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FILED
06/03/2026
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee* v. Eric E. TENNYSON Gunnery Sergeant (E-7) U.S. Marine Corps, *Appellant*	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim. App. Dkt. No. 202400272 USCA Dkt. No. 26-0191/MC

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

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Issues Presented

I.

Whether appellate defense counsel were ineffective by (A) failing to raise an unconstitutionally vague challenge against the specific section of the General Order supporting Appellant's conviction and (B) failing to challenge the legal sufficiency of the conviction based on unlawfulness of the order and lack of proof of Appellant's mens rea.

II.

Whether the section of the General Order underlying Appellant's convictions under Article 92, UCMJ, is unconstitutionally vague.

III.

Whether lower court erred by finding the evidence is legally sufficient to sustain Appellant's convictions for violation of a General Order under Article 92, UCMJ.

Introduction

Appellant stands convicted on a novel theory of sexual harassment that is unconstitutionally vague and sidesteps decades of Fifth Amendment Due Process protections. At trial, government counsel repeatedly rejected the traditional "reasonable person" standard and instead relied on a lower, subjective standard that had never been previously upheld by any military court as passing constitutional muster.[1]

Unfortunately, both Appellant's prior appellate counsel and appellate government counsel misunderstood the legal issue in this case. Both focused briefing on an objective standard that was not presented at trial—something the lower court acknowledged in its opinion.[2]

Appellant desires to raise a legitimate legal issue on appeal: the Government charged an unconstitutionally vague crime based on an admittedly subjective standard. Whether such a standard can sustain a conviction is a question of law that has not been answered, and one the lower court did not answer because Appellant's prior counsel did not raise it. This Court should grant review of this

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[1] S*ee, e.g.*, *United States v. Rosario*, No. 201500251, 2016 CCA LEXIS 32, at *4 (N-M. Ct. Crim. App. Jan. 28, 2016) (explaining the standard for sexual harassment is an objective standard based on reasonableness).
[2] *United States v. Tennyson*, No. 202400272, slip op. at 6 (N-M. Ct. Crim. App. Jan. 30, 2026).

issue of first impression—whether the Government's charging theory is unconstitutionally vague—and hear the substantive issue itself or remand this case to the lower court to do so.[3] Even though the lower court did not address this issue, leaving its decision in tact provides authority for the Government to obtain additional convictions under this novel theory, sidestepping decades of precedent that require the crime of sexual harassment to be based on objectively measurable standards.

The prior counsel's unreasonable misunderstanding of the Government's theory at trial also impacted that counsel's legal sufficiency argument. Prior counsel argued that there was insufficient evidence to sustain a conviction based on a reasonable person standard but did not challenge the legal sufficiency of the evidence based on the Government's actual charging theory.

Appellant desires to challenge the legal sufficiency of the Government's novel charging theory for two reasons. First, the Government did not prove that the specific portion of the order supporting Appellant's conviction, relying on the subjective understanding of potential victims, provided a "clear and specific mandate" such that the order was lawful.[4] Additionally, the Government's theory at trial relied on a mens rea of Appellant knowing he made the comments—not that

[3] C.A.A.F. R. 21(b)(5)(A), (B), (C).
[4] *See United States v. Womack*, 29 M.J. 88, 90 (C.M.A. 1989).

he knew his comments were unwelcome. This theory conflicted with Supreme Court precedent requiring defendants to have knowledge of the *wrongfulness* of their actions. This Court should also grant review of this case to determine itself, or remand to the lower court to determine, whether the Government provided legally sufficient evidence of the lawfulness of the order and Appellant's mens rea to sustain his conviction.[5]

Statement of Statutory Jurisdiction

Appellant filed a timely Notice of Appeal of his special court-martial conviction with the lower court.[6] The lower court reviewed this case under Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ).[7] Accordingly, this Court has jurisdiction under Article 67(a)(3), UCMJ.[8]

Statement of the Case

A special court-martial consisting of a military judge alone convicted Appellant, contrary to his pleas, of two specifications of sexual harassment in violation of Article 92, UCMJ, for violating Marine Corps Order 5354.1E, Marine Corps Prohibited Activities and Conduct Prevention and Response ("PAC

[5] C.A.A.F. R. 21(b)(5)(B), (C).
[6] Notice of Appeal.
[7] 10 U.S.C. § 866(b)(1)(A) (2024).
[8] 10 U.S.C. § 867(a)(3) (2024).

Order").[9] The military judge sentenced Appellant to a reprimand.[10] The convening authority approved the sentence, and the military judge signed the Entry of Judgment.[11] The lower court affirmed the findings and sentence on January 30, 2026.[12] Appellant filed a motion for reconsideration on February 27, 2026, which the lower court denied on March 6, 2026.[13] Appellant was served with the initial opinion and denial of the motion to reconsider on the same dates they were issued. Appellant timely petitioned this Court for review on May 4, 2026.[14]

Statement of Facts

A. The Government's allegations stem from several interactions that Appellant had upon reporting to a new command.

Two discrete incidents form the basis of Appellant's two convictions. Corporal (Cpl) R.A.B. testified that Appellant "watch[ed]" a female lieutenant walk by, say he "was going to get himself into some trouble" and make what she perceived as a "suggestive noise."[15] Cpl R.A.B. testified that the incident had no

[9] Statement of Trial Results, Aug. 3, 2022. He was found not guilty of a third specification.
[10] *Id.*
[11] Post-trial Action, Sept. 26, 2022; Entry of J., Dec. 1, 2022.
[12] *Tennyson*, slip op. at 8.
[13] Appellant's Mot. for Recons.; Order Den. Appellant's Mot. for Recons.
[14] Pet. for Grant of Review, May 4, 2026.
[15] R. at 126-27.

negative impact on her Marine Corps career.[16] She further explained that she would have reported the incident if it impacted her or constituted sexual harassment.[17] Cpl R.A.B. never informed Appellant she considered the comments to be unwelcome.[18]

The other incident involved Appellant speaking with two male sergeants. The sergeants testified Appellant made a comment about a female Marine who was not present, stating that she "must have paid good money for those tits."[19] One sergeant testified that Appellant also speculated the female Marine had a "shaved" private area.[20] No females were present, and one sergeant acknowledged that Appellant's comments were not directed at them, but occurred within their vicinity.[21] The other sergeant testified that, although he considered the comments "unwelcome," he was not personally offended by them.[22] Neither sergeant testified that they informed Appellant his comments were unwelcome.[23]

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[16] R. at 140.
[17] R. at 157.
[18] *See* R. at 127-30.
[19] R. at 283.
[20] R. at 203.
[21] R. at 285, 293.
[22] R. at 217
[23] *See* R. at 216, 285.

B. The Government charged a novel definition of sexual harassment that focused on the subjective feelings of alleged victims and disavowed the traditional objective standard.

The PAC Order provides three distinct definitions of sexual harassment, Sections A, B, and C.:[24]

> 010502. Sexual Harassment
>
> A. Knowing, reckless, or intentional conduct with a nexus to military service that:
>
> 1. Involves unwelcome sexual advances, requests for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature when:
>
> a. Submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career;
>
> b. Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person: or
>
> c. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment; or,
>
> 2. Is so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the work environment as hostile or offensive.
>
> B. Any knowing, reckless, or intentional use or condonation, by any person in a supervisory or command position, of any form of sexual behavior to control, influence, or affect the career, pay, or job of a Service member or DOD employee.
>
> C. Any conduct whereby a Service member or DOD employee knowingly, recklessly, or intentionally and without proper authority but with a nexus to military service makes deliberate or repeated unwelcome verbal comments or gestures of a sexual nature.
>
> (There is no requirement for concrete psychological harm to the complainant for behavior to constitute sexual harassment.)

[24] U.S. MARINE CORPS, ORDER 5354.1E, MARINE CORPS PROHIBITED ACTIVITIES AND CONDUCT PREVENTION AND RESPONSE vol. 2, chap. 1 § 010502 (Mar. 26, 2018).

None of the specifications clarified which sexual harassment section of the PAC Order Appellant was alleged to have violated:

Specification 1 (Violation of a General Order): In that Gunnery Sergeant Eric E. TENNYSON, U.S. Marine Corps, on active duty, did, on board Marine Corps Base Camp Lejeune, North Carolina, on or about 1 October 2020, violate a lawful general order, which was his duty to obey, to wit: Paragraph 010502, MCO 5354.1E W/ADMIN CH, dated 15 June 2018, by wrongfully sexually harassing;

- First Lieutenant A. A. P., U.S. Marine Corps; and,
- Corporal R. A. B., U.S. Marine Corps.

Specification 2 (Violation of a General Order): In that Gunnery Sergeant Eric E. TENNYSON, U.S. Marine Corps, on active duty, did, on board Marine Corps Base Camp Lejeune, North Carolina, on or about 2 October 2020, violate a lawful general order, which was his duty to obey, to wit: Paragraph 010502, MCO 5354.1E W/ADMIN CH, dated 15 June 2018, by wrongfully sexually harassing;

- Staff Sergeant S. J. T., U.S. Marine Corps; and,
- Corporal R. A. B., U.S. Marine Corps.

Specification 3 (Violation of a General Order): In that Gunnery Sergeant Eric E. TENNYSON, U.S. Marine Corps, on active duty, did, on board Marine Corps Base Camp Lejeune, North Carolina, on or about 5 October 2020, violate a lawful general order, which was his duty to obey, to wit: Paragraph 010502, MCO 5354.1E W/ADMIN CH, dated 15 June 2018, by wrongfully sexually harassing;

- First Sergeant S. L. P., U.S. Marine Corps;
- Sergeant J. C. A. , U.S. Marine Corps; and,
- Sergeant D. C. H. , U.S. Marine Corps.

Trial defense counsel made multiple motions to dismiss, arguing that the specifications did not provide sufficient notice and that "[t]he PAC Order itself is unconstitutionally vague and overbroad. The key operative terms are not defined and can make anyone a criminal so long as the alleged victim is sufficiently offended."[25]

In opposing these motions, the Government clarified "to be clear, we are actually pursuing Charlie," referring to Section C, and further stated "there is no evidence that's been discovered upon defense that would lead to any of those

[25] Appellate Ex. XIII at 2; Appellate Ex. XXV.

paragraphs [subsections A and B of the sexual harassment definition] as being the applicable paragraph under the charging theories."[26] The trial court orally denied both defense motions to dismiss without specifically addressing whether Section C of the PAC Order was unconstitutionally vague.[27] Consistent with the notion that the Government was prosecuting only Section C, trial counsel stuck to this case theory in both opening and closing statements.[28] The Government described what it "had to prove" as the comments being "unwelcome" and making the people present "uncomfortable."[29] Trial counsel never mentioned a reasonable person standard or argued Appellant's conduct was severe, pervasive, or created an intimidating, hostile, or offensive working environment.[30]

C. Appellant's initial appellate counsel focused the appeal on Section A of the PACORDER and not the preserved issue as to Section C. Appellate government counsel followed suit by focusing on Section A's language creating an objective standard.

Appellant's prior appellate counsel raised, inter alia, legal and factual

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[26] R. at 79.
[27] R. at 106-07.
[28] R. at 112 ("you'll hear how this made [her] feel at the time"), 114 ("they will both tell you how these comments . . . made them feel") ("these comments were unwelcome"), 380 ("she told us how she felt . . . that it was unwelcome"), 383 ("we know just how uncomfortable those individuals felt in that room"), 405 ("We're to prove that was unwelcome. She said it was unwelcome."), 406 ("The only evidence we have is that he felt awkward.").
[29] R. at 406-07.
[30] R. at 376-83, 402-08.

sufficiency assignments of error ("AOEs").[31] To support these AOEs, that counsel argued that there was insufficient evidence to establish Appellant's conduct was "so severe or pervasive that it effects [sic] the victim's work environment."[32] The brief analyzed "decades of federal case law interpreting sexual harassment" under the Equal Opportunity Commission and noted that the lower court had previously relied on the "reasonable person" standard to uphold a previous sexual harassment conviction as not unconstitutionally vague.[33] The brief references the "reasonable person" standard seven times.[34]

Appellant's initial brief, however, did not raise an AOE for Section C of the PAC Order being unconstitutionally vague.[35] The brief only mentions Section C when addressing legal sufficiency and arguing the comments were not "deliberately . . . unwelcome."[36] The Government responded in kind, focusing its Answer on a purported objective, severe and pervasive, reasonable person standard as applied to Section C.[37]

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[31] Appellant's Br.
[32] *Id.* at 12.
[33] *Id*.
[34] *Id.* at 9, 11, 12, 14, 19.
[35] Appellant's Br. at 2.
[36] R. at 15, 19.
[37] Appellee's Answer at 19.

D. The lower court noticed the parties both briefed the wrong issue, affirmed, and then declined to review the constitutional vagueness issue for Section C.

The lower court concluded that "Appellant's attacks on the legal and factual sufficiency center around definitions within the PAC Order that were not the basis for the charges against him."[38] The court held in no uncertain terms that the Government charged, and had to prove, Section C, requiring "that Appellant's comments were made knowingly and were deliberate unwelcome verbal comments of a sexual nature. That is *all* that is required to prove a violation of Section C[.]"[39]

In affirming, the lower court repeatedly referenced the subjective understanding of alleged victims:

- "Corporal R.A.B. found the noise along with the comments to be suggestive in nature and unwelcome in that environment."[40]
- "Sergeant D.C.H. said those comments were not welcome in a work setting."[41]
- "Sergeant J.C.A. also felt it was too awkward to try to correct someone higher in grade."[42]

After the lower court issued the opinion, successor appellate counsel filed a

[38] *Tennyson*, slip op. at 6.
[39] *Id.* at 7 (emphasis added).
[40] *Id.* at 3.
[41] *Id.* at 4.
[42] *Id.* at 4.

motion for reconsideration, explicitly requesting the lower court consider whether Section C was unconstitutionally vague because it contained no objective test, no reasonable person test, and no requirement that an accused's conduct be severe or pervasive.[43] The lower court denied Appellant's motion, holding that Appellant "failed to establish good cause for not raising the matter earlier" and holding the matter was "[t]herefore . . . waived."[44]

[43] Appellant's Mot. for Recons.
[44] Order Den. Appellant's Mot. for Recons.

Reasons to Grant Review

I.

Prior appellate counsel was ineffective for (A) not raising a preserved constitutional challenge to the Government's novel theory of criminality and (B) failing to challenge the legal sufficiency on the basis that (i) the relevant section of the order was not lawful and (ii) there is no evidence Appellant's comments were deliberately unwelcome.

In order to prevail on a claim of ineffective assistance of counsel, under *Strickland v. Washington*, an appellant must show that: (1) his counsel's performance was "so deficient that it fell below an objective standard of reasonableness," and (2) the deficient performance was "so serious as to deprive the appellant of a fair appellate proceeding whose result is reliable."[45] Both components of the *Strickland* test are met here.[46]

A. At trial, Appellant preserved the issue of whether the Government's theory of culpability is unconstitutionally vague.

Appellant squarely preserved his challenge to PAC Order Section C at trial by filing a motion challenging its constitutionality and vagueness.[47] The initial

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[45] *United States v. Adams*, 59 M.J. 367, 370 (C.A.A.F. 2004) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)) (cleaned-up).
[46] *United States v. Metz*, 84 M.J. 421, 428 (C.A.A.F. 2024) (citing *Strickland*, 466 at 687) (explaining the two components of ineffective assistance of counsel: (1) deficient performance; and (2) resulting prejudice); *Adams*, 59 M.J. at 370 (explaining claims of appellate IAC are "measured by the [*Strickland*] test").
[47] Appellate Exs. XIII, XXV.

appellate counsel's failure to raise this issue meets the *Strickland* standard for two reasons.

First, prior appellate counsel focused the appeal on an uncharged theory of criminal liability (Section A) and failed to raise a preserved trial challenge to the Government's actual theory of liability (Section C).[48] Indeed, the lower court correctly pointed out Section A was not pursued by the Government at trial and is not the basis for Appellant's convictions.[49] Raising an issue about a theory that was not charged while missing a preserved objection to the theory actually charged was objectively unreasonable.

Second, this deficient representation "deprive[d] . . . Appellant of a fair appellate proceeding whose result is reliable" as discussed in the second Issue Presented below.[50]

B. The record presents issues of legal insufficiency based on the unlawfulness of the order and lack of evidence that Appellant's comments were deliberately unwelcome.

In addition to failing to raise a preserved constitutional challenge to the

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[48] Appellate Exs. XIII, XXV; Appellant's Br. at 9, 11-12, 14, 19; *Tennyson*, slip op. at 6.

[49] Appellant's Br. at 9, 11-12, 14, 19; *Tennyson*, slip op. at 6. When Appellant's second appellate defense counsel raised this issue after the lower court issued its opinion, the court found there was not good cause to raise the issue late. That lack of good cause underscores that Appellant received ineffective assistance of counsel. Order Den. Appellant's Mot. for Recons.

[50] *Adams*, 59 M.J. at 370 (citing *Strickland*, 466 U.S. at 688).

Government's theory of criminal culpability, prior appellate counsel only challenged the legal sufficiency of the conviction based on a definition the Government did not use at trial. In doing so, prior appellate counsel did not raise to the lower court that Appellant's convictions were legally insufficient on the grounds that (1) the section of the order underlying his conviction was not criminally enforceable and (2) there was no evidence that Appellant's comments were deliberately unwelcome. These two issues were central to the Government's novel and untested theory of criminality. Raising legal sufficiency as an AOE based on a case theory not pursued at trial, while not raising two significant issues with a novel and untested theory of culpability, was plainly unreasonable.

This deficient representation "deprive[d] . . . Appellant of a fair appellate proceeding whose result is reliable" as discussed in the third Issue Presented below.[51]

This Court should grant review due to ineffective assistance of appellate counsel. Denying review of this issue would deny Appellant the effective exercise of his appellate rights and undermine his statutory right to an appeal. There would be, effectively, no appellate review of a preserved trial issue challenging the constitutionality of a conviction nor of the legal sufficiency of a novel and untested

[51] *Id*.

theory of criminal culpability. Because the lower court did not consider this constitutional issue of first impression nor the legal sufficiency issues, it is appropriate for this Court to grant review and either review the issue itself or summarily reverse the lower court's decision and remand for it to do so.

II.

Appellant's conviction is based on a subjective, unconstitutionally vague sexual harassment standard.

When an ineffective assistance of counsel claim is "premised on counsel's failure" to raise an issue, the "appellant must show that there is a reasonable probability that" raising the issue "would have been meritorious" in order for the ineffectiveness to be prejudicial.[52] Here, this prejudice test is met, and this Court should grant review of the issue Appellant tried to raise before the CCA. Whether Section C of the PAC Order is unconstitutionally vague is an unsettled question that this Court can and should resolve.[53]

A. Military courts have only upheld the constitutionality of sexual harassment orders violations under an objective, reasonable person standard.

The Constitution's Due Process Clause ensures that "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.

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[52] *Metz*, 84 M.J. at 428 (citations omitted).
[53] *See* C.A.A.F. R. 21(b)(5)(A).

All are entitled to be informed as to what the State commands or forbids."[54] This Court has applied the unconstitutional vagueness doctrine to military orders to uphold a conviction when the "order's language was sufficiently clear, specific, and narrowly drawn under the circumstances of this case."[55]

In the context of sexual harassment orders, military courts have repeatedly relied on an objective, reasonable person standard to find that the order was not unconstitutionally vague.[56] "Key" to these holdings is the concept that "features of sexual harassment are at least standards that can be measured objectively."[57] These holdings focused on sexual harassment that created a hostile, intimidating, or offensive working environment, and "brought with them the 'old soil' of decades of their application and interpretation in federal courts."[58]

The lower court previously addressed the constitutionality of an order

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[54] *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).
[55] *United States v. Moore*, 58 M.J. 466, 469 (C.A.A.F. 2003) (upholding order from superior petty officer not to speak with certain civilians who worked in appellant's work center).
[56] *United States v. Truitt*, 84 M.J. 721, 725 (C.G. Ct. Crim. App. 2024); *Rosario* 2016 CCA LEXIS, at *4; *United States v. Balcarczyk*, 52 M.J. 809, 811 (N-M. Ct. Crim. App. 2000); *United States v. Swan*, 48 M.J. 551 (N-M. Ct. Crim. App. 1998).
[57] *Swan*, 48 M.J. at 555 (quoting *United States v. Peszynski*, 40 M.J. 874, 881 (N.M.C.M.R. 1994)).
[58] *Truitt*, 84 M.J. at 725.

similar to the PAC Order in this case in *United States v. Rosario*.[59] There, the court only upheld the constitutionality of the order *because* of the objective, reasonable person standard.[60] *Rosario* made a passing comment that the order "further provides" prohibitions on "deliberate or repeated unwelcome comments" (the Section C-equivalent), but only upheld the constitutionality of "unwelcomed" behavior if it "produced an intimidating, hostile or offensive working environment" under "objectively measurable standards."[61]

B. The subjective standard charged in this case is unconstitutionally vague.

Trial counsel explicitly disavowed Section A's objective, reasonable person standard. Instead, the Government repeatedly and consistently stated its theory of criminality relied on Section C's subjective perceptions of the named victims. This theory, as the lower court affirmed, allowed the Government's charging theory to sidestep decades of precedent establishing the constitutional limits of sexual harassment as a crime.[62]

The range of purportedly prohibited conduct under Section C is unlimited,

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[59] *Rosario*, 2016 CCA LEXIS 32, at *4-9.
[60] *Id.* at 7-8.
[61] *Id.*
[62] Notably, the lower court's ruling did not follow the culpability theory the Government espoused in its Answer brief that attempted to apply a reasonable person standard to Section C.

making it impossible to put the accused on notice that the charged conduct was criminal.[63] Even when notice can come from multiple sources, including federal case law, military case law, military custom and usage, and military regulations, the notice in previous sexual harassment cases is based on an objective standard of a reasonable person.[64] No case, custom, or regulation provides notice of criminality based on personal, subjective feelings.

When a comment or gesture is made, one cannot know how every person who might observe the action will perceive it. But the criminality from Section C turns on the subjective interpretation of third parties—parties who, as in this case, may not even be personally offended, despite stating the comments were "unwelcome," and may not even consider the statements as constituting harassment.

Even if Section C is interpreted to require that an accused know that his comments are unwelcome, the language is still unconstitutionally vague because it allows potential "eggshell" victims to dictate what behavior is criminalized. One person in a military unit could declare a range of conduct they find unwelcome, and that conduct would immediately become criminalized within that unit. This is

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[63] *See Parker v. Levy*, 417 U.S. 733, 757 (1974); *United States v. Saunders*, 59 M.J. 1, 8 (C.A.A.F. 2003).
[64] *See United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003) (citations omitted).

a constitutionally untenable outcome that could criminalize—based solely on perceptions of third parties—innocuous discussions about fertility and pregnancy, one's personal life, and a range of other activity that would not be criminalized under an objective, reasonable person test.

In work centers such as sexual assault prevention and response offices, legal offices, law enforcement offices, and medical offices, discussions of a "sexual nature" are often necessarily part of one's military duties. Allowing "eggshell" victims to dictate the definition of sexual harassment could criminalize discussions required as part of one's military duties. Such potential outcomes demonstrate that the plain language of Section C of the PAC order is unconstitutionally vague because one could not reasonably understand what specific conduct is prohibited.

Appellant had a reasonable likelihood of success in prevailing on the issue of unconstitutional vagueness. No military court, before now, has upheld a criminal sexual harassment conviction on purely subjective grounds. This is a question that has not, but should be, settled by this Court or the lower court. This Court should grant review and consider the constitutional issue itself or summarily reverse the lower court's decision and remand the case for consideration of this issue.

III.

Appellant's convictions are legally insufficient because: (A) the order was not lawful; and (B) there was no evidence Appellant's comments were deliberately unwelcome.

A. Section C of the PACORDER is not lawful because it does not have a clear and specific mandate.

To be lawful and subject to criminality, an order must be a "clear and specific" mandate and "be worded so as to make it 'specific, definite, and certain.'"[65] For example, the Army Court of Military Review held that an order to "go to work," under the specific facts of the case, did not "provide a clear enough mandate to establish a violation of Article 90, Uniform Code of Military Justice."[66]

Here, the lower court did not address Article 92's first element, lawfulness, and did not analyze whether Section C of the PAC Order provided a clear and specific mandate. Rather, the court's declarative conclusion was that an order was in effect, as opposed to considering whether the relevant section was lawful in the first place.[67]

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[65] *Womack*, 29 M.J. at 90 (upholding conviction for violating order directing specific "health procedures").
[66] *United States v. Beattie*, 17 M.J. 537 (A.C.M.R. 1983) (setting aside conviction for willfully disobeying verbal order from superior commissioned officer).
[67] *Tennyson*, slip op. at 7.

For the same reasons that this standard is constitutionally infirm (it relies on the subjective interpretation of victims), Section C also does not provide a "clear and specific" mandate. The mandate, rather, is up to the personal interpretation of individuals and is not subject to any objective standard. The lower court's declarative conclusion that the order was lawful conflicted with military precedent and, thus, this Court should grant review.[68]

B. There is no evidence Appellant's conduct was deliberate, making the evidence legally insufficient because the mens rea was not met.

The Supreme Court has repeatedly held that "wrongdoing must be conscious to be criminal" and that "a defendant must be 'blameworthy in the mind' before he can be found guilty.[69] The defendant in *Elonis v. United States* was convicted under a statute making it "a crime to transmit in interstate commerce 'any communication containing any threat . . . to injure the person of another.'"[70] The *Elonis* jury instructions, which formed the basis for the Supreme Court to reverse the Circuit Court opinion upholding the conviction, applied an intentional mens rea to the making of the statement and a negligence mens rea to his understanding that the statement would be perceived as a threat:

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[68] *See* C.A.A.F. R. 21(b)(5)(B).
[69] *See Elonis v. United States*, 575 U.S. 723, 734 (2015) (internal citations omitted).
[70] *Id.* at 726 (citing 18 U.S.C. § 875(c)).

> A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.

There, the Supreme Court held that the defendant's intentional communication of the words and negligence regarding their nature as a threat were insufficient to sustain a conviction. The Court instead interpreted the statute to require that the defendant "transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat."[71] The Court explained that a criminal communication of a threat "would require Elonis know the threatening nature of his communication . . . . [It] turns on whether a defendant knew the *character* of what was sent, not simply its contents and context."[72]

Applying *Elonis* and other Supreme Court precedent to Section C means that "deliberate" or "knowing" must be more than just knowing that Appellant uttered

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[71] *Id.*; *see also Morissette v. United States*, 342 U.S. 246 (1952) (requiring a defendant have knowledge of another's property rights; without such knowledge the deliberate act of removing property from government facility is insufficient); *Liparota v. United States*, 471 U.S. 419 (1985) (finding a statute making it a crime to knowingly possess or use food stamps in an unauthorized manner required knowledge that use was unauthorized).

[72] *Id*. at 739.

the words. Rather, a plain reading of Section C requires the accused to have deliberately made comments that he knew would be unwelcome—this is the only interpretation that provides a mens rea requiring Appellant to have been "blameworthy in the mind."[73]

The Government produced no evidence, and made no argument, that Appellant knew, let alone deliberately said any words, to make anyone feel unwelcome.[74] The Government elicited no testimony from Cpl R.A.B. about Appellant's purported knowledge or deliberations; nor did it elicit any evidence that she or anyone else ever told Appellant that his comments were unwelcome.[75] Indeed, she testified on direct examination that she "remained silent" during the interaction.[76] She acknowledged that she never took any action that would have contemporaneously informed Appellant his actions were unwelcome.[77]

Similarly, the Government presented no evidence (or argument) that Appellant said the comments to the sergeants in a way that he knew was, or

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[73] *See Elonis*, 575 U.S. at 734.
[74] Notably, the Government's theory here had even less mens rea requirements than *Elonis*, applying strict liability once a comment that is unwelcome to a third party is knowingly made. The Government explicitly disavowed a negligence theory under Section A of the PAC Order.
[75] *See* R. at 127-30.
[76] R. at 129.
[77] R. at 139.

intended to be, unwelcome. One sergeant testified that he did not try to correct or address the comments "in any way," explaining that he "just felt kind of awkward making a correction. . . . So I did not respond."[78] He acknowledged he gave no indication to Appellant that his comments were unwelcome.[79] The other sergeant also did not notify Appellant that his comments were unwelcome, instead, nodding and smiling.[80]

The lower court did not address whether Appellant had a sufficient mens rea to support the Government's theory of criminality. Had the lower court analyzed this issue and applied an appropriate mens rea requirement, it would have held that Appellant's conviction was not legally sufficient. This Court should grant review and consider the legal sufficiency issues itself or summarily reverse the lower court's decision and remand the case for consideration of these issues.

Conclusion

Appellant respectfully requests that this Court grant his Petition for Review and decide whether his convictions were based on an unconstitutionally vague order or legally insufficient. In the alternative, he requests this Court summarily

[78] R. at 204.
[79] R. at 216.
[80] R. at 285.

vacate the lower court's judgment and remand to the lower court to address these issues that prior appellate counsel failed to raise.

Respectfully submitted.

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Appendix

A. *United States v. Tennyson*, No. 202400272, slip op. (N-M. Ct. Crim. App. Jan. 30, 2026).

Certificate of Compliance with Rules 21(b) and 37

This Supplement complies with the type-volume limitations of Rule 21(b) because:

This Supplement contains 4,832 words.

This brief complies with the typeface and type style requirements of Rule 37.

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Certificate of Filing and Service

I certify that a copy of the foregoing was delivered to the Court and delivered to the Director, Appellate Government Division, at Code46-DAC@us.navy.mil, and to the Deputy Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, at Joshua.D.Ricafrente.civ@us.navy.mil on June 3, 2026.

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This opinion is subject to administrative correction before final disposition.

United States Navy–Marine Corps Court of Criminal Appeals

Before
DALY, GROSS, and de GROOT

UNITED STATES
Appellee

v.

Eric E. TENNYSON
Gunnery Sergeant (E-7), U.S. Marine Corps
Appellant

No. 202400272

Decided: 30 January 2026

Military Judges:
Nicholas S. Henry (Arraignment)
Benjamin A. Robles (Motions, Trial)

Sentence adjudged 2 December 2021 by a special court-martial tried at Marine Corps Base Camp Lejeune, North Carolina, consisting of a military judge sitting alone. Sentence in the Entry of Judgment: reprimand.

For Appellant:
Lieutenant Commander Leah Fontenot, JAGC, USN
Lieutenant Commander Marc D. Hendel, JAGC, USN

For Appellee:
Lieutenant Erin H. Bourneuf, JAGC, USN
Commander John T. Cole, JAGC, USN

This opinion does not serve as binding precedent, but may be cited as persuasive authority under NMCCA Rule of Appellate Procedure 30.2.

PER CURIAM:

A military judge sitting alone as a special court-martial, convicted Appellant, contrary to his pleas, of two specifications of violating a general order in violation of Article 92, Uniform Code of Military Justice (UCMJ).[1] Before us, Appellant raises four assignments of error (AOE):

I. Is the evidence legally sufficient to sustain Appellant's convictions for violation of a general order under Article 92, UCMJ?

II. Is the evidence factually sufficient to sustain Appellant's convictions for violation of a general order under Article 92, UCMJ?

III. Do the specifications of which Appellant was convicted fail to state an offense?

IV. Whether referral to a mandatory judge-alone special court-martial of charged offenses carrying a maximum authorized punishment including two years' confinement and a dishonorable discharge violated Appellant's Fifth Amendment right to due process.[2]

For the reasons set forth below, we affirm.

I. BACKGROUND

On 1 October 2020, Appellant began the check-in process at his new command. Corporal (Cpl) R.A.B. introduced herself to Appellant as she was the clerk who would be assisting him with his check-in. While Cpl R.A.B. was putting together paperwork for Appellant, who was standing in the doorway, First Lieutenant (1stLt) A.A.P. walked by the office. Appellant and 1stLt A.A.P. gave

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[1] 10 U.S.C. §892.

[2] We carefully considered the matters raised by Appellant in his brief regarding the fourth AOE and find it does not require discussion or relief. *See United States v. Matias* 25 M.J. 356, 361 (C.M.A. 1987); *See also United States v. Wheeler*, 85 M.J. 70 (C.A.A.F. 2024).

each other the greeting of the day as she passed, and then Appellant leaned out of the office to watch 1stLt A.A.P. continue to walk down the hallway. When Appellant returned to the office, he looked at Cpl R.A.B. and "made a suggestive noise and said that he was gonna get himself into some trouble in [the] company."[3] Corporal R.A.B. found the noise along with the comments to be suggestive in nature and unwelcome in that environment.[4] After 1stLt A.A.P. was gone, First Sergeant (1stSgt) S.L.P. stopped by to introduce herself to Appellant. On cross-examination, Cpl R.A.B. testified that after 1stSgt S.L.P. left, Appellant said "she's going to hate my fucking guts."[5]

The next day, 2 October 2020, Appellant returned to Cpl R.A.B.'s office to weigh-in as part of his check-in to the command. Staff Sergeant (SSgt) S.J.T., who was present along with Cpl R.A.B., saw Appellant in his camouflage uniform instead of his green shorts, which he was holding in his hands. Staff Sergeant S.J.T. heard Appellant start to unbuckle his belt and asked Appellant to go across the hallway to change into the shorts. Corporal R.A.B. testified that Appellant then said, "[y]ou don't mind it's just my panties, right, Corporal [R.A.B.]?"[6] Appellant proceeded to take off his pants and change into his green shorts for the weigh-in, even though SSgt S.J.T. told him again to change in the bathroom across the hallway. Corporal R.A.B. testified that she felt uncomfortable,[7] but she did not see much as she hid her face behind her computer screen and did not interact with Appellant. Staff Sergeant S.J.T.'s testimony corroborated Cpl R.A.B.'s account as to what happened. Staff Sergeant S.J.T. testified that he found Appellant's actions to be more disrespectful due to Appellant ignoring his request rather than making him feel uncomfortable. Later, SSgt S.J.T. decided to file a complaint after speaking with his 1stSgt in order to "stick up for Corporal [R.A.B.]."[8]

Also in early October, Appellant was speaking with Sergeant (Sgt) J.C.A. about drill instructor duty, while then-Sgt D.C.H.[9] was working in their office. During this discussion, he made comments about 1stSgt S.L.P. Sergeant D.C.H. testified that Appellant said he "would love to see her in boots and utes, and that he bets – he bets that she has a shaved p[****]. And also that she paid

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[3] R. at 127.

[4] R. at 129-30.

[5] R. at 142.

[6] R. at 133.

[7] R. at 133.

[8] R. at 175.

[9] By the time of trial, Sgt D.C.H. had promoted to Staff Sergeant.

a pretty penny for her fake t[***]."[10] Sergeant D.C.H. testified that he "felt uncomfortable in the situation, you know . . . a staff NCIOC saying something like that about your company First Sergeant."[11] Sergeant D.C.H. said those comments were not welcome in a work setting. Although he wished he had said something at the time, he felt awkward making a correction, as he was a sergeant checking in a new gunnery sergeant;[12] however, Sgt D.C.H. was not personally offended by the comments.[13] Sergeant J.C.A. also testified to Appellant's comments and said he was not offended by them; however, the comments were not welcome, especially since Sgt J.C.A. did not know Appellant and was Appellant's subordinate. Sergeant J.C.A. also felt it was too awkward to try to correct someone higher in grade. Sergeant D.C.H. reported the comments to the chain of command in hopes that Appellant would receive mentoring.

Appellant was charged with three specifications of violating paragraph 010502 of the Prohibited Activities and Conduct Prevention and Response Policy, Marine Corps Order (MCO) 5354.1E W/ADMIN CH, dated 15 June 2018 (PAC Order) for the three incidents described above. The military judge found Appellant guilty of two of the three specifications.[14]

II. DISCUSSION

A. The Evidence is Legally and Factually Sufficient to Sustain Appellant's Convictions for Violation of Article 92, UCMJ.

1. Standard of Review

The test for legal sufficiency is whether, "considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt."[15] "As such, '[t]he

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[10] R. at 203.

[11] R. at 203-04

[12] R. at 204.

[13] R. at 217.

[14] The military judge found Appellant not guilty of Specification 2, which was the 2 October 2020 incident described above involving the weigh-in. R. at 410; Entry of Judgment.

[15] *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia,* 443 U.S. 307, 319 (1979)).

standard for legal sufficiency involves a very low threshold to sustain a conviction.'"[16]

For crimes that occurred prior to 2021, we review factual sufficiency de novo.[17] The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," we are convinced of an appellant's guilt beyond a reasonable doubt.[18] We presume neither innocence nor guilt, and instead take "a fresh, impartial look at the evidence" to independently determine whether each element has been satisfied with proof beyond a reasonable doubt.[19] Proof beyond a reasonable doubt "does not mean the evidence must be free from conflict."[20]

2. Analysis

We begin with an analysis of whether the evidence is legally sufficient to support Appellant's convictions for sexual harassment. In Specification 1, the Government needed to prove:

(1) That there was in effect a certain lawful general order, to wit: Paragraph 010502, MCO 5354.1E ADMIN CH, dated 15 June 2018,[21]

(2) That Appellant had a duty to obey such order; and

(3) That on or about 1 October 2020 at Marine Corps Base Camp Lejeune, North Carolina, Appellant violated this lawful general order by wrongfully sexually harassing Corporal R.A.B.[22]

For Specification 3, the Government needed to prove:

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[16] *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2023) (citing *United States v. Navrestad*, 66. M.J. 262, 269 (C.A.A.F. 2008).

[17] Article 66(d)(1), UCMJ (2019 ed.); *See United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017).

[18] *Turner*, 25 M.J. at 325.

[19] *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

[20] *United States v. Rankin*, 63 M.J. 552, 557 (N-M. Ct. Crim. App. 2006) (citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)).

[21] The military judge took judicial notice of MCO 5354.1E ADMIN CH dated 15 June 2018 as a lawful order and that it was in effect at the time of the offenses. R. at 348.

[22] Appellant was originally charged with sexually harassing both Cpl R.A.B. and 1stLt A.A.P. in this specification; however the military judge excepted the words "First Lieutenant A.A.P." and found Appellant guilty of the specification as excepted. Entry of Judgment.

(1) That there was in effect a certain lawful general order, to wit: Paragraph 010502, MCO 5354.1E ADMIN CH, dated 15 June 2018,

(2) That Appellant had a duty to obey such order; and

(3) That on or about 1 October 2020 at Marine Corps Base Camp Lejeune, North Carolina, Appellant violated this lawful general order by wrongfully sexually harassing Sergeant J.C.A. and Sergeant D.C.H.[23]

Appellant's attacks on the legal and factual sufficiency of his convictions center around definitions within the PAC Order that were not the basis for the charges against him.[24] Paragraph 010502 of the PAC Order sets forth prohibited conduct that is considered to be sexual harassment. Section C prohibits "[a]ny conduct whereby a Service member or DOD employee knowingly, recklessly, or intentionally and without proper authority but with a nexus to military service makes deliberate or repeated unwelcome verbal comments or gestures of a sexual nature."[25] The PAC Order also states "[t]here is no requirement for concrete psychological harm to the complainant for behavior to constitute sexual harassment."[26] During an Article 39(a) session, trial counsel provided notice to Appellant and the military judge that the offenses were based on violations of Section C of paragraph 010502 of the PAC Order;[27] further, during closing argument, trial counsel only referred to Section C.

Based on the witness testimony and the other evidence presented at trial in this case, a reasonable fact-finder could have found the essential elements of the crimes beyond a reasonable doubt. Considering the evidence in the record of trial in the light most favorable to the Government, we find the evidence to

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[23] In this specification, Appellant was also charged with sexually harassing 1st Sgt S.L.P; however the military judge excepted the words "First Sergeant S.L.P." and found Appellant guilty of the specification as excepted. Entry of Judgment.

[24] Appellant argues the Government did not prove the sexual harassment conduct as defined by paragraph 010502 Section A.2., which states "knowing, reckless, or intentional conduct with a nexus to military service that: . . . . 2. [i]s so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the work environment as hostile or offensive." Appellant's Brief at 5, 24. Appellant cites to *United States v. Truitt*, 84 M.J. 721 (C.G. Ct. Crim App. 2024) and *United States v. Rosario*, No. NMCCA 201500251, 2016 CCA LEXIS 32 (N-M Ct. Crim. App. Jan. 28, 2016) in support of his argument. However, this argument is inapt, as Appellant was not convicted under Section A.2.

[25] Pros. Ex. 2 at 11.

[26] Pros. Ex. 2 at 11.

[27] R. at 79.

be legally sufficient to support Appellant's convictions. Specifically, the Government presented more than sufficient evidence to show that Appellant's comments were made knowingly and were deliberate unwelcome verbal comments of a sexual nature. This is all that is required to prove a violation of Section C of paragraph 010502 of the PAC Order. Weighing the evidence, while allowing for not having personally observed the witnesses, we are also convinced beyond a reasonable doubt of Appellant's guilt and find the specifications factually sufficient.

B. The Specifications of Which Appellant was Convicted Do Not Fail to State an Offense

1. Standard of Review

Whether a specification states an offense is a question of law and is reviewed de novo.[28] "A specification states an offense if it alleges, either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy."[29] "[W]hen [a] charge and specification are first challenged at trial, we read the wording . . . narrowly and will only adopt interpretations that hew closely to the plain text."[30] "Hewing closely to the plain text means we will consider only the language contained in the specification when deciding whether it properly states the offense in question."[31]

2. Analysis

Appellant argues that the specifications of which he was convicted are defective, because they do not allege the specific acts that violated the PAC Order and therefore both fail to state an offense.[32] Specification 1 of the Charge is as follows:

> In that Gunnery Sergeant Eric E. TENNYSON, U.S. Marine Corps, on active duty, did, on board Marine Corps Base Camp Lejeune, North Carolina, on or about 1 October 2020, violate a lawful general order, which was his duty to obey, to wit: Paragraph 010502, MCO 5354.1E W/ADMIN CH, date 15 June 2018,

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[28] *United States v. Turner*, 79 M.J. 401, 404 (C.A.A.F. 2020) (citing *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006).

[29] *Crafter*, 64 M.J. at 211 (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)); *See also* Rule for Courts-Martial (R.C.M.) 307(c)(3).

[30] *Turner*, 79 M.J. at 403 (quoting *United States v. Fosler*, 70 M.J. 225, 230 (C.A.A.F. 2011)) (internal quotations omitted).

[31] *Id.*

[32] Appellant's Brief at 24.

by wrongfully sexually harassing; - First Lieutenant A.A.P., U.S. Marine Corps; and - Corporal R.A.B., U.S. Marine Corps.[33]

Specification 3, of which Appellant was also convicted, is drafted in the same manner as specification 1 except the date and the names of the victims are different.

The specifications provided notice of each element of the offense of violating a lawful general order. The act which violated the PAC Order is the act of sexually harassing the named victims on the date and in the location that are within each specification. While the term "sexually harassing" may arguably be vague without sufficient context, the prohibited conduct as described in Section C of Paragraph 010502 of the PAC Order is pointed and sufficiently clear. There is no requirement that the specifications detail each comment or action Appellant did that violated the PAC Order.[34] This Court finds that each of the specifications for which Appellant was convicted properly stated an offense.

III. CONCLUSION

After careful consideration of the record and the briefs of appellate counsel, we have determined that the findings and sentence are correct in law and fact and no error materially prejudicial to Appellant's substantial rights occurred.

The findings and sentence are **AFFIRMED.**[35]

FOR THE COURT:

Mark K. Jamison

MARK K. JAMISON
Clerk of Court

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[33] Charge Sheet.

[34] *See United States v. Rogers*, 54 M.J. 244 (C.A.A.F. 2000). Appellant could have requested a bill of particulars if he was unaware of which specific conduct formed the basis for the specifications. *See* R.C.M. 906(b)(6).

[35] Articles 59 and 66, UCMJ.