* § 920b(h)(5)(D). The AFCCA’s holding will encourage prosecutors to lessen their burden at trial and instead charge any communication of indecent language as indecent conduct, contrary to Congress’ intent. The AFCCA’s holding “render[s] subsection (h)(5)(C) of 10 U.S.C. § 920b (indecent language) surplusage,” which is error. App. A at 23.

Conclusion

The AFCCA made a new rule where none was needed and one that is contrary to the statute’s meaning. The AFCCA used this erroneous view of the law to conduct its legal sufficiency review, which itself was error. Therefore, this Court should grant review to clarify the scope and definition of “indecent conduct” within 10 U.S.C. § 920b(c) and remand this case to the AFCCA to apply correct legal principles to its legal sufficiency review.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'J. Fredericks', with a long horizontal line extending to the right.

JOHN M. FREDERICKS, Capt, USAF
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
John.Fredericks.2@us.af.mil
U.S.C.A.A.F. Bar No. 37723

Counsel for Appellant

APPENDIX A

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

No. ACM 40810

UNITED STATES

Appellee

v.

Derrick E. BRADDY

Master Sergeant (E-7), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 5 June 2026

Military Judge: Thomas A. Smith;¹ Willie J. Babor.

Sentence: Sentence adjudged 20 December 2024 by GCM convened at Scott Air Force Base, Illinois. Sentence entered by military judge on 16 January 2025: Dishonorable discharge, confinement for 60 months, and reduction to E-1.

For Appellant: Captain John M. Fredericks, USAF (on brief); Brad Simon, Esquire (on brief); Major Trevor N. Ward, USAF; Scott R. Hockenberry, Esquire.

For Appellee: Colonel G. Matt Osborn, USAF (on brief); Colonel Matthew D. Talcott (on brief); Mary Ellen Payne, Esquire (on brief); Major Vanessa Bairos, USAF; Major Heather R. Bezold, USAF; Major Jocelyn Q. Wright, USAF.

Before GRUEN, MENDELSON, and KUBLER, *Appellate Military Judges*.

Judge MENDELSON delivered the opinion of the court, in which Senior Judge GRUEN and Judge KUBLER joined.

¹ Hearing concerning applications for prereferral warrants pursuant to Article 30a, Uniform Code of Military Justice, 10 U.S.C. § 830a.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

MENDELSON, Judge:

A general court-martial consisting of a military judge convicted Appellant, contrary to his pleas, of three specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b.^{2,3} The military judge sentenced Appellant to a dishonorable discharge, confinement for 60 months, and reduction to the paygrade of E-1. The convening authority took no action on the findings or sentence.

Appellant raises three issues on appeal, which we consolidate and restate as two issues: (1) whether the findings of guilty are factually sufficient; and (2) whether Specification 3 of Charge I is legally sufficient. We find no error and affirm.

I. BACKGROUND

A. Convicted Offenses Involving EH (Appellant's Niece)

Appellant's niece, EH, is the victim of Appellant's convicted offenses of sexual abuse of a child. At the time of the offenses, EH was 11 or 12 years old.

While Appellant was stationed at Scott Air Force Base, Illinois, he would frequently see family members, including EH, who resided at the family farm in Piedmont, Missouri, about two-and-a-half hours away. Appellant and his sister JC—EH's mother—would frequently watch each other's children, and the children would spend time at each other's homes. Appellant was considered the “fun uncle” and was particularly close with EH. The other children in the family would tease EH that she was Appellant's “favorite.”

² Unless otherwise noted, references in this opinion to the UCMJ, Rules for Courts-Martial, and Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

³ One specification of Article 120b, UCMJ, was withdrawn and dismissed without prejudice. Appellant was found not guilty of one specification of touching the buttocks of a child, EH, under the age of 16 years with his hand in violation of Article 120b, UCMJ; one specification of unlawfully giving alcohol to a child, EH, under the age of 18 years in violation of Article 134, UCMJ, 10 U.S.C. § 934; and one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920, involving a different charged victim.

At trial, EH testified about two separate incidents that happened while staying at Appellant's home.

1. First Incident (Specification 1 of Charge I)

The first incident occurred one night in the spring of 2022, when EH was either 11 or 12 years old. On that night, while EH and Appellant were watching a movie, Appellant gave EH different sleep aids so that she would go to bed—first a Melatonin pill, then a Melatonin gummy, and then NyQuil—as he normally would when EH stayed at his house. EH felt “[d]rowsy, really sleepy,” and fell asleep on the couch after finishing the movie. The next thing EH remembered was waking up with Appellant's penis in her outstretched hand “moving back and forth.” At trial, EH described the feeling of Appellant's penis in her hand “[l]ike a bone with like skin on it.” EH tried “not to hold [her] hand in the position that he would put it in” but when her “fingers would fall . . . he would fix [her] fingers” to curl them back together. EH “fluttered [her] eyes” but did not open her eyes because she was “scared . . . [she] was going to get in trouble and [she] didn't know what to do.” EH, however, knew it was Appellant because “[h]is hands were like calcified, like dry and he was doing his like usual breathing after he was like done playing the game or like during playing the game because he screams, or when he drinks.” The “heavy breathing” did not sound like anyone else and the only other people in the home that night were EH's 13-year-old brother, her 10-year-old male cousin (Appellant's son), and her 14-year-old female cousin (Appellant's daughter). EH did not “say anything” to Appellant because she was “scared” and “figured if [she] would've said something, he would've got mad and then . . . tell [her] mom that [she] did something.” EH also did not initially tell anyone what had happened because they “wouldn't have believed [her].” This incident formed the basis for the charge of sexual abuse of a child under the age of 16 years of age “by causing [EH] to touch his penis with her hand, with an intent to gratify his sexual desires” (Specification 1 of Charge I).

After this first incident, EH did not want to go back to Appellant's house but “was scared to tell [Appellant] why [she] didn't want to go up there.” EH's mother, JC, testified that she noticed a change in EH's behavior during this timeframe, in that EH no longer wanted to go to Appellant's house and EH “seemed a little reclused.” Appellant and EH did, however, exchange numerous text messages following the first incident. Appellant repeatedly urged EH to “go up” to his house. EH repeatedly responded that she did not want to go to Appellant's house, telling him at various points in the text message conversation: “I don't think I want to be going up there as much,” “I just don't want to go up there,” “I haven't been wanting to go up there for a little while,” “What if I just don't want to go up there anymore,” and “I don't want to talk tomorrow or ever.” Appellant repeatedly probed EH asking why she did not want to come

to his house. After EH avoided answering by saying she did not know why, Appellant messaged that “[n]othing will change about how I feel towards you.” Appellant elaborated by messaging: “I can’t say you are a favorite. But I do see your struggles and I try to show you that you are loved and you are pretty and you do matter.” At a later point, Appellant again texted to EH, “I love you, you are pretty, and you need to know both, I only try to put you first sometimes because you feel you are last a lot of times.”

2. Second Incident (Specifications 3 and 4 of Charge I)

The second incident happened when EH did eventually go back to Appellant’s house during the end of June 2022. On that day, EH was playing on her virtual reality headset when Appellant approached her with a glass of soju.⁴ EH recalled that it tasted “[l]ike rubbing alcohol” and “it burnt [her] entire mouth.” After drinking the soju from the glass slowly, Appellant asked EH if it would be “easier” if she took a shot. After EH agreed it would be easier, Appellant poured shot glasses and told EH to get off of her virtual reality headset so that it could “just be him and [EH].” Over the course of the next hour-and-a-half to two hours, EH recalled that Appellant poured her anywhere from 6 to 15 shots. EH felt dizzy to the point that she would not have been able to play on her virtual reality headset if she had tried. At one point, Appellant brought out a breathalyzer to test EH. The second time EH used the breathalyzer, Appellant told EH she was at “.06.” At that point, Appellant put away the shot glasses and then asked EH to play a game of “truth or dare.” At first the game “was pretty normal.” But then the game started to make EH uncomfortable. The first time EH felt uncomfortable was when she chose a “dare” and Appellant dared her “to take off your underwear but you can put your shorts back on when you’re done taking them off.” EH refused to do the dare. Appellant responded, “Oh, okay,” with “a deep sigh, breath in, breath out,” and appeared disappointed. On Appellant’s next turn, he chose a “dare” and EH dared Appellant to spin around in a circle, which he did. Then on EH’s next turn, she chose “truth” and Appellant asked, “What is the type of porn you watch?” EH refused to answer. After that, the game “was just back to normal Truth or Dare.” Appellant’s “dare” and “truth” formed the basis for the charges of sexual abuse of a child under the age of 16 years of age “by daring [EH] to take off her pants and underwear” (Specification 3 of Charge I) and by “intentionally communicating indecent language” to EH by asking her about pornography (Specification 4 of Charge I).

After playing one more round of “truth or dare,” EH asked for a glass of water. Appellant left the room to get the glass of water, but EH fell asleep in

⁴ Appellant testified that he purchased the soju from a Korean restaurant and explained that soju is a wine with 13% alcohol content.

bed before he ever returned. When she fell asleep, EH was wearing a sports bra, underwear, shorts, and a sleep shirt with a koala on it. She woke up the next morning in entirely different clothes—a different sports bra, pair of underwear, shorts, and shirt—but had no recollection of ever changing clothes. The different shorts and shirt that EH woke up in previously belonged to Appellant’s deceased wife. That morning, EH told her female cousin that she was “kind of weirded out because . . . I went to sleep in such and such clothes, and I woke up in those clothes.” EH did not, however, tell her cousin about the events of the night before.

3. EH’s Disclosures

EH did not immediately disclose what Appellant had done. She first made a partial disclosure in August 2022, when she told her mother, JC, that Appellant gave her alcohol to drink. EH told JC about the drinking because she “thought [she] did something wrong for agreeing to drink.” JC immediately became angry and upset. EH testified at trial that, during this initial conversation with her mother, she did not tell her mother about any sexually inappropriate behavior. JC reapproached EH later the same day to ask for more details about the drinking. During that second conversation with her mother, EH provided additional details about the “truth or dare” game, including the “dare” to take off her underwear and the “truth” question about pornography.

After EH made the initial disclosure about drinking alcohol and the “truth or dare” game, JC confronted Appellant. Appellant admitted to JC that he did provide alcohol to EH and explained that he breathalyzed EH to “make sure that she wasn’t drunk.” Appellant also admitted that he did play “truth or dare” with EH, but insisted that “nothing sexual happened.” When JC asked why EH woke up in different clothes, Appellant said it was possible EH “could’ve taken a bath or possibly thrown up on herself.”

EH’s testimony at trial did not pinpoint exactly when she initially disclosed the first incident that occurred in the spring of 2022 (when she woke up on the couch to Appellant’s penis in her hand). EH testified that “one of the first times” she told anyone in detail about the night of the first incident was in September 2022, when she typed a note on a tablet for her stepmother, CH (her biological father’s wife), to read. The note reads:

Things I don’t want to speak of but need y’all to no?

[Appellant] got me drunk [redacted text] the next day I was in different clothes like every thing wasn’t the same my underwear and bra I took like 12 shots on I couldn’t move with out falling over it was like 11pm to i think 1am he asked me if I wanted to play truth or dare and I said I guess and one of the dare’s was me to take my underwear off and and truth was what kind of

porn/pron I watch and one time he picked me up and held me in he's arms and then smack my [peach emoji][⁵] bc I was laughing at my phone and I don't know if it's a dream but he picked up my hand and put he's [eggplant emoji][⁶] in it and was putting it in and out of my hand but it felt like it was real like I felt it in my hand [redacted text].⁷

(Redacted texts in original).

During her trial testimony, EH explained that she wrote the note on the tablet because it was difficult to talk about and she wanted her stepmother to show the note to her father. EH's stepmother, CH, also testified at trial about the note EH typed on the tablet. CH explained that prior to the note, she kept asking EH if she was alright because EH was "acting a little weird" on their family vacation. Eventually, EH told CH that there was something she needed to talk about without her father around, and she wrote down "what happened" as a note on the tablet. Once EH told CH about what happened with Appellant, CH messaged JC, who told CH that "she already knew."

In November 2022, EH underwent a Child Forensic Interview (CFI). During the CFI, EH initially said she was not sure whether the first incident—when she woke up on the couch with Appellant's penis in her hand—was a vivid dream. At trial, EH was confronted with her prior statement:

[Senior Defense Counsel (SDC)]. Now thinking back to 2022, when you reported this incident, specifically the penis in the hand incident, you would agree with me that it's completely possible that this could've just been a vivid dream, correct?

[EH]. No.

....

[SDC]. And so, is it your testimony today that this was not a dream?

[EH]. This was -- that was not a dream.

[SDC]. But isn't it true that when you conducted your Child Forensic Interview, in November of 2022, you said that you weren't sure if it was a vivid dream or not?

....

⁵ EH testified that she meant the peach emoji to represent a "[b]utt."

⁶ EH testified that she meant the eggplant emoji to represent a "[p]enis."

⁷ Unless otherwise noted, the note is copied verbatim from Prosecution Exhibit 5.

[EH]. Yes, because me and him had I thought the perfect relationship other than those two incidents But I was hoping that it was a dream.

[SDC]. Okay. And so -- so --

[EH]. -- And it wasn't. It wasn't. I've never had a dream like that.

EH also acknowledged that three years before the first incident occurred with Appellant, "[she] had previously had this happen to [her] by [her] cousin."⁸

B. Uncharged Offenses of Child Molestation of Other Family Members

At trial, the Government presented evidence that Appellant committed other uncharged offenses of child molestation of other family members, pursuant to Mil. R. Evid. 414 and 404(b).⁹

1. SA (Appellant's Stepsister)

Appellant's stepsister, SA, testified about an incident that occurred in 2004, when she was 12 years old, while Appellant was home on leave. SA fell asleep on the couch and woke up to Appellant kneeling down next to her with her "arm stretched out, and his penis was in [her] hand." SA testified she was positive it was Appellant because she opened her eyes and saw him and his penis in her hand. SA pulled her arm in to "avoid it, and tried rolling over to just go back to sleep." She dozed off, but Appellant kept waking her up. At some point, SA told Appellant she did not feel well, and Appellant brought her NyQuil pills to take. SA tried to avoid Appellant by going into her bedroom, but discovered Appellant sitting on her bed. Appellant eventually left her bedroom, and SA was able to shut and lock her bedroom door.

SA did not initially tell anyone what happened with Appellant because she was "afraid that nobody would believe [her]." She testified that she did not confront Appellant, "[o]ut of fear of what would happen." The first time SA told anyone was about 5 years later, when she was 17 years old, when she first told her daughter's father. Other than possibly telling her best friend, SA did not tell anyone else until September 2022, when JC messaged asking to talk. JC asked SA whether "anything weird had ever happened when [SA] was younger," and SA disclosed what had happened with Appellant. At the time of this conversation, SA was not aware of any allegations against Appellant.

⁸ This cousin was not one of the other children present at the home during the first incident.

⁹ On appeal, Appellant does not challenge the admissibility of this evidence.

2. HB (Appellant's Daughter)¹⁰

HB is one of Appellant's daughters.¹¹ HB testified about an incident that occurred in 2008, when she was 7 years old, where Appellant took HB and her two brothers to a swimming hole at a creek. After a couple of hours of swimming, Appellant told HB and her brothers that it was time to take a nap. Appellant told HB that she had to nap in the front seat of his pickup truck, while HB's brothers napped in the back seat. HB fell asleep and woke up to Appellant's hand between her legs and touching her under her underwear, with his "fingers penetrating [her]." HB was scared and confused. Once Appellant realized she was awake, he "quickly jumped" and "said that he needed to go pee." After this incident, HB's mother took her to seek medical care and the doctors "determined that something had happened," but for reasons HB cannot remember there were no "court proceedings."

C. Knowledge of the Other Family Members' Allegations

In September 2022, after EH made her initial disclosure about Appellant giving her alcohol and the "truth or dare" game, JC (Appellant's sister/EH's mother) messaged SA to ask if "anything weird had ever happened when [SA] was younger." JC and SA then had a conversation in person during which SA disclosed what Appellant did to her. During her conversation with SA, JC did not bring up "specifics" of what EH had disclosed. JC testified that she never discussed with EH what SA disclosed, but she did share the information with several other family members. JC also testified that, after her conversation with SA, she eventually became "aware of additional sexual misconduct involving [EH] and [Appellant]."

At the time EH initially disclosed to JC that Appellant gave her alcohol, JC was already aware that HB had made allegations of sexual assault against Appellant, but thought that the investigation had been closed. EH also became aware of HB's allegations, although the exact timing is unclear. EH initially testified that she was unsure whether she spoke with HB before EH had her CFI. Later in her testimony, however, EH acknowledged that at the time of her CFI, she was aware of the details of HB's allegations against Appellant.

¹⁰ This section discusses HB's testimony about an uncharged incident that occurred when she was 7 years old that was admitted at trial under Mil. R. Evid. 414 and 404(b). HB also testified about a separate incident that occurred when she was 17 years old that formed the basis of the specification for sexual assault in violation of Article 120, UCMJ, *see* n.3 *supra*, for which Appellant was found not guilty.

¹¹ HB is not the same daughter who was present at Appellant's home at the time of EH's first incident in the springtime of 2022.

EH also acknowledged that since her disclosure she spoke with HB “once or twice” and HB gave her “support and encouragement to report [Appellant].”

D. Appellant’s Testimony

Appellant testified at trial, denying that anything of a sexual nature ever happened with EH, denying ever placing his penis in SA’s hand, and denying ever sexually assaulting his daughter HB.

1. Convicted Offenses Involving EH

Appellant testified that, prior to EH’s allegations, the family—including “the kids”—were aware that Appellant was under investigation for allegations made by his daughter HB. Despite the family’s knowledge of the investigation relating to HB, JC’s children still regularly stayed at Appellant’s house. Appellant and EH had a “good relationship,” but Appellant denied that EH was his favorite. He did, however, acknowledge that the other children perceived that he favored EH, and that JC expressed concerns to Appellant about the perceived favoritism because the other children teased EH about it.

Appellant and EH would exchange messages on Facebook Messenger¹² daily or every other day, which was usually initiated by EH. When asked about messages he exchanged with EH, in which he told her “[n]othing will change about how I feel towards you” and “I try to show you that you are loved and you are pretty and you do matter,” Appellant explained that telling EH she was pretty was not “sexual” but was in response to her brother always calling her names.

With respect to the first incident EH testified to—when she woke up on the couch to Appellant’s penis in her hand—Appellant testified there was no truth to the allegation, that when he first learned of the allegation he had no idea what she was talking about, and that there has never been a time that he sexually abused EH. Appellant did admit that he frequently gave “the kids” sleeping aids such as melatonin pills or melatonin gummies.

With respect to the second incident EH testified to—when Appellant gave her alcohol and they played “truth or dare”—Appellant corroborated many of the events of that night but with materially different details. Appellant testified that EH asked to try soju. According to Appellant, he and JC had an agreement that the children could drink alcohol in “limited amounts.”¹³ Appellant estimated that he provided EH in total about half a cup of “straight or pure”

¹² Appellant explained that the farm did not have cell phone service, and Facebook Messenger was a simple application to use on a wireless network.

¹³ In the Government’s rebuttal case, JC testified that she never had an agreement with Appellant that EH was allowed to drink alcohol.

soju, but diluted it with ginger ale and provided it to her in about six shot glasses over about an hour-and-a-half to two hours.¹⁴ To ensure that EH did not become “intoxicated,” Appellant used a breathalyzer on EH two or three times. The highest reading Appellant observed on the breathalyzer was “.06.” At that point, Appellant told EH she was done drinking because “that was too close to being 0.08, the legal limit.” Appellant testified that he did not ever observe signs of intoxication from EH.

After Appellant “cut [EH] off from drinking,” EH went back to playing on her virtual reality headset “for a little bit,” watched television, and hung out. When Appellant later checked on EH, she complained that she was “bored” and wanted to play the game *Cards Against Humanity*.¹⁵ Appellant told EH it would be boring to play *Cards Against Humanity* with only two people, and then EH said she wanted to play a game of “truth or dare.”

When asked about EH’s testimony that he “dared” her to remove her shorts and underwear and put back on her shorts with no underwear, Appellant denied that the dare had anything to do with “taking off underwear.” Instead, Appellant testified he dared EH to “[t]ake a pair of [her] underwear and put them on over [her] shorts.” Appellant explained that EH was into “cosplay” and he “was trying to be supportive of her hobbies.” He elaborated that he “thought it would be cute . . . [like] the Superman look, inside out . . . [or like] SpongeBob had one of those where he did an inside out day.” Appellant denied that he was trying to arouse his sexual desires and instead maintained “[i]t was just supportive fun, like ha ha.” Appellant did, however, admit that in daring EH to put a pair of her underwear over her shorts he “didn’t clarify that it wasn’t the pair that she was wearing.” Appellant testified that EH said she did not want to do the dare.

When asked about the “truth” EH testified to—where Appellant asked her what type of pornography she watches—Appellant denied asking that as a “truth” during the game, but did admit to asking that question in a different context. Appellant explained that they were discussing that EH’s brother and male cousin had been “caught” with pornography and EH was “making fun of

¹⁴ Although Appellant admitted to giving alcohol to EH, the military judge found him not guilty of the Article 134, UCMJ, offense of unlawfully giving alcohol to a child under 18 years. The military judge took judicial notice of an Illinois criminal statute that the Defense argued allowed persons standing in *loco parentis* to provide alcohol to a person under 21 years of age in the privacy of a home.

¹⁵ Appellant testified that *Cards Against Humanity* is a game that discusses topics such as ejaculation, penises, vaginas, and rape. However, Appellant did not consider the game to be a “sexual game” and said that the family often played the game together.

them for having some sort of weird porn.” Appellant’s response was to ask EH, “well, what kind of weird porn do you watch,” as a way to teach her “don’t throw stones, like, don’t make fun of them whenever, you know, you do the same thing.” Appellant testified, “There was nothing sexual or gratifying about that.”

2. Uncharged Offenses Involving SA and HB

Appellant recalls the night SA, his stepsister, testified about the sexual abuse incident, but denies ever putting his penis in SA’s hand while she was sleeping on the couch or ever making “sexual” contact with SA. According to Appellant, SA was on the couch and he was talking to her “about the complete dysfunction of the family.” While he was talking to SA, she stretched out on the couch and kicked Appellant. That was the only “physical interaction” that they had on the couch, and it was not sexual in nature. Appellant testified that he first learned of SA’s allegations after EH disclosed to her mother, JC, that Appellant gave her alcohol.

Appellant also recalls taking HB and her brothers to the swimming hole at the creek, when HB was 7 years old. Appellant drove the children in his truck and was the only adult present. The children swam for “a couple of hours” and became tired. On the drive back to the farm, HB fell asleep in the front seat of Appellant’s truck, while the two boys fell asleep in the back. Once they got back to the farm, the children “woke up and continued playing.” Appellant denied ever sexually assaulting HB. Appellant testified that he became aware that HB complained of vaginal discomfort after the day at the swimming hole. HB underwent a medical examination, which determined that she had a yeast infection.

E. Expert in Forensic Psychology

The Defense also presented the testimony of Dr. WJ, an expert in the field of forensic psychology. Dr. WJ explained the concept of “false memories” in which a person genuinely believes an event or details of an event to be true when it did not actually occur. “Suggestibility” puts a person at risk for a false memory. Children aged 3 to 6 years old are most susceptible to suggestibility; while all children are at risk for suggestibility, older children “have developed stronger cognitive skills and abilities.” An authority figure “can further put [children] at risk for suggestibility.”

Dr. WJ opined that, based upon reviewing EH’s CFI and observing her trial testimony, multiple risk factors for suggestibility were present. The CFI occurred approximately two-and-a-half months after the “initial outcry of an allegation of sexual abuse,” which put EH at risk for suggestibility from family members in the intervening time. Dr. WJ explained that the “neutral interview” should have happened “shortly after, as quickly as possible,” and that

the more time that passes the child will be exposed to more risk factors for suggestibility.

Dr. WJ also testified that EH was subject to repetitive questioning from family members, which is another risk factor for suggestibility. Moreover, because EH reported to family members with their own history of sexual abuse, it created a risk of confirmation bias in which those family members ask questions to confirm their pre-existing belief that something in fact must have occurred. Additionally, EH's own prior experience of sexual abuse three years earlier created a risk of "an alternate source of knowledge." Dr. WJ also testified that the negative stereotyping of Appellant and EH's initial statement that she was not sure whether it was a vivid dream are further risk factors of suggestibility.

On cross-examination, Dr. WJ testified that salient memories, such as experiencing a sexual assault, are more strongly encoded in a person's memory. Dr. WJ agreed that children under 5 years old are at the highest risk for suggestibility, and that the presence of a positive relationship reduces the risk of suggestibility. Moreover, the presence of a risk factor does not mean that the risk factor had an effect. Factors that decrease the risk of suggestibility include consistency of the memories that are recalled and a spontaneous statement made by a child in "language that was akin to a child." Dr. WJ agreed that incremental disclosures—in which the person initially gives some details, but then provides additional details upon further questioning—is a common observance, especially with children. An incremental disclosure does not, by itself, mean that a memory is a false memory. Dr. WJ also agreed that dreams typically "don't have a logical flow to them" and are "kind of random . . . all over the place." Moreover, "typically a person would not recall a sensory detail of an experience, if that experience was a dream."

II. DISCUSSION

On appeal, Appellant challenges the factual sufficiency of his convictions. Appellant also challenges the legal sufficiency of the specification charging indecent "conduct" by daring EH to take her pants and underwear off, where the "actus reus exclusively involved language."

A. Factual Sufficiency

1. Law

We are neither required nor empowered to review the factual sufficiency of the evidence unless an appellant both (1) asserts an assignment of error and (2) shows a specific deficiency in the proof. *United States v. Harvey*, 85 M.J. 127, 130 (C.A.A.F. 2024). The current version of Article 66(d)(1)(B), UCMJ, FACTUAL SUFFICIENCY REVIEW, provides:

(i) In an appeal of a finding of guilty under subsection (b), the Court may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.

(ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—

(I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and

(II) appropriate deference to findings of fact entered into the record by the military judge.

(iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

10 U.S.C. § 866(d)(1)(B), *Manual for Courts-Martial, United States* (2024 ed.) (2024 MCM).

“[T]he requirement of ‘appropriate deference’ when a [Court of Criminal Appeals (CCA)] ‘weigh[s] the evidence and determine[s] controverted questions of fact’ . . . depend[s] on the nature of the evidence at issue.” *Harvey*, 85 M.J. at 130 (third and fourth alterations in original). It is within this court’s discretion to determine what level of deference is appropriate. *Id.* at 131.

“[T]he quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is proof beyond a reasonable doubt, the same as the quantum of proof necessary to find an accused guilty at trial.” *Id.* at 131 (internal quotation marks omitted). For this court “to be ‘clearly convinced that the finding of guilty was against the weight of the evidence,’ two requirements must be met.” *Id.* at 132. First, we must decide that evidence, as we weigh it, “does not prove that the appellant is guilty beyond a reasonable doubt.” *Id.* Second, we “must be clearly convinced of the correctness of this decision.” *Id.*

2. Analysis

a. Specification 1 of Charge I - Causing EH to Touch Appellant’s Penis

In order to convict Appellant of Specification 1 of Charge I, the Government was required to prove: (1) Appellant committed a lewd act upon EH, by causing EH to touch his penis with her hand; (2) Appellant did so with the intent to gratify his sexual desires; and (3) EH was a child who had not attained the age of 16 years. *See Manual for Courts-Martial, United States* (2019 ed.) (MCM),

pt. IV, ¶ 62.b.(3); *see also* *MCM*, pt. IV, ¶ 62.a.(h)(5) (defining “lewd act”); *MCM*, pt. IV, ¶ 62.a.(h)(4) (defining “child”). Appellant contends the Government failed to prove beyond a reasonable doubt that the lewd act occurred or, if it did, that Appellant was the one who committed it. He presents several arguments in support of this contention, which we find to be a sufficiently “specific showing of a deficiency in proof” to empower this court to review the factual sufficiency. *See* Article 66(d)(1)(B)(i), UCMJ.

First, Appellant points to EH’s statements, made in the note typed on the tablet and initially during the CFI, that she was unsure whether the incident was a vivid dream. Appellant contends that because he gave EH sleep aids prior to the incident, and because she was the victim of a prior similar assault by her cousin, it increased the possibility that she was recalling a dream because “[d]reams, of course, are a reflection of past experiences.” We are unpersuaded. While we acknowledge that the defense expert testified that EH’s initial statements that she was unsure whether the incident was a dream increased her risk for suggestibility, EH was clear and firm in her testimony at trial that she knew the incident was not a dream. EH explained her prior statements questioning whether it was a dream as a coping mechanism in that she was “hoping that it was a dream.” We find it perfectly reasonable that a child who looks up to their uncle would not want to believe that he sexually abused her.

Moreover, EH described in graphic detail what she felt and heard upon waking up to Appellant’s penis in her hand—explaining that the penis felt “like a bone with like skin on it,” describing the sensation of “back and forth” movement, feeling Appellant’s “calcified, like dry” hands rearranging her fingertips to “curl them back” into a closed hand around his penis, and the sound of Appellant’s “heavy breathing” just like how he sounds after screaming during a game or when he drinks. The defense expert, Dr. WJ, agreed that “typically a person would not recall a sensory detail of an experience, if that experience was a dream.” Furthermore, the logical flow of EH’s recollection weighs against finding it was only a dream because, as Dr. WJ agreed, dreams typically “don’t have a logical flow to them” and are “kind of random . . . all over the place.” While Dr. WJ did testify that EH’s prior experience of sexual abuse three years earlier created a risk of “an alternate source of knowledge,” she did not indicate that it created a risk of a false memory based upon a dream. Additionally, there is no support for Appellant’s assertion that the sleeping aids made it more likely that EH had a dream that created a false memory, nor is there any support for Appellant’s assertion that “[d]reams, of course, are a reflection of past experiences.”

Next, Appellant cites to evidence that EH never actually saw Appellant commit the charged act and that there were “several of the male children” in

the house at the time. EH testified that while she “fluttered” her eyes, she did not open her eyes because she was scared. While visual identification may be a more reliable identifier, we are nonetheless persuaded by EH’s ability to identify Appellant (who she frequently spent time with) by his “calcified, like dry” hands and the familiar sound of his heavy breathing. Just prior to falling asleep on the couch, Appellant gave EH “sleep aids” and was watching a movie with her. We find EH’s description of the penis—“like a bone with like skin on it”—as more consistent with an adult male’s penis than that of the only two other males present in the home, EH’s 13-year-old brother and her 10-year-old male cousin. Furthermore, we find the evidence of the strikingly similar incident involving SA lends additional weight to the identity of Appellant.

Appellant also cites to what he characterizes as “crosstalk” between various family members and contends that it was only after SA shared her allegation with EH’s mother, JC, that “EH then alleged the exact same thing.” The trial testimony does establish that JC learned of SA’s allegation in September 2022. However, JC testified that she never discussed SA’s allegation with EH, although she did share the information with other family members. At trial, EH was not asked whether she was aware of SA’s allegation. Mere speculation that EH may have been aware of SA’s allegation, because JC and other family members knew, is not persuasive. Moreover, even if we were to assume that EH was aware of SA’s allegation, we do not find any basis to believe that EH fabricated her allegation on the basis of SA’s allegation. While the allegations are strikingly similar in the respect that Appellant placed his penis in each child’s sleeping hand, the similarity is just as likely to show Appellant’s motive, intent, or plan.

In support of his argument, Appellant points to the fact that EH only disclosed that Appellant gave her alcohol in her initial disclosure to JC in August 2022 and, at that time, did not disclose the first incident of waking up to Appellant’s penis in her hand. We do not, however, find EH’s partial disclosure to raise a reasonable doubt. Dr. WJ agreed that the doctrine of incremental disclosure is a common observance in psychology, especially with children, and that an incremental disclosure does not, by itself, mean that a memory is a false memory.

Finally, Appellant points to Dr. WJ’s testimony that EH presented multiple risk factors for suggestibility or false memory. Dr. WJ testified that EH’s initial statement that she was unsure whether it was a vivid dream, the passage of two-and-a-half months between EH’s initial disclosure and the CFI, repetitive questioning, potential for confirmation bias, EH’s prior experience of sexual abuse, and negative stereotyping of Appellant, were all risk factors for suggestibility and a false memory. However, Dr. WJ also agreed that countervailing indications existed weighing against the risk of suggestibility such as EH’s age,

consistency of the memory recalled, spontaneous statement made in “language that was akin to a child,” and positive relationship with Appellant. Moreover, Dr. WJ agreed that the presence of a risk factor does not mean that the risk factor had an effect.

Appellant’s argument does not contest that EH’s testimony, if true, is factually sufficient to sustain his conviction for this offense. In assessing EH’s credibility, we are persuaded for several reasons. First, we find persuasive EH’s graphic detail of the sensations she felt—“like a bone with like skin on it,” “back and forth” movement, Appellant’s “calcified, like dry” hands, and the sound of Appellant’s “heavy breathing.” We also note the corroborating evidence that EH suddenly no longer wanted to go to her “fun uncle’s” house, which is evidenced by the text messages in which EH responded to Appellant’s repeated requests that she come to his house by stating that she “did not want to.” Both EH’s mother, JC, and her stepmother, CH, noticed a change in EH’s demeanor in which she no longer wanted to go to Appellant’s house, seemed “reclused,” and was “acting a little weird.” We are also persuaded by EH’s spontaneous disclosure in “language that was akin to a child” by typing on the tablet that “he picked up my hand and put he’s [eggplant emoji] in it and was putting it in and out of my hand but it felt like it was real like I felt it in my hand.” Moreover, we find Appellant’s strikingly similar past molestation of his sleeping 12-year-old stepsister SA, as well as his past molestation of his sleeping 7-year-old daughter HB, to be strong propensity evidence. *See United States v. Fetrow*, 76 M.J. 181, 188 (C.A.A.F. 2017) (“The very nature of propensity evidence is to permit the trier of fact to infer that since the accused has acted previously in a certain fashion, he was inclined to have acted in conformity with that conduct with respect to the charged offenses.”).

The military judge, unlike this court, had the opportunity to observe the demeanor of both EH and Appellant in their testimony and to assess their credibility firsthand. In finding Appellant guilty, the military judge evidently found EH sufficiently credible. We find it appropriate to give substantial deference to the military judge’s determination of credibility, *Harvey*, 85 M.J. at 130, and we ourselves are not clearly convinced that the finding of guilty was against the weight of the evidence, Article 66(d)(1)(B), UCMJ (2024 *MCM*).

b. Specifications 3 and 4 of Charge I – “Truth or Dare” Game

Appellant argues that his own testimony at trial presented “a perfectly plausible account in the context of a game of truth or dare and would clearly not constitute a lewd act.” In support of this argument, he contends EH’s perception of the events “could have resulted from a misunderstanding due to her alcohol consumption and . . . her exposure to multiple family members talking negatively about [Appellant].” We find Appellant’s arguments to be a sufficiently “specific showing of a deficiency in proof” to empower this court to

review the factual sufficiency. *See* Article 66(d)(1)(B)(i), UCMJ. Nonetheless, we are unpersuaded.

i) Specification 3 of Charge I – the Dare

In order to convict Appellant of Specification 3 of Charge I, the Government was required to prove: (1) Appellant committed a lewd act upon EH, by engaging in indecent conduct, to wit: daring EH to take her pants and underwear off; (2) which was intentionally done in the presence of EH; (3) which conduct amounted to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common society and tends to excite sexual desire or deprave morals with respect to sexual relations; and (4) EH was a child who had not attained the age of 16 years. *See MCM*, pt. IV, ¶ 62.b.(3); *see also MCM*, pt. IV, ¶ 62.a.(h)(5)(D) (defining “lewd act”); *MCM*, pt. IV, ¶ 62.a.(h)(4) (defining “child”).

In his own testimony, Appellant admits he provided numerous “shots” of alcohol to EH and then played a game of “truth or dare” with her. He also admits that, during the game, he dared EH to do something that involved her underwear, but claims a different version of the “dare.” EH testified that Appellant dared her “to take off your underwear but you can put your shorts back on when you’re done taking them off.” The dare made EH “uncomfortable” and she refused to do it. EH testified that Appellant sounded disappointed when she refused. Appellant testified to a different version, claiming he did not dare her to take off her underwear, but rather dared her to put a pair of underwear on over her shorts. In his testimony, Appellant contended the dare was not for his sexual gratification but was simply to be “cute” and “fun.” Under EH’s version of the “dare,” we have no reasonable doubt that an uncle daring his 12-year-old niece to take off her underwear is a lewd act.

We are not persuaded by Appellant’s argument that EH misunderstood the dare due to her alcohol consumption or was biased by the negative stereotyping of Appellant by other family members. EH testified to her detailed recollection of the night, including a description of the soju—how it tasted “[l]ike rubbing alcohol” and “burnt [her] entire mouth”—and how many “shots” Appellant poured, which was generally consistent with Appellant’s own testimony. Both Appellant and EH testified that the highest breathalyzer reading was .06, which Appellant described as “less than the legal limit” for intoxication, albeit for an adult. Moreover, Appellant testified that EH did not show signs of intoxication. EH did not indicate any inability to recall in her testimony, and in fact testified to the specific wording of the “dare.” Finally, there was no direct evidence that EH was aware of the other family members’ allegations at the time of the “truth or dare” game or at the time of her disclosure to her mother, JC.

With conflicting testimony between EH and Appellant, the military judge had to make a credibility determination between EH's version of the dare and Appellant's version of the dare. In our review, we find EH's version more credible, particularly in light of the surrounding circumstances in which Appellant first plied EH with numerous shots of soju, which he mixed with ginger ale to make it "easier" for her to keep drinking. Applying appropriate deference to the military judge, who assessed witness credibility firsthand, we are not clearly convinced that the finding of guilty was against the weight of the evidence.

ii) Specification 4 of Charge I – the Truth

In order to convict Appellant of Specification 4 of Charge I, the Government was required to prove: (1) Appellant committed a lewd act upon EH, by intentionally communicating indecent language to her, to wit: asking what kind of pornography she watches; (2) with an intent to gratify his sexual desires; and (3) EH was a child who had not attained the age of 16 years. *See MCM*, pt. IV, ¶ 62.b.(3); *see also MCM*, pt. IV, ¶ 62.a.(h)(5)(C) (defining "lewd act"); *MCM*, pt. IV, ¶ 62.a.(h)(4) (defining "child").

Appellant admits that he indeed asked EH what kind of pornography she watches. However, Appellant claims that the question was not part of the "truth or dare" game but rather came up in a "wholly different context" when EH was making fun of her brother and cousin who had been caught watching "weird porn." According to Appellant's testimony, he was teaching EH, "don't throw stones, like, don't make fun of them whenever, you know, you do the same thing." On appeal, Appellant argues, "there was nothing inherently improbable in [his] story." Even under Appellant's "story," we have no reasonable doubt that asking his 12-year-old niece what kind of pornography she watches was indecent language with the intent to satisfy his sexual desires.

B. Legal Sufficiency of Specification 3 of Charge I – the Dare

For the first time on appeal, Appellant contends that Specification 3 of Charge I is legally insufficient because it charges indecent *conduct* based on communication of indecent *language*, which Appellant contends is a separate theory of criminal liability for a lewd act.

1. Law

"In most legal sufficiency cases, which we review de novo, the [c]ourt asks 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. Mendoza*, 85 M.J. 213, 217 (C.A.A.F. 2024) (internal quotation marks and citation omitted). The court draws every reasonable inference from the evidence in favor of the prosecution, thus "[t]he standard for legal sufficiency involves a very low threshold to

sustain a conviction.” *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (alteration in original) (internal quotation marks and citation omitted).

But, as in *Mendoza*, “[t]his case . . . departs from the usual ‘reasonable trier of fact’ analysis because [the a]ppellant challenges the legal sufficiency of his . . . conviction on . . . unusual grounds.” 85 M.J. at 217. Like *Mendoza*, Appellant “argues that his conviction was legally insufficient . . . by conflating two different theories of criminal liability . . .” *Id.* This is a question of statutory interpretation, which the court reviews de novo. *Id.* at 218.

The first step in statutory interpretation cases is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. [I]f the statutory language is unambiguous and the statutory scheme is coherent and consistent, the inquiry is done. Whether the statutory language is ambiguous is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.

When we engage in this analysis, the [c]ourt typically seeks to harmonize independent provisions of a statute. To this end, this [c]ourt employs the surplusage canon, which requires that, if possible, every word and every provision is to be given effect and that no word should be ignored or needlessly be given an interpretation that causes it to duplicate another provision or to have no consequences.

Id. (first alteration in original) (citation modified).

The relevant statute at 10 U.S.C. § 920b provides:

(c) SEXUAL ABUSE OF A CHILD.—Any person subject to this chapter who commits a lewd act upon a child is guilty of sexual abuse of a child and shall be punished as a court-martial may direct.

. . . .

(h)(5) LEWD ACT.—The term “lewd act” means—

(A) any sexual contact with a child;

(B) intentionally exposing one’s genitalia, anus, buttocks, or female areola or nipple to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person;

(C) intentionally communicating indecent language to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; or

(D) any indecent conduct, intentionally done with or in the presence of a child, including via any communication technology, that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

In their arguments, both parties rely heavily on our superior court’s opinion in *United States v. King*, 71 M.J. 50 (C.A.A.F. 2012), which predates Article 120b, UCMJ. In *King*, the court reviewed the legal sufficiency of a specification of an indecent act under Article 120(k), UCMJ, *Manual for Courts-Martial, United States* (2008 ed.) (2008 *MCM*). *Id.* The specification at issue in *King* alleged that the accused engaged in an indecent act by requesting that his stepdaughter expose her breasts so that he could view them on a web camera. *Id.* at 51. At the time, Article 120(k), UCMJ, provided that any person who engaged in “indecent conduct” is guilty of an indecent act. 2008 *MCM*, pt. IV, ¶ 45.a.(k). “Indecent conduct,” in turn, was defined in part as “that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.” 2008 *MCM*, pt. IV, ¶ 45.a.(t)(12). At the time, indecent liberty with a child was also an offense under Article 120(j), UCMJ. 2008 *MCM*, pt. IV, ¶ 45.a.(j). “Indecent liberty” was defined as “indecent conduct, but physical contact is not required. . . . [It] may consist of communication of indecent language as long as the communication is made in the physical presence of the child.” 2008 *MCM*, pt. IV, ¶ 45.a.(t)(11).

On appeal, King challenged the legal sufficiency of the specification charging an indecent act. *King*, 71 M.J. at 50. “[T]he crux of King’s argument [was] that asking his fourteen-year-old stepdaughter to lift her shirt so that he could see her breasts constituted ‘indecent language’ and ‘indecent language’ is not included under the definition of ‘indecent conduct.’” *Id.* at 52. The United States Court of Appeals for the Armed Forces (CAAF) noted that “this court has held that ‘language’ can be, or be part of, ‘conduct’ in a particular case.” *Id.* at 52 n.3 (citing *United States v. Brinson*, 49 M.J. 360, 364–65 (C.A.A.F. 1998)) (concluding that use of coarse language constituted disorderly conduct); *United States v. Littlewood*, 53 M.J. 349, 352, 353–54 (C.A.A.F. 2000) (finding a variety of offenses, including indecent language, to be indecent conduct of a nature to bring discredit upon the armed forces and prejudicial to good order and discipline); *United States v. Lofton*, 69 M.J. 386, 390 (C.A.A.F. 2011) (holding that

sexual comments made by an officer to a female enlisted Airman constituted conduct unbecoming an officer). The court, however, found it “unnecessary to address the . . . issue” of whether the language charged could be “conduct” because it concluded that “at a minimum, the facts support an attempted indecent act.” *Id.* at 52–53. In reaching that conclusion, the court reasoned that “King’s request was an ‘overt act’ that constituted ‘direct movement toward the commission’ of an indecent act. But for his stepdaughter’s refusal to lift her shirt, King would have ‘view[ed]’ his stepdaughter’s breasts using the webcam.” *Id.* at 52 (alteration in original).

A panel of this court followed *King*, 71 M.J. 50, in considering a similar specification under Article 120(k), UCMJ (2008 *MCM*), where the accused requested a 13-year-old girl send him an image of her breasts. *United States v. Capps*, No. ACM 38160, 2013 CCA LEXIS 842, at *13 (A.F. Ct. Crim. App. 9 Oct. 2013) (unpub. op.). The court noted, “*King* does not stand for the proposition that a request to view a young teenager’s breasts via electronic means can *never* constitute a completed indecent act.” *Id.* at *13. However, like the CAAF in *King*, the court nonetheless did “not find it necessary to hold that the appellant completed an indecent act” because “[c]onsistent with our superior court’s example, we affirm the lesser included offense of an attempted indecent act, which does not change the sentencing landscape.” *Id.*

2. Analysis

In relevant part, Specification 3 of Charge I alleges that Appellant committed a lewd act upon EH “by engaging in indecent *conduct*, to wit: *daring* EH to take her pants and underwear off, intentionally done in the presence of EH” (Emphasis added). Appellant argues that, under the precedent of *King*, the “dare” charged in the specification is “language” and “not conduct itself.” According to Appellant, interpreting “conduct” to include language “would render an entire statutory provision superfluous” because the statute “clearly delineates indecent language from indecent conduct.” Appellant contends that the misconduct charged in the specification “would be at most an *attempt* to engage in indecent conduct,” but unlike *King*, “no lesser included offense is available based on the charging language.”¹⁶ The Government counters that, as a panel of this court found in *Capps*, unpub. op. at *13, “*King* does not stand for the proposition that a request . . . can never constitute a completed indecent act.” The Government urges this court to find that the “dare” was “conduct” that was a completed offense the moment Appellant communicated his request

¹⁶ Nonetheless, Appellant does concede that “affirming [a lesser included offense] of attempt would not result in a reduction of sentence.”

to EH. In the alternative, the Government requests that we affirm a lesser included offense of “an attempted lewd act via indecent conduct.”

We agree with the Government that “at a minimum” we could affirm the lesser included offense of attempt—under the theory that the “dare” was attempted indecent conduct because, but for EH’s refusal, Appellant would have seen EH take off her pants and underwear—in line with *King*, 71 M.J. 50, and *Capps*, unpub. op. We also agree with the Government, and as Appellant concedes, that affirming the lesser included offense of attempt would not change the sentencing landscape. However, we find it unnecessary to affirm the lesser included offense of attempt, because we find the specification alleges *completed* indecent conduct—the act of the verbal request itself.

Because the CAAF ultimately found it “unnecessary to address the . . . issue” of whether the language charged in *King* (requesting that his stepdaughter expose her breasts so that he could view them on a web camera) could be “conduct,” it does not squarely answer the question before us. We disagree with Appellant’s argument that the “dare” charged in the specification could not be “conduct itself.” As instructed in *Mendoza*, “our analysis begins, as it must, with the text of the statute.” 85 M.J. at 219. The language of subsection (h)(5)(D) of 10 U.S.C. § 920b does not expressly foreclose the Government from proving that Appellant engaged in “conduct” by the act of making a verbal request. Indeed, subsection (h)(5)(D) includes “any” indecent conduct. Looking beyond the specific statutory language and examining “the specific context in which that language is used, and the broader context of the statute as whole,” *Mendoza*, 85 M.J. at 218, we believe that Appellant reads subsection (h)(5)(D) too narrowly in excluding the possibility that language may be conduct in a particular case.

The common understanding of “conduct” includes verbal acts. *See Conduct*, BLACK’S LAW DICTIONARY (12th ed. 2024) (defining “conduct” as “[p]ersonal behavior, whether by action or inaction, *verbal* or nonverbal; the manner in which a person behaves; collectively, a person’s deeds” (emphasis added)). In line with this common understanding, the CAAF “has held that ‘language’ can be, or be part of, ‘conduct’ in a particular case.” *King*, 71 M.J. at 52 (citations omitted). We find that the verbal request as charged in the specification amounts to conduct within its common meaning. In making this determination, we heed the CAAF’s admonition that “context matters” when evaluating language. *United States v. Avery*, 79 M.J. 363, 369 (C.A.A.F. 2020) (citing *United States v. Green*, 68 M.J. 266, 270 (C.A.A.F. 2010)). The specification does not merely charge language, but instead charges the “dare,” which is the verbal act of a

challenge.¹⁷ In making the “dare,” Appellant was not merely communicating language but rather was actively engaging in “conduct” by making a verbal request to EH to take her shorts and underwear off. In other words, the gravamen of the offense is the act of the verbal request itself (*daring* EH to take off her pants and underwear), not the indecency of the language (pants and underwear). Appellant completed his “conduct” by making the verbal request itself. The fact that EH did not comply with the request does not negate the “conduct” of the request itself.

We also disagree with Appellant’s contention that by finding certain “language” in a particular context to be “conduct” we render subsection (h)(5)(C) of 10 U.S.C. § 920b (indecent language) surplusage. While “‘language’ can be, or be part of, ‘conduct’ in a particular case,” *King*, 71 M.J. at 52, not all language itself is conduct. For example, language communicating a desire, thought, or an observation is unlikely to be conduct. By finding some language—such as the verbal request for EH to take off her pants and underwear—to be conduct does not render subsection (h)(5)(C) “practically devoid of significance” or “relegat[ed] . . . to mere surplusage without any purpose or effect.” *Mendoza*, 85 M.J. at 220 (citation omitted).

III. CONCLUSION

The findings as entered are correct in law and fact. Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2024 *MCM*). In addition, the sentence as entered is correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.



FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

¹⁷ The definition of “dare” is “to challenge to perform an action esp[ecially] as a proof of courage.” *Dare*, MERRIAM WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1996).

APPENDIX B

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

Errors Assigned for Review

- I. Whether Appellant's conviction for Charge I, Specification 1, is legally and factually insufficient.**
- II. Whether trial defense counsel were ineffective for waiving the exclusion of EH in the courtroom and the military judge erred by failing to *sua sponte* exclude EH from the courtroom.**
- III. Whether the military judge erred by prohibiting two defense witnesses from testifying via remote means during sentencing and whether trial defense counsel were ineffective for failing to file a motion to produce them.**
- IV. Whether threats from a third-party to a defense witness require the findings and sentence to be set aside.**
- V. Whether trial defense counsel were ineffective for not raising numerous errors at trial.**
- VI. Whether the military judge improperly considered matters admitted under Mil. R. Evid. 414.**

I. Appellant's conviction for Charge I, Specification 1, is legally and factually insufficient.

A. Additional Facts

There were multiple deficiencies in the presentation of the evidence, including failure to present exculpatory evidence. Furthermore, the facts presented around EH's memory were incomplete.

Appellant personally witnessed an event where EH had fallen asleep and then slept-walk around his grandfather's home for approximately fifteen minutes, laying down in a different room. Mot. to Attach, August 6, 2026, App. A. EH stated that she did not remember the event when she woke up the next morning. *Id.*

At the time when the incident described in Charge I, Specification 1, allegedly took place, Appellant owned a couch and a loveseat. *Id.* The loveseat is what EH would have fallen asleep on during the alleged events of Charge I, Specification 1, because it was the only seat that could recline. *Id.*; see Trial Tr. 408. The loveseat had a middle console area with a rough, scratchy surface. Mot. to Attach, August 6, 2026, App. A. Appellant also had two dogs who lived with him at the time that often slept on the loveseat. *Id.* Appellant also states it would have been a physical impossibility for someone to commit the alleged misconduct in Charge I, Specification 1, because of the living room layout. *Id.*

B. Standard of Review

The military Courts of Criminal Appeals (CCAs) “review questions of factual sufficiency when an appellant (1) asserts an assignment of error and (2) shows a specific deficiency in proof.” *United States v. Allen*, 2026 CCA LEXIS 302, at *18 (A.F. Ct. Crim. App. June 25, 2026). For a CCA “to be clearly convinced that the finding of guilty was against the weight of the evidence, two requirements must be met.” *Harvey*, 85 M.J. at 132. “First, the CCA must decide that the evidence, *as the CCA has weighed it*, does not prove that the appellant is guilty beyond a reasonable doubt. Second, the CCA must be clearly convinced of the correctness of this decision.” *Id.*

While “[t]his Court lacks the authority to make its own findings of fact or to conduct its own factual sufficiency review,” it “retain[s] the authority to review factual sufficiency determinations of the CCAs for the application of ‘correct legal principles,’ but only as to matters of law.” *United States v. Clark*, 75 M.J. 298, 300 (C.A.A.F. 2016). The standard of review for legal sufficiency is adopted from Section I, *supra*.

C. Argument

Charge I, Specification 1, is legally and factually insufficient. The AFCCA did not consider additional specific deficiencies in proof; therefore, that specification should be remanded to the AFCCA for proper legal and factual sufficiency review.

EH's sleeping habits, the presence of dogs, and the layout of the living area are specific deficiencies of proof for Charge I, Specification 1. Even with appropriate deference to the factfinder, the AFCCA should not have been clearly convinced the finding of guilty was against the weight of the evidence. EH's prior instance of sleepwalking for approximately fifteen minutes, without memory of it, shows that she sleeps deeply and would be unlikely to remember events that took place while she slept, such as the events alleged in Charge I, Specification I. Furthermore, the breathing she heard could have been Appellant's dogs breathing. Lastly, the description EH provided of where she fell asleep and how the lewd act occurred are in conflict. The only reclining seat in the living room was on a loveseat, not a couch, further diminishing the credibility of EH's memory. Additionally, the position of the loveseat would have made it a physical impossibility for someone to perform the alleged misconduct. The "rough" sensation EH remembered may have also been the rough surface of the loveseat's central console, which aligns with where her right hand would have been.

Because the AFCCA did not consider these specific deficiencies of proof, which would diminish the credibility of the allegations, Charge I, Specification 1, should be set aside and the case remanded to the AFCCA for a new review.

II. Trial defense counsel were ineffective for waiving the exclusion of EH in the courtroom and the military judge erred by failing to *sua sponte* exclude EH from the courtroom.

A. Additional Facts

During trial, EH was allowed in the courtroom throughout the proceedings. Trial Tr. 301-03, 413:12-14, 425-27. During EH's direct examination, she referenced trial counsel's previous witness examinations. Trial Tr. 413:12-14, 425-27. During EH's direct examination, EH referenced trial counsel's presentation of evidence, stating, "You guys' kind of got it a little mixed up." Trial Tr. 425:14-15. The military judge determined that EH was "talking about testimony that was earlier adduced," and that that was "the risk of having witnesses inside of the courtroom." Trial Tr. 426:1-6. The military judge attempted to cure the issue with EH directly, giving her a "brief warning." Trial Tr. 427:7-12. Prior to any witness testimony and opening statements, the military judge asked trial defense counsel if the defense was requesting the sequestration of named-victims. Trial Tr. 302:2-4. Trial defense counsel replied, "No, sir." Trial Tr. 302:5.

B. Standard of Review

"The issue of waiver is a legal question that this Court reviews de novo." *United States v. Ford*, __ M.J. __, 2026 CAAF LEXIS 570, at *7 (C.A.A.F. July 1, 2026). "[W]aiver can occur when an accused intentionally relinquishes a known right by taking affirmative action." *Id.*

C. Applicable Law

For waiver, “it is appropriate for this Court to consider the fact that Appell[ant] chose not to file an ineffective assistance of counsel claim against the attorney who represented him at trial.” *United States v. Malone*, 86 M.J. 297, 303 (C.A.A.F. 2026). For an appellant to establish that trial defense counsel were ineffective, the appellant must show “(1) that his counsel’s performance was deficient, and (2) that this deficiency resulted in prejudice.” *United States v. Green*, 68 M.J. 360, 361-62 (C.A.A.F. 2010). A claim of ineffective assistance of counsel is reviewed de novo. *United States v. Scott*, 81 M.J. 79, 84 (C.A.A.F. 2021). ““When a claim of ineffective assistance of counsel is premised on counsel’s failure to make a motion . . . , an appellant must show that there is a reasonable probability that such a motion would have been meritorious.”” *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001).

This Court applies a three-part test to determine whether the presumption of competence has been overcome:

1. Are appellant’s allegations true; if so, “is there a reasonable explanation for counsel’s actions”?
2. If the allegations are true, did defense counsel’s level of advocacy “fall measurably below the performance . . . [ordinarily expected] of fallible lawyers”?
3. If defense counsel was ineffective, is there “a reasonable probability that, absent the errors,” there would have been a different result?

United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011).

“A military judge’s decision concerning whether a witness falls within one of the three exclusion exceptions to Mil. R. Evid. 615 is reviewed under an abuse-of-discretion standard.” *United States v. Langston*, 53 M.J. 335, 337 (C.A.A.F. 2000). A military judge abuses his discretion when “his findings of fact are clearly erroneous, the court’s decision is influenced by an erroneous view of the law, or the military judge’s decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law.” *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008).

D. Argument

Trial defense counsel were ineffective for failing to request that EH be sequestered from the courtroom and for waiving that motion at trial. The military judge abused his discretion by failing to exercise his *sua sponte* duty to sequester EH from the courtroom after he found EH altered her testimony due to her presence in the courtroom.

1. Trial defense counsel were ineffective.

Trial defense counsel’s performance was deficient. Trial defense counsel’s motion to exclude EH likely would have been meritorious. Given her age, the order of witnesses, and suggestibility factors, EH’s testimony was going to “be materially altered if [she] heard other testimony at that hearing.” Trial Tr. 832-39; Mil. R. Evid. 615.

There is no reasonable explanation for trial defense counsel to waive that motion. The main defense theory at trial for the allegations involving EH was that due to her age and suggestibility factors, her memory was altered. Trial Tr. 832-39, 905, 920-30. By allowing EH into the courtroom during trial and allowing her to hear the testimony of multiple other witnesses, defense counsel allowed her testimony to be materially altered. Trial Tr. 316-42, 344-90. This risk became reality and during EH's trial testimony, she referenced previous trial proceedings, causing the military judge to limit her testimony. Trial Tr. 425-27. While that portion of testimony was with regard to Charge I, Specification 2, of which Appellant was acquitted, it is unknown how much of her testimony was altered by previous testimony. Trial defense counsel's failure to foresee this issue when asked by the military judge whether EH should be excluded fell below the level of advocacy expected of them. Had they not been ineffective, EH would have been excluded from watching her own mother's testimony on the allegations, and her testimony would have remained unaltered. As a result, the military judge likely considered altered testimony in his decision to convict Appellant.

2. The military judge abused his discretion.

The military judge had a *sua sponte* duty to exclude EH from the courtroom. Mil. R. Evid. 615. The military judge should have also expected EH's testimony to be materially altered because of her age and the order of witnesses. The military

judge's failure to *sua sponte* sequester EH was unreasonable and an abuse of discretion. Therefore, this Court should set aside the findings and sentence.

III. The military judge erred by prohibiting two defense witnesses from testifying via remote means during findings, and trial defense counsel were ineffective for failing to file a motion to produce them.

A. Additional Facts

Appellant requested that two witnesses be allowed to testify remotely during the Defense case-in-chief. Trial Tr. 623-35, 788-90. Both witnesses were anticipated to testify about circumstances related to the Specification of the Additional Charge, of which Appellant was acquitted, and one could have testified to Appellant's whereabouts during the alleged Mil. R. Evid. 414 misconduct discussed in Section VI, *infra*. Trial Tr. 630, 789-90; Mot. to Attach, August 6, 2026, App. A. The military judge denied the defense's motion. *Id*.

B. Standard of Review

A military judge's decision to deny production of a witness is reviewed for abuse of discretion. *United States v. Rockwood*, 52 M.J. 98, 104 (C.A.A.F. 1999). The standards of review for abuse of discretion and ineffective assistance of counsel are adopted from Section II.C of this Appendix, *supra*.

C. Argument

The military judge abused his discretion by not allowing two fact witnesses to testify for the Defense. Trial defense counsel were likewise ineffective for failing

to file a motion to produce the two witnesses before trial. The two fact witnesses would have provided favorable information in Appellant's defense, to include rebutting the allegation made by HB and admitted under Mil. R. Evid. 414, which could have led to acquittals for the other Charges and Specifications. Therefore, this Court should set aside the findings and sentence.

IV. Threats from a third-party to a defense witness require the findings and sentence to be set aside.

A. Additional Facts

A defense witness, JD, was subject to threats from other witnesses and her ex-husband (GD) due to her testimony at trial, which took place at Scott Air Force Base, Illinois. Trial Tr. 1, 384-87, 733-35, 817-19. The threats from GD, a military member, were brought to the attention of the military judge. Mot. to Attach, August 6, 2026, App. B. As a result, GD, who was stationed at Sheppard Air Force Base, Texas, was flagged in the Defense Biometric Identification System (DBIDS) so Scott Air Force Base security forces members would be notified if he attempted to enter the installation. *Id.* GD did not enter Scott Air Force Base during the trial. The DBIDS entry was never discussed on the record.

JD was Appellant's girlfriend at the time of trial. Trial Tr. 812. Due to the threats from other witness and GD, JD limited her testimony at trial. Mot. to Attach, August 6, 2026, App. A. But for the threats, JD would have testified that Appellant did not have rough hands like EH described. *Id.* JD would have also testified that

Appellant suffered from erectile dysfunction and was therefore unable to have an erection like the one EH described. *Id.* JD would have also testified that Appellant's breathing is different during intimacy than it is when he is playing video games, contradicting EH's testimony. *Id.*; Trial Tr. 409-10. While JD testified during findings and presentencing, the military judge did not allow her to testify about JC's steps to involve GD at trial. Trial Tr. 818-19.

B. Standard of Review

This court reviews a military judge's decision to exclude evidence for an abuse of discretion. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010). The standards of review for abuse of discretion and ineffective assistance of counsel are adopted from Section II.C of this Appendix, *supra*.

C. Argument

Trial defense counsel were ineffective for failing to ask JD questions about Appellant's hands and erectile dysfunction. The military judge abused his discretion by not allowing JD to testify about JC's efforts to involve GD at trial. Had trial defense counsel asked questions about Appellant's hands and erectile dysfunction, EH's testimony would have been refuted, and it is unlikely Appellant would have been convicted. Therefore, this Court should set aside the findings and sentence.

V. Trial defense counsel were ineffective for not raising numerous errors at trial.

A. Standard of Review

This Court reviews “the cumulative effect of all errors, plain or preserved, de novo.” *United States v. Bass*, __ M.J. __, 2026 CAAF LEXIS 544, at *16 (C.A.A.F. June 24, 2026). When there are “a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding,” reversible error may exist. *Pope*, 69 M.J. at 335. “[W]hen the combined effect of the errors deprived the accused of a fair trial,” this Court will reverse. *Bass*, 2026 CAAF LEXIS 544, at *16. The standard of review for ineffective assistance of counsel is adopted from Section II.C of this Appendix, *supra*.

B. Argument

Trial defense counsel were ineffective for failing to present evidence of JC’s threats to take Appellant’s children, involve state authorities, and go to the media about the case. Mot. to Attach, August 6, 2026, App. A. Trial defense counsel were ineffective for failing to ask EH about her sleep habits. *Supra*, § I. Additionally, trial defense counsel did a poor job during Appellant’s direct examination by failing to elicit similar information. Because trial defense counsel were ineffective in all the aforementioned instances, there was cumulative error that warrants reversal. Therefore, this Court should set aside the findings and sentence.

VI. Whether the military judge improperly considered matters admitted under Mil. R. Evid. 414.

A. Additional Facts

Prior to trial, the military judge ruled that “Members could find by a preponderance of the evidence that [Appellant] committed another offense of child molestation,” specifically, that he touched his daughter’s (HB’s) vagina at some point between 2005-2007, and allowed the Government to present this evidence under Mil. R. Evid. 414. App. Ex. XXXVII at 16-19. However, Appellant denied this accusation to both law enforcement and at trial. Trial Tr. 656-60; Pros. Ex. 9; *see* Trial Tr. 646-47. HB’s mother had reported the alleged incident to law enforcement, who, in turn, notified Appellant about the allegation. Trial Tr. 657-58. The Department of Family Services (DFS) took over the investigation. Trial Tr. 659. When trial defense counsel tried to introduce evidence of DFS’ disposition of the case, the prosecution objected, and the military judge sustained their objection. *Id.* Had the military judge overruled the objection, Appellant would have testified that DFS determined Appellant did not commit the alleged Mil. R. Evid. 414 conduct. Mot. to Attach, August 6, 2026, App. A.

The military judge also ruled that “Members could reasonably find by a preponderance of the evidence that [Appellant] committed another offense of child molestation,” specifically, that he placed his penis in his minor stepsister’s (SA’s) hand in 2003 or 2004, and allowed the Government to present this evidence under Mil. R. Evid. 414. App. Ex. XL at 9. SA turned 12 years old on 10 June 2003 and

13 years old on 10 June 2004. *Id.* at 2; Trial Tr. 319, 323, 329. The only time Appellant spent the night at SA's home with none of his siblings around was once in early summer of 2012. Trial Tr. 720-21; Mot. to Attach, August 6, 2026, App. A. Appellant also denied the accusation. Trial Tr. 720-21. Furthermore, Appellant was deployed from October 7, 2023, to November 2, 2004. Pros. Ex. 13.

B. Standard of Review

This court reviews a military judge's decision to exclude evidence for an abuse of discretion. *United States v. Hyppolite*, 79 M.J. 161, 164 (C.A.A.F. 2019). The standard of review for abuse of discretion is adopted from Section II.C of this Appendix, *supra*.

C. Applicable Law

Admissibility under Mil. R. Evid. 414 requires the following findings by the military judge:

- (1) whether the accused is charged with an act of child molestation as defined by 414[(d)];
- (2) whether the proffered evidence is evidence of his commission of another offense of child molestation as defined by the rule; and
- (3) whether the evidence is relevant under M.R.E. 401 and M.R.E. 402.

United States v. Fetrow, 76 M.J. 181, 185 (C.A.A.F. 2017) (footnote omitted).

D. Argument

The military judge abused his discretion when he found HB's and SA's allegations were relevant under Mil. Rs. Evid. 401 and 402. The military judge's rulings

were based on erroneous findings of fact. For HB, the military judge erroneously found that the members could have found the alleged misconduct occurred and that it occurred between 2005-2007. Because the DFS report stated that the misconduct did not occur, and that the vaginal discomfort was due to a yeast infection, the members could not have found the alleged misconduct occurred by a preponderance of the evidence. Also, HB testified that the alleged misconduct occurred in 2008, not 2005-2007. Trial Tr. 546. The military judge also erred by not allowing Appellant to testify to the DFS disposition at trial.

For SA, the military judge erroneously found that the members could have found the alleged misconduct occurred in 2003 or 2004. Appellant only visited SA's home alone once in 2012, and he was deployed for the majority of the alleged time period, which is corroborated by Pros. Ex. 13 and would have been further bolstered by JC, a witness the military judge did not allow. *See supra*, § III. Trial defense counsel were likewise ineffective for failing to bring up Appellant's deployment during findings.

The military judge erred by allowing HB's and SA's allegation into evidence under Mil. R. Evid. 414, which both he and the AFCCA considered when evaluating Appellant's guilt for the Charge and Specifications involving EH. *See App. A* at 7-8, 11. Therefore, this Court should set aside the findings and sentence.

CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on August 6, 2026, and that a copy was also electronically served on the Air Force Government Trial and Appellate Operations Division at af.jajg.afloa.filng.workflow@us.af.mil on the same date.



JOHN M. FREDERICKS, Capt, USAF
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
John.Fredericks.2@us.af.mil
U.S.C.A.A.F. Bar No. 37723

Counsel for Appellant

**CERTIFICATE OF COMPLIANCE
WITH C.A.A.F. R. 21(b) & 37**

This supplement complies with the type-volume limitation of C.A.A.F. R. 21(b) because it contains 5,043 words.

This supplement complies with the typeface and type-style requirements of C.A.A.F. R. 37 because it has been prepared in a proportional typeface using Microsoft Word with Times New Roman 14-point typeface.

The issues raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), comply with the type-volume limitation of C.A.A.F. R. 21A because it is presented in a separate appendix to the supplement and does not exceed fifteen pages.



JOHN M. FREDERICKS, Capt, USAF
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
John.Fredericks.2@us.af.mil
U.S.C.A.A.F. Bar No. 37723

Counsel for Appellant