IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellant v. Lieutenant Colonel (O-5) **ASHLEY R. ELLIS** United States Army Appellee	BRIEF ON BEHALF OF APPELLEE Crim. App. Dkt. No. 20240254 USCA Dkt. No. 25-0197/AR

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

Certified Issues

I. WHETHER THE ARMY COURT ERRED BY FINDING APPELLANT HAD NOT WAIVED WHETHER THE MILITARY JUDGE SHOULD HAVE INSTRUCTED THE PANEL ON THE STATE OF LAW OF THE 1ST AMENDMENT.

II. WHETHER THE ARMY COURT ERRED BY OMITTING ANALYSIS REGARDING FORFEITURE ON WHETHER THE MILITARY JUDGE SHOULD HAVE INSTRUCTED THE PANEL ON THE STATE OF THE LAW OF THE 1ST AMENDMENT.

III. WHETHER THE ARMY COURT ERRED BY FINDING A MANDATORY PANEL INSTRUCTION ON THE STATE OF THE LAW OF THE 1ST AMENDMENT THAT THE MILITARY JUDGE FAILED TO GIVE.

IV. WHETHER THE ARMY COURT ERRED BY FINDING THE MILITARY JUDGE NEEDED TO PROVIDE A PANEL ISNTRUCTION REGARDING A QUESTION OF LAW.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2024). This Honorable Court has jurisdiction over this matter under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2024).

Statement of the Case

On May 17, 2024, a panel of officers sitting as a general court-martial convicted appellee, Lieutenant Colonel (LTC) Ashley R. Ellis, contrary to his pleas, of one charge and specification of Conduct Unbecoming an Officer, in violation of Article 133, UCMJ. (JA 16-21, 114-115).[1] On May 17, 2024, the military judge sentenced appellee to be reprimanded. (JA 116). On May 31, 2024, the convening authority took no action on the findings and approved the sentence. (JA 23). On June 19, 2024, the military judge entered judgment. (JA 22).

On May 13, 2025, the Army Court set aside the findings and sentence and ordered a rehearing. (JA 6-10). On June 18, 2025, The Judge Advocate General of the Army [TJAG] certified four issues to this court. (JA 3-5). On June 23, 2025,

[1] Appellee was acquitted of one charge and 15 specifications of domestic violence, in violation of Article 128b, UCMJ, and one charge and specification of Child Endangerment, in violation of Article 119b, UCMJ. One specification of Domestic Violence and one specification of Conduct Unbecoming an Officer were withdrawn prior to findings. (JA 16-21, 114-115).

this court docketed appellant's case and ordered briefing pursuant to Rule 25. (JA 1-2). On July 23, 2025, appellant submitted its initial brief. (Gov't. Br.).

Summary of Argument

As the Army Court correctly noted, the panel was deprived of proper instructions on the law. Importantly, the Army Court did not find the military judge must instruct on the "state of the law," rather, it found the military judge failed to instruct *on* the law. This critical distinction renders the government's arguments flawed from the start. If this Court disagrees, the government's arguments still fail for several critical reasons.

First, the government did not raise waiver or forfeiture before the Army Court. The government should be precluded from now seeking relief for that which it failed to argue below.

Second, all certified issues are framed as whether the Army Court erred in its findings, thus implicating whether the Army Court abused its discretion. It did not. The Army Court determined the government's charging decision impacted appellee's private speech. Appellee did not affirmatively waive instruction on this issue; therefore, the military judge erred in not instructing on the First Amendment and the "clear and present danger" test.

Third, finding waiver of a constitutional right is highly disfavored. This Court should not disturb the Army Court's ruling that appellee did not waive his constitutional protections.

Fourth, the Army Court's finding that the instructional issue was preserved obviated any need for the court to conduct a forfeiture analysis.

Statement of Facts

A. The Charged Misconduct

On April 17, 2023, Appellee sent a 46-second video to his wife, also an Army officer, via text message in which he filmed a set of her clothes in her closet and said the clothes were "ho dresses" and that appellee's cousin appeared to have taught his wife how to "dress like a ho." (JA 15, 53). Appellee was intimating that during their separation—which was highly contentious—it appeared his wife was dressing in provocative clothing to attract the attention of other men. (JA 63, 67).

On direct examination, appellee's wife did not address whether she was offended by appellee's words either as his wife or as a fellow officer. She did not testify to feeling humiliated, harassed, or degraded by appellee's words. She did feel "confused" by the video, but only because she did not know how appellee knew of her conversation with appellee's cousin. (JA 56). Appellee's wife agreed on cross-examination that the dresses were provocative and that it was acceptable for a husband to discuss his concerns about the provocativeness with his wife. (JA

64). It was also commonplace for both appellee and his wife to use curse words while communicating with each other. (JA 34, 69).

B. Pre-trial Motion to Dismiss Based on First Amendment Protections

Appellee was charged with Conduct Unbecoming an Officer based solely on the texted video. (JA 15). The government incorporated "with intent to humiliate, harass, or degrade" from Article 120, Abusive Sexual Contact, in the specification and charge under Article 133. (JA 15).

Prior to trial, appellee moved to dismiss the specification based on First Amendment and void for vagueness grounds. (JA 33-42). The military judge acknowledged that "calling someone names" is normally protected by the First Amendment. (JA 34).

During the motions hearing, the military judge specifically asked trial counsel, "And how am I to instruct the members in such a way as to avoid a First Amendment?…You'd agree that normally outside the military context the swearing or things like that is protected by First Amendment speech, correct? (JA 37). Trial counsel agreed that this private speech would normally be protected. (JA 37).

The military judge then asked trial counsel:

> So, we're on the second part of the test as to whether or not there was a clear and present danger that such conduct could cause a violation of the standards expected of an officer. So, how do I instruct the members in such a way

> as to not—as to narrow that down so that it's not we don't lose our free speech completely? And so, do I instruct them on the First Amendment and start telling them, hey, you normally have a First Amendment right to call your wife names, but officers don't have that same First Amendment right? Is that the line I'm drawing?

(JA 37). The government stated that instruction on the "terminal element" would suffice. (JA 39).

The military judge denied the defense motion. (JA 43). In his written ruling, the military judge noted that normally a husband calling his wife a "ho" is protected speech under the First Amendment. (JA 149). Though he acknowledged such speech is normally protected, he cited *United States v. Hartwig,* 39 M.J. 125, 128 (C.A.A.F. 1994), and ruled the specification was not "facially void," and as such, he would not dismiss it. (JA 150).

C. Motion to Dismiss During Trial

After the presentation of evidence, the defense again moved to dismiss the specification pursuant to R.C.M. 917 based on First Amendment issues and void for vagueness. (JA 72-76). In discussion on the R.C.M. 917 motion, the military judge noted, "it's clearly language that would normally be protected by the First Amendment" and thus, the parties had to address the "clear and present danger test." (JA 78). Trial counsel then suggested that it was appellee's intent to humiliate, harass, or degrade his wife that "put his standing in grave danger," not

his speech. (JA 77). The military judge deferred ruling, but eventually denied the motion. (JA 79, 112-113).

D. Panel Instructions Discussion

Given the military judge deferred his ruling, the parties went immediately into discussion on instructions. (JA 79). During this discussion, only a single sentence of the military judge's colloquy, buried in the middle of the discussion, was dedicated to the Article 133 charge, "Conduct unbecoming an officer, again, the court's standard instructions." (JA 89).

After this initial discussion, a series of R.C.M 802 conferences were held regarding instructions. (JA 95). However, the military judge never placed what the parties discussed during these conferences on the record.

E. Panel Instructions

The military judge instructed the panel as to the statutory elements of Article 133 and several definitions from the Military Judges' Benchbook. (JA 104-105, 319-320). The military judge did not instruct the panel on whether certain speech was protected by the First Amendment, nor did he instruct on the "clear and present danger" standard used when speech is implicated under Article 133.

After instructing the panel, the military judge asked the parties, "Also, after correcting myself, are the parties satisfied that I did correctly, subject to all the objections and such, correctly advise the members as to all of the substantive law

in this case?" (JA 107). The defense responded, "As best we could tell, yes, sir." (JA 107).

F. Proceedings at the Army Court

In his brief to the Army Court, appellee raised several assignments of error, including whether the First Amendment protects private speech between spouses, whether appellee had proper notice, and whether the military judge properly instructed the panel as to the First Amendment. (JA 156-241).

In its response, the government argued that the First Amendment did not apply to appellee's conduct and the military judge did not err when he omitted an instruction as to appellee's speech. (JA 257, 269-270). The government never argued that appellee waived or forfeited any objection to the military judge's instructions. (JA 242-271).

The Army Court found instructional error and set aside the findings and sentence. (JA 6-10). The Army Court declined to find waiver. (JA 9). "Here, we decline to find waiver, given the military judge's broad 'subject to all the objections and such' caveat." (JA 9). The Army Court found the "caveat" transformed, or as the Army Court put it, "transmogrified the defense's previous motions into objections to the instructions, too." (JA 9).

The Army Court found that the military judge erred when he withheld the "clear and present danger" instruction from the panel. (JA 9). The Army Court

noted that the military judge failed to put on the record any analysis of whether appellee's speech was protected by the First Amendment and what, if any, legal conclusions he made. (JA 9). "As best we can tell, he apparently assessed [appellee's] speech was unprotected and therefore, no specific instructions regarding constitutional implications were required." (JA 9). Because of the military judge's failure to instruct on the "clear and present danger" test, the Army Court found "[appellee's] panel was unable to consider this critical factor in reaching its guilty finding." (JA 9).

Combined Certified Issues I and II

WHETHER THE ARMY COURT ERRED BY FINDING APPELLANT HAD NOT WAIVED WHETHER THE MILITARY JUDGE SHOULD HAVE INSTRUCTED THE PANEL ON THE STATE OF THE LAW OF THE 1ST AMENDMENT.

WHETHER THE ARMY COURT ERRED BY OMITTING ANALYSIS REGARDING FORFEITURE ON WHETHER THE MILITARY JUDGE SHOULD HAVE INSTRUCTED THE PANEL ON THE STATE OF THE LAW OF THE 1ST AMENDMENT.

Standard of Review

A Court of Criminal Appeals [CCA] enjoys "broad discretion" in conducting its review and as such, actions by a CCA under Article 66 are generally reviewed for "an abuse of discretion." *United States v. Guinn,* 81 M.J. 195, 199 (C.A.A.F. 2021) (citing *United States v. Swift,* 76 M.J. 210, 216 (C.A.A.F. 2017)). The

government is asking whether the Army Court "erred" in finding no waiver. This Court may pierce through the Army Court's determination and look to whether the military judge erred in instructing the panel. *United States v. Blackburn*, 80 M.J. 205, 211 (C.A.A.F. 2020); *United States v. Shelton*, 64 M.J. 32, 37 (C.A.A.F. 2006). This Court has found this to be so even when the government certifies, and thus is responsible, for mis-framing the issue and presenting a challenge only to a service court's determination. *United States v. Siroky*, 44 M.J. 394, 399 (C.A.A.F. 1996). But this Court defers to the service court's factual determinations when deciding whether the service court erred in evaluating the trial court's decision. *United States v. Johnson*, 20 M.J. 155, 160 (C.M.A. 1985).

"Whether an appellant has waived an issue is a legal question that this Court reviews de novo." *United States v. Davis,* 79 M.J. 329, 332 (C.A.A.F. 2020). Issues not raised at trial are reviewed for plain error, so long as they are not waived. *United States v. Cole*, 84 M.J. 398, 404 (C.A.A.F. 2024) (citation omitted).

"'Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.'" *Davis,* 79 M.J. at 331 (quoting *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (internal quotation marks omitted) (citation omitted) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)).

If a constitutional right is implicated, appellate courts "generally decline to find waiver" and will instead review for plain error. *United States v. Smith,* 85 M.J. 283, 287 (C.A.A.F. 2024) (citing *United States v. Goings,* 72 M.J. 202, 205 (C.A.A.F. 2013)). "There is 'a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional relinquishment of a known right or privilege.'" *Smith,* 85 M.J. at 287 (quoting *United States v. Sweeney,* 70 M.J. 296, 303-304 (C.A.A.F. 2011)); *see also Blackburn*, 80 M.J. at 209 (applying presumption against waiver).

Law

Instructions to the panel should "consist of a statement of the issues in the case and an explanation of the legal standards and procedural requirements by which the members will determine findings." *Discussion* to R.C.M. 920(a). "Failure to object to an instruction or to omission of an instruction before the members close to deliberate forfeits the objection." R.C.M. 920(f).

"The government shall make no law…abridging the freedom of speech[.]" U.S. Cons. Amend. I. When the government alleges misconduct that implicates an accused's private speech, "'The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a

right to prevent.'" *Hartwig,* 39 M.J. 127 (quoting *Schenck v. United States,* 249 U.S. 47, 52 (1919)).

Argument

As an initial matter, the government never argued waiver before the Army Court. The government now complains that the Army Court should have found waiver even though the government failed to raise the issue. By failing to claim waiver before the Army Court, the government has relinquished its waiver and forfeiture arguments. *United States v. Dowdell*, 70 F.4th 134, 140 (3d. Cir. 2023); *United States v. Garcia-Lopez*, 422 F.3d 316, 319 (9th Cir. 2005) (finding the government "waived its waiver argument"). Indeed, the Army Court, despite the government's failure to argue it, considered waiver but declined to find it in this case. (JA 6).

Secondly, the Government misinterprets the Army Court's ruling. The Army Court did not hold the military judge should have instructed the panel "on the state of the law regarding the 1st Amendment," as the Government states in its brief. (Gov't. Br. at 22-23). Rather, it held, "the factfinder must be aware of the relevant law." (JA 9). The Army Court clarified it was discussing the instructions and the guidance the military judge should have provided the panel, as well as the legal tests to apply, not whether First Amendment jurisprudence was in flux. (JA 9). "Instead, panel members must obtain all operative legal guidance from the

judge. Without proper explanation as to the 'clear and present danger' legal standard applicable to a case involving an officer's private speech, appellant's panel was unable to consider this critical factor in reaching its guilty finding." (JA 9).

A. The First Amendment Was Squarely at Issue in Appellee's Case

The Army Court did not err on declining to find waiver. Twice appellee moved to dismiss the charge and specification based on First Amendment grounds. (JA 33-42, 72-79). Twice the military judge brought forth his concerns that the specification implicated First Amendment issues and challenged the government as to how he was supposed to instruct the panel. (JA 37, 78). Yet he still failed to instruct regarding the First Amendment, although he recognized it was at issue, and commented that the instructions were "subject to all the objections and such."

Second, and most significantly, appellee at no point affirmatively waived his right to have constitutionally appropriate instructions provided to the panel. This Court applies a presumption against such a waiver. *See Smith,* 85 M.J. at 287; *Blackburn*, 80 M.J. at 209.

The Army Court correctly found that appellee did not waive instructions on the First Amendment. The Army Court correctly noted that appellee's private speech was at the center of the charged misconduct, which placed whether his speech was protected at the forefront of the panel's fact finding. The military

judge did indeed subsume all prior contested issues when he caveated his question "subject to all the objections and such." The Army Court's interpretation of that statement, that it "transmogrified the previous motions into an objection to the instructions, too," is not an unreasonable interpretation, especially considering how prevalent defense's objections were on First Amendment grounds.

The government relies heavily on *Davis* for the notion appellee affirmatively waived an instruction on the First Amendment. (Gov't. Br. 10-13). But in *Davis* the appellant "affirmatively declined to object to the military judge's instructions" and so, by "'expressly and unequivocally acquiescing' to the military judge's instructions, appellant waived all objections to the instructions." *Davis,* 79 M.J. at 331 (quoting *United States v. Smith*, 2 C.M.A. 440, 442 (C.M.R. 1953)). Not so here. The "subject to all the objections and such" caveat was met with "as best we could tell." No express waiver is found here.

Nor do the policies supporting finding waiver apply here. First, as already established, this was an issue of constitutional import, and thus a presumption against waiver applies. *See Smith,* 85 M.J. at 287; *Blackburn*, 80 M.J. at 209. Second, Government relinquished its own waiver argument. One of the purposes of the policy supporting waiver and forfeiture is to protect against surprise. *Dowdell*, 70 F.4th at 141. The Government's briefing before the Army Court was robust, and not only did it not argue waiver, the Government in no way indicated it

was surprised as to the First Amendment issue before the Army Court. The trial record in appellee's case provides ample foundation to address the constitutional issues raised at trial and on appeal, and based on that record, the Army Court correctly declined to find waiver.

Furthermore, the Army Court exercised its discretion in declining to find waiver. In doing so, it was conducting its legal analysis with prudence. As Justice Scalia observed, where a party failed to raise an issue at trial, "The refusal to consider arguments not raised is a sound prudential practice, rather than a statutory or constitutional mandate, and there are times when prudence dictates the contrary." *Davis v. United States*, 512 U.S. 452, 465 (1994) (Scalia, J., concurring) (citing *United States National Bank v. Independent Insurance Agents of America*, 508 U.S. 439, 445-448 (1993)). Here, arguments were raised regarding the First Amendment—indeed, the arguments and development of the record were robust—and within that context the Army Court "declined to find waiver." Considering the robust record, the military judge's recognition of the appellee's objections, and the government's failure to argue waiver before it, the Army Court's decision was a model of prudence.

B. The Army Court Did Not Abuse Its Discretion

The Army Court properly conducted its analysis as to waiver. As the initial appellate authority, the Army Court is granted broad discretion in its review, and

subject to erroneous findings of fact or misapplication of the law, this Court should not disturb the Army Court's findings. *Guinn,* 81 M.J. at 199. The Army Court did not make erroneous findings of fact or misapply the law.

The Army thoroughly analyzed Appellee's case, found the military judge's instructions lacking the necessary constitutional instruction, and thus found error. The government fails to point to where the Army Court abused its discretion, rather it relies on the issue of waiver; an issue it did not raise before the Army Court.

In declining to find waiver, the Army Court was not obligated to then analyze forfeiture. The government can point to no authority to demand a service court provide superfluous analysis. Service courts regularly affirm cases before them without any written analysis of an appellant's arguments. *See* Art. 66, UCMJ. The same principle applies here.

The Army Court found that the prior motions and the military judge's reference to those motions preserved the issue of the military judge's requirement to instruct on the First Amendment and the "clear and present danger" legal standard. And preservation means forfeiture is moot. No further analysis is required.

Certified Issue III

WHETHER THE ARMY COURT ERRED BY FINDING A MANDATORY PANEL INSTRUCTION ON THE STATE OF THE LAW OF THE 1ST AMENDMENT THAT THE MILITARY JUDGE FAILED TO GIVE.

Standard of Review

A Court of Criminal Appeals [CCA] enjoys "broad discretion" in conducting its review and as such, actions by a CCA under Article 66 are generally reviewed for "an abuse of discretion." *Guinn,* 81 M.J. at 199.

Whether the military judge failed to provide a mandatory instruction is reviewed de novo. *United States v. Dearing,* 63 M.J. 478, 482 (C.A.A.F. 2006).

Law

"Congress shall make no law…abridging the freedom of speech." U.S. Const. amend. I. "When an alleged violation of Article 133 is based on an officer's private speech, the test is whether the officer's speech poses a clear and present danger that the speech will, in dishonoring or disgracing the officer personally, seriously compromise the person's standing as an officer." *Hartwig,* 39 M.J. at 128 (internal quotations omitted).

Argument

A. The Army Court Did Not Abuse Its Discretion

The Army Court did not abuse its discretion in finding the military judge erred when he omitted a necessary instruction as to the "clear and present danger"

test. The military judge was required to present the required law and legal standards to the panel, but he did not. This was error.

Further, as argued *supra,* the Army Court did not dictate a military judge is required to provide a "mandatory panel instruction on the state of the law." A thorough reading of the Army Court's opinion returns no mention of the "state of the law." Rather, the Army Court correctly noted a military judge is required to provide the panel with the "relevant law" and "all operative legal guidance." (JA 9).

In the present case, the military judge did not make findings of fact or conclusions of law as to whether appellant's speech was protected by the First Amendment. The Army Court assumed he found it was not protected and analyzed from that starting point. (JA 9).

If appellee's speech was indeed protected, it required an instruction on the relevant legal standard outlined in *Hartwig*. That instruction was not given. Rather, a generic description of unbecoming conduct was provided. (JA 104-105). Notably missing is any reference to private speech or whether appellee's private speech was a "clear and present danger" to his standing as an officer.

This omission is what the Army Court was referencing when it found instructional error. (JA 9). It did not find the military judge erred by not providing

guidance to the panel on the "state of the law," but rather that the operative legal test was omitted.

B. The Clear and Present Danger Test Does Implicate the First Amendment

The government "urges this Court clarify that the Clear and Present Danger standard does not implicate necessarily the 1st Amendment." (Gov't. Br. 21). This argument strays from the certified issue and is a flawed application.

Hartwig analyzed speech within a private letter. 39 M.J. at 128. Much the same as private speech in a texted video from a husband to a wife, this Court noted that type of speech would normally avail itself of the First Amendment's protections.

As such, it is not whether the "clear and present danger" test implicates the First Amendment, but rather whether private speech implicates the First Amendment. If so, then the application of the "clear and present danger" test is required. Based on this implication, it naturally follows that the military judge erred in not providing instruction on the operative "clear and present danger" test because the sole nature of the underlying misconduct was based on private speech.

The Army Court did not require a mandatory instruction on the state of the law, but did correctly require the military judge to analyze the private speech and instruct on the correct law.

C. There Is a Requirement to Provide a Panel Instruction on the Law

The government argued to both this Court and the Army Court that *Hartwig* was the correct test to utilize when analyzing conduct that implicated the First Amendment. (Gov't. Br. 18-24; JA 252-53). The Army Court relied on *Hartwig* to find that the military judge erred in not providing a required instruction to the panel. (JA 9). However, it appears the government now suggests the Army Court did not rely on *Hartwig,* but instead relied on its own precedent in *United States v. Henderson,* 83 M.J. 735 (Army. Ct. Crim. App. 2023), to find a mandatory instruction. The government argues *Henderson* expands this court's ruling on instructions from *United States v. Byunggu Kim,* 83 M.J. 235 (C.A.A.F. 2023) (Gov't. Br. 23-24). This argument fails for three reasons.

First, the Army Court did not cite *Henderson* nor *Kim* anywhere in their decision. The government makes an unsupported leap by arguing this. But even if the Army Court relied on *Henderson*, that case was not challenged at this Court.

Second, both *Henderson* and *Kim* note that when the criminalization of conduct may implicate a constitutional grey area, that situation must be more closely scrutinized. At no point does *Henderson, Kim*, nor the Army Court's decision suggest anything other than the requirement that military judges apply the correct law and provide the correct instructions.

Third, the government suggests that "such an instruction is absent from the Benchbook." (Gov't. Br. 21). Yet the government incorporated wording from Article 120 in the specification, which would necessitate instructions not found under or alongside the "standard" Article 133 instructions. The Benchbook is not the law's source, rather a tool providing the insight of military judges as to a correct view of the law at the time. *United States v. Riley*, 72 M.J. 115, 122 (C.A.A.F. 2013). Thus, it is not dispositive here.

The military judge is required to instruct the panel on the correct law; the correct law is the "clear and present danger" test. *Hartwig,* 39 M.J. at 127-28. Whether or not the exact wording from *Hartwig* is found in the standard Article 133 Benchbook instructions does not absolve the military judge of his duty to instruct on the proper test. The error of omission is made especially more glaring when the military judge correctly noted the appropriate standard during argument on the defense's motion to dismiss, and yet still failed to correctly instruct on the test. (JA 37).

Certified Issue IV

WHETHER THE ARMY COURT ERRED BY FINDING THE MILITARY JUDGE NEEDED TO PROVIDE A PANEL INSTRUCTION REGARDING A QUESTION OF LAW.

Standard of Review

A Court of Criminal Appeals [CCA] enjoys "broad discretion" in conducting its review and as such, actions by a CCA under Article 66 are generally reviewed for "an abuse of discretion." *Guinn,* 81 M.J. at 199.

Whether a military judge failed to provide a mandatory instruction is reviewed de novo. *Dearing*, 63 M.J. at 482.

Argument

The Army Court did not find that a military judge must present a question of law to the panel. Rather, it found that 1) the military judge erred by not placing on the record whether he concluded appellee's private speech was protected and 2) because the charged misconduct involved private speech, it necessarily implicated the "clear and present danger" test. As such, the Army Court did not abuse its discretion, especially given it did not require a question of law be presented to the panel.

The Army Court noted the military judge did not explain why he omitted instructions on the First Amendment when speech was clearly implicated. Given this, the Army Court generously assumed the military judge "assessed appellant's

speech was unprotected and therefore, no specific instructions regarding constitutional implications were required." (JA 9). It is clear the Army Court was not suggesting the military judge send a question of law to the panel. Rather, it was pointing out that the military judge omitted his conclusion of law. Even with this omission—which was error in and of itself—the Army Court still analyzed the instructions provided. And as the Army Court found those instructions lacking in the operative legal test, not a question of law, it found error.

At no point in its opinion did the Army Court mandate judges instruct on a question of law.

Conclusion

The certified issues are flawed from the outset as they do not accurately represent the ruling of the Army Court. Yet the government still fails to show how the Army Court abused its discretion in finding instructional error when appellee's First Amendment rights were implicated, and the military judge omitted the operative legal standard. Though the government did not argue waiver at the lower court, the Army Court correctly concluded that appellee did not waive proper instructions. The First Amendment, appellee's private speech, and the "clear and present danger" standard were at issue from the conception of trial.

Wherefore, this Court should uphold the Army Court's decision.

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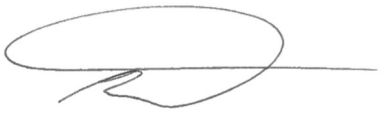

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Certificate of Compliance with Rules 24(c) and 37

1. This Brief on Behalf of Appellee complies with the type-volume limitation of Rule 24(c) because it contains 4,858 words.

2. This Brief on Behalf of Appellee complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Ellis, Crim. App. Dkt. No. 20240254, USCA Dkt. No. 25-0197/AR was electronically filed with the Court and Government Appellate Division on August 18, 2025.

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