IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee v. Specialist (E-4) **DAVID P. VAN BUREN** United States Army Appellant	**BRIEF ON BEHALF OF APPELLANT** Docket No. ARMY 20220062 Tried at Wheeler Army Airfield, Hawaii, on 6 December 2021, 4 February 2022, and 14-16 February 2022, before a general court-martial convened by the Commander, 8th Theater Sustainment Command, Lieutenant Colonel Michael E. Korte, Military Judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS:

I.

THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUPPORT FINDINGS OF GUILTY FOR ABUSIVE SEXUAL CONTACT AND LEGALLY INSUFFICIENT TO SUPPORT A FINDING OF GUILTY FOR IMPERSONATION OF AN AGENT.

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DID NOT RECUSE HIMSELF FROM THE COURT-MARTIAL.

III.

THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO EXCUSE A BIASED PANEL MEMBER.

Panel 4

IV.

APPELLANT WAS DENIED THE RIGHT TO A UNANIMOUS VERDICT UNDER THE SIXTH AMENDMENT AND THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FIFTH AMENDMENT.

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STATEMENT OF THE CASE

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of three specifications of abusive sexual contact and one specification of impersonation of an agent of superior authority in violation of Articles 120 and 106 Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 920 and 906 (2019). The panel acquitted appellant of sexual assault and false official statement in violation of Articles 120 and 107, UCMJ, 10 U.S.C. §§ 920, 907 (R. at 598).

The military judge sentenced appellant to a reduction to the grade of E-1, confinement for a total of 16 months, [1] and a bad conduct discharge. (R. at 630). The convening authority took no action on the findings or sentence, and disapproved appellant's request for deferment of reduction and deferment and waiver of automatic forfeitures. (Action).

STATEMENT OF FACTS

Abusive Sexual Contact (Charge I, Specifications 2, 3, and 4)

[1] The military judge sentenced appellant as follows: for Specification 2 of Charge I (abusive sexual contact), 10 months of confinement, to be served concurrently with Specification 4 of Charge I; for Specification 4 of Charge I, 10 months of confinement to be served concurrently with Specification 2 of Charge I; for Specification 3 of Charge I (abusive sexual contact), 6 months confinement to be served consecutively with Specifications 2 and 4 of Charge I, and for The Specification of Charge III (impersonation of an agent), to no confinement.

[redacted] arrived in Hawaii in January 2021. (R. at 338). Her team leader asked appellant to take [redacted] "under his wing." (R. at 380). Shortly after her arrival, she began communicating with appellant via text message. (Pros. Ex. 4 at 1). In these text messages, appellant expressed that he was interested in her as a friend, rather than romantically. (Pros. Ex. 4 at 3).

On February 25, 2021, [redacted] and appellant made plans to spend time together. They went to the Post Exchange [PX] and then to the beach. (R. at 343). The accused had brought a hammock to the beach. [redacted] testified that appellant got in the hammock with her but denied that he had initially refused to get in the hammock with her as she requested. (R. at 385). However, when she and appellant discussed this matter through text messages, she did not argue with him when he said that he was trying not to touch her, but she insisted that he get into the hammock with her. (R. at 385).

The next day, appellant texted [redacted] to ask her if she wanted to go on a "booze cruise." (R. at 344). [redacted] understood that to mean that appellant would drive her around while she drank alcohol. (R. at 344). [redacted] began drinking prior to meeting up with appellant, and had been drunk on previous occasions, despite not being 21 years old at the time. (R. at 345). The pair went to the beach, where they sat together as [redacted] continued to drink (R. at 345). They were gone

for approximately an hour, and then returned around 2300 to the barracks building where they both lived. (R. at 386).

[redacted] and appellant went to his barracks room, located on the first floor of the building. (R. at 387). [redacted] testified that she did not hang out with appellant in the common area of the barracks building because "it's a really small space…[i]t's not really like the place to hang out in the barracks." (R. at 348). Appellant's room was near the Change of Quarters [CQ] desk, where Soldiers on duty monitor the comings and goings of those in the barracks. (R. at 387).

To get to the elevator from appellant's barracks room, it was necessary to walk by the CQ desk. However, the stairwell near appellant's room could be accessed without walking by CQ. (R. at 387). [redacted] brought her alcohol with her to appellant's room. (R. at 388). Despite this being the only time that she was in appellant's barracks room, she was sober enough to later draw a diagram of the room when she met with law enforcement during the investigation. (R. at 388). Appellant's bed was situated with one side against a wall with a television against the opposite wall. (R. at 392).

Once in his room, [redacted] changed into the accused's clothes because her clothes had gotten sand on them at the beach. [redacted] testified that appellant was not in the room when she changed. (R. at 348). Appellant, on the other hand, recalled that she took her clothes off in front of him to change into the clothes he

had lent her (Pros. Ex. 7). Appellant also called his brother via a video chat. (R. at 347). [redacted] testified that she laid down on appellant's bed with her head at the foot of the bed, and appellant laid down the opposite way, with his head at the top of the bed, while they watched television. (R. at 394). [redacted] and appellant then got up from the bed and did an "Irish Folk Dance" and were "jumping and being goofy." (R. at 347). [redacted] continued to drink alcohol, and appellant joined her. (R. at 348). She testified at trial that she then sat in a chair in his room but did not report this during her interview with law enforcement. (R. at 392).

After spending several hours with appellant, around 0300 or 0400 a.m., [redacted] again laid down in appellant's bed. (R. at 349). This time, [redacted] lay next to appellant with both of their heads at the top of the bed. (R. at 395). [redacted] was facing the wall, away from the television (R. at 395). [redacted] testified that her memory was clear at this point, and she testified that she was not too intoxicated to know what was happening. (R. at 397).

[redacted] testified that as they were both lying in bed facing the wall, appellant reached into her shirt and grabbed her breasts underneath her shirt but over her bra. She grabbed his hand, removed it, and told him to stop and "no." (R. at 351-352). She said that she "freaked out" when this happened, but that it did not cause her to feel more awake. (R. at 400).

[redacted] then testified that appellant put his hand under her shorts and touched her buttocks, which were bare because she was wearing a thong. (R. at 353). She testified that she grabbed his hand and told him to stop, and that he then moved his hand to her inner thigh and vaginal area and rubbed her vagina over her underwear in a circular motion. (R. at 354). She testified that he did not touch vaginal area under her underwear. (R. at 355). She again moved his hand and told him to stop. (R. at 355).

[redacted] said she did not leave the room while this was happening because she was drunk and underage and did not want the Soldiers at CQ to see her, despite the availability of the staircase that she could have taken to her room. (R. at 353). She testified that he "just kept going," but that she was "really tired" and so eventually fell asleep. (R. at 355). [redacted] said that she was capable of walking out and taking the back stairwell to her room without anyone seeing. (R. at 397). On cross-examination, she admitted that she had also drank "pre workout" at some point during the evening, which she explained was a highly caffeinated drink that "you drink before you go work out and it wakes you up." (R. at 400).

[redacted] testified that the next morning, appellant wanted her to stay in his room a little longer, but nothing sexual happened. (R. at 398). She left his room and walked by CQ in his clothing. (R. at 398). She encountered two friends outside

of appellant's room. (R. at 399). One of the friends, [redacted], described her as "distraught" and "upset." (R. at 415).

One of her friends said "whoa, rough night [redacted]?" (R. at 357). They also asked her why she was wearing appellant's clothing. (R. at 399). One of her friends asked if she was okay and she began to cry and told them "you know, that dude I thought was pretty cool. He's not cool." (R. at 357).

[redacted] then went to the barracks room of a friend upon realizing she did not have the key to her own room because she had left it in appellant's room. (R. at 356). [redacted] said that she was spotting blood and was in pain in her vaginal area (R. at 358). She also threw up while in her friend's room. (R. at 357). One of the friends she had encountered in the hallway earlier, [redacted], came to see her, and described her as distraught. (R. at 419). [redacted] testified that [redacted] told him that she took a shower for two and a half hours, something that [redacted] did not mention during her testimony. (R. at 420).

Appellant texted [redacted] that morning to say that he was "so embarrassed [right now] and "so sorry all of that just happened." He told [redacted] that she left her belongings in his room and then told her that he "really loved holding you last night and cuddling" because he had not "had affection in so long." He said he had not drank alcohol in a while and did not mean to do what he did. About an hour later, [redacted] responded that she had trusted him and was disappointed, and that

she knew he was drunk but that "doesn't make an excuse for this morning." She told him she felt disrespected and taken advantage of." Appellant responded that he was not going to try to "sway her opinion in any way shape or form." They continued to discuss returning her belongings. [redacted] initially requested that he not bring them to CQ, before changing her mind. (Pros. Ex. 5).

[redacted] made a restricted report of sexual assault on 1 March 2021. (R. at 363). Before making this report, she spoke to [redacted], another Soldier in her unit with whom she had had a romantic relationship. He told her that if something "really happened," she should make a report. (R. at 399). She also talked to a counselor. (R. at 363).

On 1 March 2021, [redacted] went to the on-post hospital and underwent a Sexual Assault Forensic Examination (SAFE), performed by Captain [redacted]. [redacted] told [redacted] that her "private area" hurt. When asked to describe the events of the night, [redacted] told [redacted] that she and appellant went back to his barracks room and "started drinking." She told [redacted] that appellant "kept trying to go up my shirt and pants and I kept telling him to stop." [redacted] said that he "gave her a couple other drinks" and then she fell asleep to appellant "trying to get up her shirt and in my pants" and "that's really all I remember." She stated that she woke up at 0700 the next morning and appellant "tried to get in my pants again" but she left. (Pros. Ex. 14).

She also told [redacted] that she did not recall anal or vaginal penetration or oral copulation of her anus or genitals. She stated that appellant kissed her on her shoulder, attempted to give her a "suction injury" on her neck and bit her on the "asscheek" but she didn't know if he left a mark. [redacted] observed several bruises on [redacted] legs, tenderness on her hymen, and tenderness and a white moist secretion on her vagina and cervix (R. at 443; Pros. Ex. 14). [redacted] stated that the tenderness to [redacted] vagina could be consistent with vaginal penetration, but that it could also be consistent with many other things, such as masturbation, sexual intercourse from several days prior, or from something wholly unrelated to sexual contact. (R. at 444-445). [redacted] testified she gave [redacted] underwear from the day of the SAFE and agreed there could be DNA or "some kind of trace evidence" from the assailant there if someone had been sexually assaulted. (R. at 446). The government did not present evidence of any DNA from appellant recovered from the underwear or SAFE in general.

On 3 March 2021, appellant texted [redacted] offering to give her career advice, but she declined to talk to him. (R. at 365, Pros. Ex. 5). Several weeks later, [redacted] made a report to military law enforcement. After making her statement, she agreed to a "pre-text" conversation with appellant via text message. (R. at 403). She told appellant she thought she had a sexually transmitted disease in order to start the conversation. (R. at 366). During this text message exchange,

appellant sent her several videos of himself. (Pros. Exs 7, 8, 10, 11, 15). In these videos, appellant stated they got in bed together and [redacted] took her clothes off in front of him. He stated that he "was fucking butt ass naked and I rubbed my fucking dick up against [redacted] ass" and "groped [her] breasts." (Pros. Ex. 7). He stated that every time he went to "make a move," [redacted] would move his hand away and hold his hand. (Pros. Ex. 7).

Appellant noted that [redacted] "was not even that drunk" and suggested that [redacted] had taken the events of that night badly because she had "PTSD from some other incident." (Pros. Ex. 8). He also explains that he would be happy to spend time with [redacted] again, as long as they did not go to each other's rooms and only drank "in a controlled environment." (Pros. Ex. 10). He notes that "we both fucked up" and suggests that they both should move past it. (Pros. Ex. 11).

Appellant and [redacted] also exchanged text messages, where he stated that [redacted] "kept pushing him off." Appellant also told her "I mean you also grabbed my dick…but that was you touching me. Not me touching you." (Pros. Ex. 6). He stated that she only touched his penis with her hands and gave him "like a drunk 2 minute hand job." He stated that he "kind of guided [her] hand back there because that's where [he] thought it was going." Appellant told [redacted] that she said "chill chill we need to chill" and then appellant "stopped and [[redacted]] grabbed [his]

hand and put it on [redacted] chest." He also told her that he "rubbed [his] fingers on [her] through [her] panties. (Pros. Ex. 6).

Impersonation of An Agent of Superior Authority

Early in the morning on April 24, 2021, Sergeant [redacted] and Specialist [redacted], traffic accident investigators at Schofield Barracks, were on duty. (R. at 291, 298). They stopped their vehicle because they saw a vehicle on the side of the road with its hazard lights flashing. (R. at 292). They approached the vehicle and spoke to the two females inside and observed two males, along with appellant, on the opposite side of the road "doing something." (R. at 292).

[redacted] and [redacted] saw that appellant was not wearing shoes and was holding a vest marked "Military Police" in his hand. (R. at 293, 307). The vest does not have an "investigator" designation on it. (R. at 307). Appellant was bringing the two males across the street to where the car was parked. Appellant told [redacted] and [redacted] that the men had a gun. [redacted] and [redacted] did not locate a gun during their search of the men. (R. at 293-294). Both unidentified men were visibly impaired and agitated. (R. at 295, 299). The two men, who were not affiliated with the military, got back into their car and eventually drove away. (R. at 295, 299).

Appellant told [redacted] and [redacted] that the men had come from a party where an assault had occurred. Appellant begam to get agitated during the

conversation when [redacted] and [redacted] tried to take his phone from him as he tried to show them a video of an assault at a party that they had been investigating. (R. at 295, 301). [redacted] heard appellant tell [redacted] that he was an investigator twice. (R. at 294). [redacted] clarified that appellant "told us that he had told [the civilian men] that he was an investigator to diffuse [sic] the situation…then when we started to interview him and ask him what was going on he told us, himself, that he said he was an investigator to defuse the situation and not have us called out there." (R. at 307). Corporal [redacted], another MP who arrived on the scene, also heard appellant tell the civilian man who was being patted down that he was an investigator. (R. at 318).

[redacted] and [redacted] then apprehended appellant for being "disrespectful" to those on the scene. (R. at 301). They conducted a blood alcohol test on appellant at the MP station, which was negative. (R. at 302).

Sergeant First Class [redacted] testified that he was appellant's platoon sergeant in February 2021 and that appellant was not assigned as a military police investigator, and did not work undercover while he was assigned to [redacted] platoon, as did appellant's subsequent platoon sergeant, [redacted]. (R. at 323). He also explained that it was "common knowledge" that MPs are not supposed to conduct law enforcement activities outside of their shifts, as did [redacted]. (R. at

324, 332). He explained that in order to be a military police investigator, you must first attend an 8-week course. (R. at 324).

[redacted] testified that an "investigator" is a specialty section that is separate from an MP who "works the road." (R. at 289). He noted that investigators wear protective vests on duty that indicate that they are investigators. (R. at 290). He testified that MPs who are not part of CID or MPI or are not non-comissioned officers don't have authority to detain civilians while off duty. (R. at 296). [redacted] testified that appellant was not an investigator, but an "RTO which is a dispatcher." (R. at 305).

[redacted] testified that someone's designation as an investigator depends on their "duty assigned roles." (R. at 314). The government also introduced a policy memorandum from the US Army Installation Management Command-Pacific, Directorate of Emergency Services, which stated that while MPs are off duty, the power of apprehension and detention is limited to that of an ordinary private citizen. (Pros. Ex. 2).

[redacted] testified that he worked with appellant on a daily basis for approximately 12 months, and then continued to see him weekly after they were not in the same unit. (R. at 457). He said that appellant was a good Solider and had a character for law-abidingness. (R. at 458). [redacted] testified that he had known

appellant since basic training and similarly testified to his good military character and character for law-abidingness. (R. at 462-464).

Other facts necessary for the resolution of the issues can be found in the arguments below.

Errors and Argument

I.

THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUPPORT FINDINGS OF GUILTY FOR ABUSIVE SEXUAL CONTACT AND LEGALLY INSUFFICIENT TO SUPPORT A FINDING OF GUILTY FOR IMPERSONATION OF AN AGENT.

Standard of Review

This Court reviews factual and legal sufficiency issues de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Craion*, 64 M.J. 531, 534 (Army Ct. Crim. App. 2006).

Law and Argument

The test for legal sufficiency is "whether, considering the evidence in a light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003); *United States v. Pabon*, 42 M.J. 404, 405 (C.A.A.F. 1995) (*quoting Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

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, [this Court is] convinced of [appellant's] guilt beyond a reasonable doubt." *Walters*, 58 M.J. at 395. "In sum, to sustain appellant's conviction, [this Court] must find that the government has proven all essential elements and, taken together as a whole, the parcels of proof credibly and coherently demonstrate that appellant is guilty beyond a reasonable doubt." *United States v. Gilchrist*, 61 M.J. 785, 793 (Army Ct. Crim. App. 2005) (*citing United States v. Roukis*, 60 M.J. 925, 930 (Army Ct. Crim. App. 2005)).

The term "reasonable doubt" does not mean that the evidence must be free from conflict. *United States v. Reed*, 51 M.J. 559, 562 (N.M. Ct. Crim. App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). It does, however, mean "an honest, conscientious doubt, suggested by the material evidence, or lack of it," and that the government must prove guilt "to an evidentiary certainty" and must exclude "every fair and reasonable hypothesis of the evidence except that of guilt." Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook [Benchbook], para. 2-5 (29 Feb 2020).

Abusive Sexual Contact

The elements of abusive sexual contact as charged in Specifications 2, 3, and 4 of Charge I are: (1) that appellant committed sexual contact upon [redacted] by (a)

touching directly and through the clothing, the buttocks of [redacted], with his penis, (b) touching directly and through the clothing the breast, buttocks, inner thigh, and vulva of [redacted] with his hand, and (c) causing [redacted] to touch his penis with her hand; and (2) that he did so without the consent of [redacted]. *See Manual for Courts-Martial, United States* (2019) [MCM], pt. IV, ¶ 60.b.(3)(d)

Sexual contact means "touching, or causing another person to touch, either directly or through the clothing, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body or an object." *Id*. at, pt. IV, ¶ 60.g.(2).

Consent means "a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent." *See* MCM, pt. IV, ¶ 60.g.(7).

Rule for Court Martial (R.C.M.) 916(j)(1) provides that "it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense . . . . If the ignorance or mistake goes to any other element requiring only general intent or knowledge,

the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances." "It is an offense to commit a sexual act without consent, although an honest and reasonable (nonnegligent) mistake of fact as to consent serves as an affirmative defense." *United States v. McDonald*, 78 M.J. 376, 379 (C.A.A.F. 2019). This defense can be raised even when an accused does not testify. *United States v. Paige*, 67 M.J. 442, 451 (C.A.A.F. 2008).

a. Legal Insufficiency – Abusive Sexual Contact

The evidence is legally insufficient because the government failed to prove beyond a reasonable doubt that appellant did not have a reasonable and honest mistake of fact as to [redacted] consent. The day before the alleged abusive sexual contact occurred, [redacted] and appellant went to the beach together. According to both [redacted] and appellant, they got into a hammock together. During the pretext conversation – which appellant did not know was being monitored by law enforcement – appellant reminded [redacted] that he had initially not wanted to get in the hammock with her and tried to avoid physical contact, but [redacted] insisted that he get in with her. In text messages, [redacted] did not deny appellant's account of events. At trial, she acknowledged being in the hammock with appellant, but denied insisting that he get in with her. Appellant's credibility on whether [redacted] wanted him to get in the hammock with her is stronger, as he unknowingly made

this statement in the context of a pretextual conversation with [redacted], whereas she made her denial during cross-examination where she may have felt pressure to fit her testimony to that expected of an alleged victim.

The very next day, [redacted] agreed to go on a "booze cruise" with appellant. Despite her assertions that the appellant was making her drinks, [redacted] brought alcohol with her to spend time with appellant. She again went to the beach with him, then back to his barracks room with him. They continued to spend time together and both consumed more alcohol. Rather than get clean clothes from her room a few stories above appellant's, [redacted] changed into some of appellant's clothing, taking off her own clothing and putting on his shorts and shirt in front of appellant. Again, [redacted] denial of taking her clothes off in front of [redacted] is less credible than appellant's assertion that she did based on the context in which they were made.

[redacted] and appellant continued to spend time together, dancing, watching television, and calling appellant's brother until the early hours of the morning. [redacted] admitted on cross-examination that she had sat on appellant's bed to watch television. She then admitted to first laying down with their heads at opposite ends of the bed, then later laying down with her head at the same end of the bed as appellant. Despite her own barracks room being nearby and easily accessible by

the elevator or stairs, she chose to remain with appellant in his room until 0300 or 0400.

Appellant observed that [redacted] did not appear overly intoxicated, changed her clothes in front of him, laid down in his bed multiple times, and did not attempt to leave to her own room, despite appellant doing absolutely nothing to keep her there until the small hours of the morning. Most importantly, he remembered [redacted] giving him a "two-minute hand job." While he stated that he guided her hand to touch his penis, there is no evidence that he did anything to keep her hand there. [redacted] stated that she did not remember touching his penis, but that is not the same thing as saying she did not consent to doing so.

The government characterized the videos and text messages sent by appellant to [redacted] as a smoking gun. It is true appellant admitted to touching her breasts and vaginal area with his fingers, and her buttocks with his penis, and that he knew that she was moving his hand off of him. However, he also said that she would hold his hand after he moved it, not push it away, as [redacted] testified. He did not say that he heard her say "no" or "stop," only saying that at one point she said "we need to chill." In his mind, she was continuing to maintain contact with him as they lay in bed next to each other. It is clear from the full context of the videos that he sent [redacted] that he did not think their encounter was non-consensual. His apologies were meant to address the fact that he had not intended

for the night to progress the way that it did, not to apologize for sexual behavior without her consent. His mistake of fact is clear in his comments to her about a previous sexual experience coloring how she viewed what had happened between them.

The government did not disprove beyond a reasonable doubt that appellant had a reasonable and honest mistake of fact as to [redacted] consent. Therefore, the evidence was legally insufficient to convict him of Charge I, Specifications 2, 3, and 4.

b. Factual Insufficiency – Abusive Sexual Contact

1. [redacted] contradicted herself about key elements of the incident.

[redacted] first account about what happened in appellant's room was to [redacted], the nurse who conducted her SAFE approximately 48 hours after the incident. She told [redacted] that they "started drinking" when they got to appellant's room, despite testifying earlier that she had begun drinking even before she left with appellant to go to the beach. She stated that appellant "gave her a couple drinks" and then she fell asleep. She also told [redacted] about a "suction injury" and a bite on her buttocks, which she did not testify to during her in-court testimony.

Contrary to her assertion that she was very intoxicated to the point of falling asleep during the allegedly unwanted touching, she also testified that she was able

to remember the entire evening, including that they watched TV, did an Irish dance, called appellant's brother on Facetime. She was also later able to draw a diagram of appellant's bedroom from memory when talking to law enforcement. She also acknowledged on cross-examination that she had also consumed a highly-caffeinated "pre-workout" beverage, which would have counteracted the effects of the alcohol. While she asserted that she was too tired and drunk to get up from appellant's bed once the alleged touching began, she contradicted herself again by saying that she "freaked out" – but that this "freak out" was not sufficient to wake her up. [redacted] testimony reveals that she wanted the panel to believe that she was more intoxicated than she really was in order to explain why she did not leave.

[redacted] account of the actual alleged sexual contacts also changed. She told [redacted] that she "fell asleep to [appellant] trying to get up my shirt and in my pants. That's all I really remember." (Pros. Ex. 14). She did not tell [redacted] that she told appellant "no" or "stop," or that she was "freaking out" when he began touching her.

At trial almost a year later, she was much more detailed in her account of what happened, despite the passage of time. She was also unclear about whether she actually remembered appellant touching her vaginal area. During direct examination, she had the following exchange with the TC:

> TC: [referring to text message contained in Pros. Ex. 6] Here the accused states, "I mean, I rubbed my fingers on you through your panties." Were you aware of this?
>
> [redacted]: I don't recall sir, at the time. I knew after CID I knew that, sir.
>
> TC: But you recall him touching your vaginal area?
>
> TC: Yes, sir.

(R. at 378).

[redacted] thus contradicted herself about whether she actually recalled this contact, or whether she is pretending to remember it because appellant told her that it occurred. Again, the fact that she cannot remember certain contact does not mean that she did not consent to it in the moment.

[redacted] also contradicted herself about what occurred the next morning. She told [redacted] that she woke up at around 7:00 a.m. the next morning and appellant tried to "get in [her] pants again," but that she left. (Pros. Ex. 14). At trial, however, she stated appellant was trying to get her to stay with him, but does not mention any sexual contact. (R. at 356-357).

She also testified that she was in a hurry to leave, which is contradicted by the testimony of [redacted], who ran into her in the hallway around 9:00 a.m. (R. at 414). If [redacted] was really in a hurry as she claimed, she would not have spent an additional two hours in appellant's room. Finally, the government did not present

testimony from the friend whose room she went to after leaving appellant, so there is no corroboration of the fact that she threw up or took a two-hour shower. [redacted] account of events is unreliable and changed based on her audience.

2. [redacted] had two motives to fabricate – her romantic relationship with another Soldier and her desire to avoid the unit's rumor mill.

[redacted] admitted that she was in a romantic relationship with [redacted], another MP in their unit. [redacted] admitted that she talked to [redacted] about what happened before making her report, and agreed that he told her that if something like that really happened, she should make a report. (R. at 399). She agreed that she made the report just because [redacted] advised her to do so. (R. at 400).

Throughout the text messages exchanged by [redacted] and appellant, there are hints at the apparently strong "rumor mill" in their unit. Appellant tells [redacted] that he doesn't want to bring her jeans to CQ because that "looks fucked up." (Pros. Ex. 6). He also tells her that he doesn't like to "fuck with" women who are military, especially in the Army and the same branch as him. (Pros. Ex. 8). Appellant also mentions his knowledge of her relationship with [redacted] and another unnamed male entering her room the day after their sexual interaction (Pros. Ex. 15). [redacted] also asked appellant not to bring her belongings to CQ. (Pros. Ex. 5). She walked past CQ the next day wearing his shorts and t-shirt, and was then seen by her two friends when she got off of the elevator. (R. at 357).

[redacted] thus had a motive to fabricate both to make sure that [redacted] believed that the encounter with appellant was non-consensual (which he would apparently only do if she reported it) and in order to protect her reputation in the unit. As a relatively new, young Soldier to Hawaii and to the Army in general, she had a motive to make sure that her interaction with appellant did not paint her in a negative light among her peers.

c. *Impersonation of an Agent – Legal Insufficiency*

The elements of impersonation of an agent are (1) that the appellant impersonated an agent of superior authority of one of the armed forces, in a certain manner; and (2) that the impersonation was wrongful and willful; and (3) that the accused committed one or more acts which exercised or asserted the authority of the office the accused claimed to have. *See* MCM, pt. IV, ¶ 39.b. Here, the government alleged that those "acts" were "carrying a Military Police vest while off-duty and claiming to be a Military Police Investigator." (Charge Sheet).

Before 1 January 2019, impersonation of an agent of superior authority was criminalized by an enumerated Article 134, UCMJ offense. *See United States v. Martinez*, No. ACM 39973, 2022 CCA LEXIS 212, at *33 (A.F. Ct. Crim. App. Apr. 6, 2022) (unpub. op.). The elements of this predecessor offense were (1) that the accused impersonated an agent of superior authority of the Army; (2) that this impersonation was wrongful and willful; (3) that the accused exercised or

asserted the authority of the office the accused claimed to have; and (4) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces. *See* MCM (2016 ed.), pt. IV, ¶ 86. "[T]he gravamen of the military offense of impersonation does not depend upon the accused deriving a benefit from the deception or upon some third party being misled, but rather upon whether the acts and conduct would influence adversely the good order and discipline of the armed forces." *United States v. Messenger*, 6 C.M.R. 21 (C.M.A. 1952).

In *United States v. Yum*, 10 M.J. 1 (C.M.A. 1980), the accused pled guilty to impersonating an agent of superior authority; specifically, an Army Criminal Investigation Division Agent. *Id*. at *2. The accused had told hotel employees in South Korea that he was such a CID agent and used the Eight Army US Army CID Investigation Division as his address on the hotel's guest registration. *Id*.

After reviewing the legislative and judicial history of the impersonation offense, the court concluded that "both law and logic compel not only an allegation and a showing of the pretense of authority, but also the allegation and showing of an act which 'must be something more than merely an act in keeping with the falsely assumed character.'" *Id*. at *4 (citing *United States v. Rosser*, 528 F.2d 652 (D.C. Cir. 1976)). It then set aside and dismissed the impersonation specification as "this case presents an instance of bare false representation that the appellant was

an agent of the Army Criminal Investigation Division." *Id.* In his concurring opinion, Chief Judge Everett noted that "[w]hile criminal liability does not hinge on the impersonator's receiving any benefit from his impersonation, he must to some extent have played the role of the person impersonated." *Id*. at *5.

In *United States v. Wesley*, 12 M.J. 886, 886-87 (A.C.M.R. 1981), the court upheld the conviction of an accused who had misrepresented himself as a non-commissioned officer to a basic trainee on post. The court noted that unlike *Yum*, where "the misrepresentation was made in the civilian community to civilian hotel employees who may or may not have been impressed by the false identity even assuming they were aware of its significance," in the case before them, the "consequences of such a misrepresentation in a military setting, in terms of obedience, respect, and personal relationships, are well known and unusually significant." *Wesley*, 12 M.J. at *887. *See also United States v. Reece*, 12 M.J. 770, 772 (A.C.M.R. 1981) (finding that the impersonation specification alleging that accused impersonated a commissioned officer to two enlisted members was not deficient).

The specification at issue here alleged only that appellant carried a Military Police vest while off-duty and claimed to be a Military Police Investigator. As an initial matter, there was no testimony that appellant ever uttered the words "Military Police Investigator." Instead, he used the more generic phrase

"investigator." Even assuming that his use of the mere word "investigator" was enough to identify him as such, the government did not allege or prove anything beyond the bare "false representation" that was found to be deficient in *Yum*. The accused in *Yum* and appellant both were charged with merely identifying themselves to a civilian as some kind of law enforcement official. [redacted] testified that appellant "told us that he had told them that he was an investigator to diffuse [sic] the situation…then when we started to interview him and ask him what was going on he told us, himself, that he said he was an investigator to defuse the situation and not have us called out there." (R. at 307). The only testimony about appellant's actions that night were that he walked the two unidentified civilian men across the road – hardly enough to move his conduct outside of the realm of a bare misrepresentation.

As the court explained in *Wesley*, appellant's actions do not carry the same kind of concerns as the conduct of a Soldier identifying himself to other soldiers as a comissioned officer in a military setting. While recognizing that the current iteration of Article 106 does not carry the terminal element of the Article 134 charge it replaced, it still requires proof that "the accused committed one or more acts which exercised or asserted the authority of the office the accused claimed to have. *See* MCM, pt. IV, ¶ 39.b, Appellant's mere identification of himself as a

"investigator" while carrying a Military Police vest is deficient for a finding of guilty and the specification should be set aside and dismissed.

Conclusion

For the above reasons, the evidence is not legally or factually sufficient to support the panel's findings of guilty for abusive sexual contact and not legally sufficient to support their finding of guilty for impersonating an agent of superior authority.

Appellant respectfully requests that this Court set aside and dismiss those findings and set aside and reassess the sentence.

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DID NOT RECUSE HIMSELF FROM THE COURT-MARTIAL.

Additional Facts

At an Article 39(a) session on 6 December 2021, the military judge noted that it "became clear that [he] was going to be the military judge here in Hawaii" while he was still assigned as the Special Victims Prosecutor (SVP) for Hawaii in January 2021. (R. at 7). He began completing cases as the SVP in "January, February, March, and April" 2021 and stopped receiving briefs on cases in the accused's jurisdiction by March or April of that year. (R. at 7). It is not clear from

the record precisely how long he served as Hawaii's SVP prior to becoming its military judge, but it was at least one year. (R. at 6).

The miliary judge detailed his relationships with the trial counsels [TC] then assigned to the case. (R. at 5-9). He stated that while he was the SVP, he believed [redacted] was a military justice advisor. [redacted] stated that he was actually a TC at this time. The military judge characterized his overlap with [redacted] as "minimal" and said that it lasted "probably less than 2 months." (R. at 6). The military judge went on to detail his much more extensive relationship with [redacted]. He worked with [redacted] for approximately one year while [redacted] was a TC, and t military judge was the SVP. He stated that he had been detailed to two trials with [redacted] as the second assistant TC, and that the most recent trial had occurred approximately nine months earlier. (R. at 6).

The military judge stated he did not know [redacted] or [redacted] personally and had seen th[m less than other TCs as his office was not co-located with them, and because their jurisdiction was not as busy. (R. at 7). In contrast, the military judge noted that he had previously opposed the civilian defense counsel (CDC) during a "relatively straightforward 2 or 3-day case" when he was still Hawaii's SVP and that they "had been on opposite side of trial before" during the course of their careers (R. at 7).

The military judge stated that he had not seen the accused's case before and was unfamiliar with its facts. (R. at 8.) He stated that he "rechecked my files on my computers and my e-mail archive and nothing came up" and that "based on the charges alone, I think I would have remembered" the case. (R. at 8). Following these disclosures, neither side challenged the military judge. (R. at 9).

At a later Article 39(a) session on 4 February 2021, the military judge made further disclosures following the detailing of an additional TC, [redacted], to the case. He stated that he had not prosecuted any cases in court with [redacted], but that he "did advise or work with him on then current investigations" in the areas of focus for the SVP, meaning "domestic violence, child abuse, and sexual assault." (R. at 16). The military judge estimated that they worked together for six months and stated that he did not know [redacted] outside of work. (R. at 16).

Following this disclosure, the defense counsel (DC) conducted additional voir dire of the military judge. In response to the DC's question, the military judge stated that he had an "informal" mentor-mentee relationship with [redacted]. He said that he considered himself to have an informal relationship with "anyone junior" when he was the SVP, "to include defense if they talked to me," and averred that he did not have a "particularized" interest in the success of [redacted] career. (R. at 17).

The DC then challenged the military judge for cause, stating that based on his relationships with [redacted] and [redacted] together, there was a possibility for implied bias and impartiality. (R. at 18). Without asking the government's position on the challenge or offering an explanation, the military judge denied the challenge but noted that the DC had "put it on the record." (R. at 18).

During trial, the military judge made remarks that showed he had not completely shed the role of SVP, which is unsurprising, given that he had left it behind mere months before the start of appellant's trial, and had still been serving in the role when the investigation of the charges began. For example, during a discussion in an Article 39(a) session about who actually writes the narrative portion of the form of the Sexual Assault Forensic Examination (SAFE), he remarked "I don't think alleged victims actually write on these things because they're usually not in a state to write legibly." (R. at 248).

Later in the trial, the TC was attempting to elicit testimony about what [redacted] had told a friend on the morning of February 27, 2021, after the alleged abusive sexual contacts had occurred. The CDC made repeated hearsay objections throughout this testimony, which the TC was unable to overcome. The military judge eventually advised the TC to "either find an exception or ask a question in such a way that doesn't elicit a quote." (R. at 416).

As the CDC continued to object and the TC continued to attempt to elicit testimony, the parties conducted an Article 39(a) session outside the presence of the members. During this session, the CDC objected to the military judge's coaching of the TC who was trying to overcome the hearsay objection:

> CDC: He can talk about what he saw. But what she said to him is the part that's not probative. There's very little probative value. It has high potential for unfair prejudice. And that he's speaking for her again. It's clearly hearsay. It's not one of the exceptions. She can come in and say that she's already said it.
>
> MJ: Well, there is an exception for then existing –
>
> CDC: We don't want Your Honor to be telling the government that. That would be coaching. So we would obviously object to that as well.

(R. at 422).

Standard of Review

This court reviews a judge's disqualification decision for an abuse of discretion. *United States v. Uribe*, 80 M.J. 442, 446 (C.A.A.F. 2021) (quoting *United States v. Sullivan*, 74 M.J. 448, 453 (C.A.A.F. 2015)). A military judge's ruling constitutes an abuse of discretion if it is arbitrary, fanciful, clearly. unreasonable, or clearly erroneous, not if the appellate court merely would reach a different conclusion. *Id*.

Law

"In the military justice system, where charges are necessarily brought by the commander against subordinates and where, pursuant to Article 25, UCMJ, . . . the convening authority is responsible for selecting the members, military judges serve as the independent check on the integrity of the court-martial process. The validity of this system depends on the impartiality of military judges in fact and in appearance." *Hasan v. Gross*, 71 M.J. 416, 418-19 (C.A.A.F. 2012).

"'An accused has a constitutional right to an impartial judge.'" *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011) (quoting *United States v. Butcher,* 56 M.J. 87, 90 (C.A.A.F. 2001)). "An impartial and disinterested trial judge is the foundation on which the military justice system rests, and avoiding the appearance of impropriety is as important as avoiding the impropriety itself." *United States v. Berman*, 28 M.J. 615, 616 (A.F.C.M.R. 1989).

R.C.M. 902 recognizes the accused's right to an impartial judge and requires a military judge to disqualify himself or herself "in any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902(a) provides for the military judge's disqualification where the evidence does not establish actual bias, but the circumstances warrant disqualification where there is a reasonable appearance of bias. "The appearance standard is designed to enhance public confidence in the integrity of the judicial system." *United States v.*

Quintanilla, 56 M.J. 37, 45 (C.A.A.F. 2001) (citing *Liljeberg v. Health Services Acquisition Corp*., 486 U.S. 847, 860 (1988)).

The appellant must clear a "high hurdle" to prove that a military judge was partial or appeared to be so, as the law establishes a "strong presumption" to the contrary. *Quintanilla*, 56 M.J. at 44. "[W]hen a military judge's impartiality is challenged on appeal . . . the test is whether, taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions." *Martinez*, 70 M.J. at 158 (citations and internal quotation marks omitted). When conducting this test, this court applies an objective standard of "whether a reasonable person knowing all the circumstances would conclude that the military judge's impartiality might reasonably be questioned." *Sullivan*, 74 M.J. at 45. "[D]etermining whether a military judge is biased, or could be perceived as such . . . is not a mathematical equation resolved based on the percentage of rulings granted for the defense or government but instead requires a holistic review of the entire record." *United States v. Pearson*, 2019 CCA LEXIS 462, *19-20 (Army Ct. Crim. App. Nov. 18, 2019) (unpub. op.).

Assuming a military judge erred by not recusing himself, this court then applies the standards announced in *Liljeberg v. Health Services Acquisition Corp*., for determining whether a judge's disqualification warrants a remedy. *Butcher*, 56 M.J. at 92. The three-part *Liljeberg* test looks at: (1) the risk of injustice to the

parties; (2) the risk that the denial of relief will produce injustice in other cases; and (3) the risk of undermining public confidence in the judicial process. 486 U.S. at 864.

Argument

1. The military judge abused his discretion by not recusing himself.

Given the unique nature of the relationship between an SVP and the TCs in his jurisdiction, as well as the fact that his SVP assignment immediately preceded his assignment as a military judge, the military judge abused his discretion by not recusing himself. "[M]embers of the judiciary typically outrank counsel and may have served in a direct superior-subordinate relation to counsel in the past - or may be placed in such a relationship in the future…members of the military judiciary must be particularly sensitive to applicable standards of judicial conduct." *Butcher*, 56 M.J. at 91. By failing to recuse himself, the military judge was not sufficiently sensitive to the appearance of partiality created by his detailing to appellant's case.

The military judge was assigned as the SVP for all of Hawaii just prior to becoming the military judge for the same jurisdiction. Though the record is not entirely clear on how long he served as Hawaii's SVP, it is safe to assume that it was for more than one year, given that was the length of his working relationship with one of the TCs, [redacted]. As the SVP, he was responsible for working with TCs in their cases involving his areas of focus, to include sexual assault and

abusive sexual contact. Not only did he himself prosecute cases involving these charges, but he also helped to advise the TCs and military justice advisors on the conduct of the investigations and appropriate case disposition.

There was no daylight between the two assignments because he did not move to a new jurisdiction after becoming a military judge. This means that he was serving as the SVP when CID began investigating [redacted] allegations against appellant. It also meant he had worked with each of the three TCs who were detailed to this court-martial. While he did not know [redacted] well, he worked extensively with [redacted]. The military judge and [redacted] tried two cases together, including one that ended only nine months before appellant's trial began. He also worked with [redacted] for approximately six months, and while they did not try a case together, he advised [redacted] on then-current investigations. While he stated that he did not have a "particularized" interest in [redacted] career, he did not deny having some level of interest in seeing [redacted] succeed. In contrast, the military judge had tried two cases on the opposite side from the CDC, and apparently had no previous relationship with the DC.

The fact that all three of the TCs on this case had worked with the military judge shortly before he presided over this trial could have given them a unique perspective into a variety of issues important to the case – how he views the investigative process, evidence, objections, voir dire, witness credibility, and the

military justice system, to name a few. This was not a situation where the judge had worked with the TCs in an assignment long ago, in a jurisdiction far away.

While he stated on the record that he would have had an "informal" mentor-mentee relationship with anyone junior while as an SVP, in practice, this is unlikely, given the structure and organizations of legal offices. The TCs had the advantage of knowing him much better than the defense ever could. And while it is true that [redacted] worked with him the most extensively, it is fair to impute his possible knowledge of the military judge's preferences, thought processes, and perspective to the rest of the prosecutorial team.

Even if the TCs had little actual insight into these topics, the military judge still should have recused himself, as "recusal based on an appearance of bias is intended to promote public confidence in the integrity of the judicial process." *Sullivan*, 74 M.J. at 453-54. An outside observer who learned that the military judge had just worked with the entire prosecutorial team in the months prior would certainly harbor doubts about whether he could truly preside over the trial in a fair manner.

In addition to his relationship to the prosecutorial team, the military judge made numerous comments showing that he was still in the mindset of an SVP. When he remarked upon the mindset of an alleged victim, such as [redacted], during a SAFE, he revealed his assumption that someone who undergoes a SAFE is, by

default, a person who has actually been the victim of a crime. The CDC also had to object to the military judge coaching the TCs through their response to an objection. It proved impossible for the military judge to fully complete the move from the mindset of a mentor to and member of the prosecutorial team to the impartial role of military judge.

It does not matter that the members of the panel were unaware of the military judge's previous role or these comments. "The correct standard is 'whether a reasonable person *knowing all the circumstances*' would question the military judge's impartiality. . . . Thus, we consider the military judge's words and actions regardless of whether they occurred before the court members or even in the courtroom at all. This is so because the appearance of fairness is tied to the public's confidence in our judicial system, a concern that reaches far beyond the deliberation room in Appellant's court-martial." *United States v. Martinez*, No. ACM 39903 (f rev), 2022 CCA LEXIS 324, at *55 (A.F. Ct. Crim. App. May 31, 2022)(internal citation omitted) (unpub. op.). The military judge abused his discretion in not recusing himself from appellant's case.

2. Applying the *Liljeberg* factors to this error requires relief.

After deciding the military judge erred, the court must next determine whether relief is warranted. *See Butcher*, 56 M.J. at 93. An analysis of the *Liljeberg* factors demonstrates relief is warranted here. First, the risk of injustice to

appellant is high. In addition to being responsible for rulings on matters such as appellant's voir dire challenges and evidentiary objections, appellant elected to be sentenced by the military judge. (R. at 601). Appellant's case was thus presided over by a military judge who had extensive ties to the prosecution team, and no such connection to himself or his counsel, and who had not fully removed himself from the prosecutorial mindset he had necessarily inhabited in his last assignment.

The second *Liljeberg* factor addresses "the risk that denial of relief will produce injustice in other cases." *Id*. If the court does not grant relief, the military judge may continue to preside in cases where he knows and has worked with the TCs and has no such relationship with the DCs. While this risk will diminish over time as personnel who the military judge worked with when he was SVP leave Hawaii for other assignments, it still exists for those facing charges today.

The third *Liljeberg* factor, and the most important in appellant's case, considers the "risk of undermining the public's confidence in the judicial process." *Id*. Regardless of how fair the military judge believed he could be to appellant, a reasonable member of the public or the armed forces who was aware of all the circumstances would harbor doubt about the fairness of the proceedings. The military judge had connections to each of the three members of prosecution team, having just been a part of that team months before appellant's trial began. He had served as a prosecutor responsible for crimes similar to those with which appellant

was charged, and was still serving in that prosecutorial role when the investigation leading to appellant's court-martial began. He failed to entirely shed his role as a prosecutor during appellant's trial. Under the circumstances of this case, a reasonable observer would question whether the military judge was truly impartial and would lose confidence in the military justice process.

Conclusion

For the foregoing reasons, appellant respectfully requests that this Honorable Court set aside and dismiss the findings and sentence and restore all rights, property, and privileges to appellant.

III.

THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO EXCUSE A BIASED PANEL MEMBER.

Additional Facts

During voir dire, one of the panel members, [redacted], responded affirmatively when the military judge inquired whether "anyone or a member of your family or anyone close to you personally ever been the victim of an offense similar to any of those charged in this case?" (R. at 157). In response to further questioning during individual voir dire, he revealed that both his "wife, whenever she was a pre-teen, with her stepfather" and his "father with his aunt and uncle growing up" had been victims of similar crimes. (R. at 195). He stated that his wife

had been between 11 and 13 years old at the time the crimes occurred, and his father was "high school age." (R. at 196).

Defense inquired further about the incidents with his wife and father. He stated that the people accused of harming his father were not prosecuted or caught, and that his father had done "lots and lots of therapy." He stated there was no alcohol or force involved. (R. at 199). When asked the same question about his wife, he stated that the perpetrator was not prosecuted, but that it was something-that came to light after his wife's mother had divorced her stepfather. He averred that alcohol and force were involved in the incidents with his wife

During additional questioning by the military judge, [redacted] said that the incident with his wife was hardly brought up anymore, but that it had been brought up early in their relationship. He stated that they had first talked about a couple of years into their 15-year marriage, but it had been "discussed and went through." He stated that it had been a very long time since they had discussed it, and it did not come up. (R. at 201). He reported that he did not feel any particular emotion when reading the charges against appellant. He also said that the abuse of his wife was one of the reasons that his mother-in-law and stepfather got divorced. [redacted] explained that his wife had gone through therapy approximately 10 to 12 years earlier. (R. at 202). When asked by the government, he stated that he would be able to "independently and impartially review the evidence presented." He responded "I

do not believe so" when asked if he thought the experiences of his wife and father would dictate how he reviewed the evidence in this case. (R. at 196).

During voir dire, [redacted] also disclosed that he had worked as an investigating officer. (R. at 196). He had completed two investigations related to "sexual harassment and hostile work environment" and recommended court-martial for the subject of both investigations. (R. at 203). He also regularly worked with the Sexual Assault Response Coordinators [SARC] in his role as his unit's Equal Opportunity Advisor (EOA). (R. at 199).

Finally, [redacted] disclosed that he had "quite a few" individuals in his family who worked as law enforcement, to include two uncles, an aunt, two cousins, and a brother-in-law. (R. at 197). He stated that his family connections would not change how he reviewed the evidence in appellant's case. (R. at 197). He said that he was not expected to become a law enforcement officer and considered himself the "counterculture" in his family because he had joined the military instead of going police" and that he "did not see [his family] often." (R. at 204).

The CDC challenged [redacted] for cause, arguing that he noted that on his panel questionnaire, he had only disclosed that his father was sexually abused, not his wife. The CDC also noted that the abuse had occurred when his wife was a young woman, and that she had undergone treatment related to the abuse during their marriage. (R. at 220; 223). The defense argued that a member of the public

who learned that he omitted his wife's assault from his questionnaire and then admitted in court that she had been assaulted as a teenager with alcohol involved would have difficulty believing that he could be fair to appellant. (R. at 221). The CDC also noted that [redacted] was from "a law enforcement family" and he had experience as an investigating officer for the SHARP program. (R. at 221).

In response, the government argued that both incidents in [redacted] family involved younger "children" who had been victimized by members of their family. (R. at 221-222). They also argued that there had been a lengthy time lapse since the events, that they were not "part of his daily life," and that his wife is no longer in therapy, and he no longer thinks about it. (R. at 222). The government argued that there was no indication that his family in law enforcement would impact his decision making. (R. at 223). Finally, they argued that the connections between the SHARP investigations [redacted] conducted were "unclear" and that he did not remember the outcome of the cases where he had recommended court martial. (R. at 223-225). They also noted his stated willingness to remain impartial. (R. at 223).

The military judge then asked the CDC whether he thought [redacted] "concealed or omitted" the fact of his wife's sexual assault because there are "a lot of times when people filling out the panel questionnaire get something wrong." (R. at 224). The CDC argued that it was more likely that it was intentional, noting that

the questionnaire even gave the example of "Wife, 30 years ago" as a possible answer on the panel questionnaire. (R. at 224).

The military judge ultimately found that there was no actual bias with regard to [redacted]. (R. at 225). He found that "viewing this objectively through the eyes of the public, the court does not find compelling either his experience as an investigating officer…nor does the court find any impact with his, not distant, but indirect family members who are members of law enforcement." (R. at 225).

Without addressing the issue of his father's sexual abuse, the military judge found that the incidents with his wife "are largely unrelated to the charged offenses" because the "familial aspect of it is a wholly different dynamic than what the accused is facing in this particular case…the situation was brought up to his attention a long time ago and not much since." (R. at 226). The judge found that there was "insufficient concern" to grant the defense challenge for cause. (R. at 226).

Standard of Review

Appellate courts generally review a military judge's ruling on a challenge for cause for an abuse of discretion. *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002). However, implied bias challenges are reviewed "pursuant to a standard that is less deferential than abuse of discretion, but more deferential than de novo review." *United States v. Dockery*, 76 M.J. 91, 96 (C.A.A.F. 2017). "Less

deference is given to the military judge's determination when this Court is reviewing a finding on implied bias because it is objectively 'viewed through the eyes of the public.'" *United States v. Napolitano*, 53 M.J. 162, 166 (C.A.A.F. 2000) (quoting *United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999)).

Law

"As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (internal quotations omitted) (quoting *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001)). This constitutional right to impartial court-members is "sine qua non for a fair court-martial." *United States v. Modesto*, 43 M.J. 315, 318 (C.A.A.F. 1995). With regard to causal challenges of members, the liberal grant mandate mean that if it is even a close question, the military judge should grant the challenge. *United States v. Peters*, 74 M.J. 31, 35 (C.A.A.F 2015).

There are two bases for challenge of a potential member: actual bias and implied bias. "Actual bias is personal bias that will not yield to the military judge's instructions and the evidence presented at trial." *United States v. Woods*, 74 M.J. 238, 243 (C.A.A.F. 2015) (citing *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012)). "Implied bias exists when most people in the same position as the court member would be prejudiced." *United States v. Elfayoumi*, 66 M.J. 354, 356 (C.A.A.F. 2008); R.C.M. 912(f)(1)(N).

When determining whether implied bias existed, appellate courts apply an objective standard. *Dockery*, 76 M.J. at 96; *Peters*, 74 M.J. at 34. "The core of that objective test is the consideration of the public's perception of fairness in having a particular member as part of the court-martial panel." *Peters*, 74 M.J. at 34. "In reaching a determination of whether there is implied bias, namely, a 'perception or appearance of fairness of the military justice system' the totality of the circumstances should be considered. While cast as a question of public perception, this test may well reflect how members of the armed forces, and indeed the accused, perceive the procedural fairness of the trial as well." *Peters*, at 34 (internal citations omitted).

An error in the composition of a court-martial can constitute a structural error. *United States v. Adams*, 66 M.J. 255 (C.A.A.F. 2008) (finding structural error requiring reversal where the court-martial fell below a quorum and lacked enlisted membership as requested). Appellate courts "apply the Supreme Court's structural error analysis, requiring mandatory reversal, when the error affects the framework within which the trial proceeds, rather than simply an error in the trial process itself." *United States v. Upham*, 66 M.J. 83, 86 (C.A.A.F. 2008) (internal quotations and citations omitted); see also *United States v. McMurrin*, 70 M.J. 15, 19 (C.A.A.F. 2011) ("structural errors are those constitutional errors so affecting

the framework within which the trial proceeds, that the trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.").

Argument

A consideration of the totality of the circumstances in this case demonstrates that [redacted] should not have sat on appellant's panel. [redacted] disclosures during individual voir dire revealed three issues. The first issue was his service as an investigating officer, at which he recommended court martial for both subjects suspected of sexual harassment. This disclosure was problematic because it revealed [redacted] attitude that offenses less serious than the sexual acts and contacts that appellant was charged with were deserving of possible criminal liability.

Second, he identified himself as coming from a law enforcement family. This is problematic because the accused was charged with and found guilty of a law enforcement-related crime of impersonating a Military Policeman, as well as making a false official statement about being an investigator. All five of the witnesses who testified about these charges were Military Police. As someone with many family members in law enforcement, it could reasonably appear to an outside observer that [redacted] would hold appellant to a higher standard than someone who did not share his law enforcement connections. Additionally, while no law enforcement officers testified on the merits about the Article 120 offenses

concerning [redacted], much of the government's case came from evidence collected by CID agents during a pretextual conversation with appellant. [redacted] law enforcement connections could have predisposed him to view this evidence more favorably.

Third, and most concerning, were [redacted] disclosures and concealements about his close connections to victims of similar crimes. [redacted] disclosed on his panel questionnaire that his father had been a victim of a similar crime.[2] He did not, however, make such a disclosure about his wife, despite "wife" being the example listed on the panel questionnaire itself. Appellant acknowledges that "[a] prior connection to a crime similar to the one being tried before the court-martial is not per se disqualifying to a member's service." *United States v. Terry*, 64 M.J. 295, 297 (C.A.A.F. 2007). However, under the circumstances described by [redacted], the experiences of his wife should have disqualified him from serving on the panel.

In *Terry*, the C.A.A.F. conducted a useful comparison of two panel members who each had loved ones who were the victims of similar crimes to those of the accused in the case. One of the members disclosed that his wife had been the subject of a sexual assault by her stepfather 10-20 years earlier. She had never

[2] [redacted] questionnaire is not part of the Record of Trial. However, the military judge and CDC both acknowledged that [redacted] failed to disclose his wife's abuse on the questionnaire. (R. at 224).

reported the crime to law enforcement, had not received counseling, had only spoken to her husband about it a few times, and had not discussed it with him for five years. There had been reconciliation between his wife and the assailant and the assailant was still married to his mother-in-law. *Terry*, 64 M.J. at 304. Considering all of these circumstances, the court found that the implied bias challenge against this member had been properly denied. *See also United States v. Rodriguez*, No. ARMY 20180138, 2019 CCA LEXIS 387, at *23 (Army Ct. Crim. App. 1 Oct. 2019) (unpub. op.) (military judge did not abuse discretion in denying implied bias challenge of member whose wife had been assaulted by an acquaintance 20 years earlier when there was no law enforcement involvement and member did not appear to know details of the assault); *United States v. Quill,* No. ARMY 20160454, 2018 CCA LEXIS 390, at *23 (Army Ct. Crim. App. 10 August 2018) (unpub. op.) (member's experience with sexual assault of his sister was not "pronounced and distinct" because member was not emotionally close to his sister, was twelve years older than her, spoke to her infrequently, and he did not have detailed knowledge of his sister's assault).

In contrast, the court in *Terry* analyzed another member and found that the military judge erred in not excusing him because his experience with rape was "profound and distinct." *Id*. at 297. This member's then-girlfriend had been raped seven years earlier, and they had split up because of it. The member was aware of

the details of the rape, such as when it occurred, who perpetrated it, and how the assailant gained access to her, as well as aggravating circumstances surrounding the rape, such as that the ex-girlfriend had named the resulting child after the member. *Id*. at 305.

[redacted] experience with sexual assault is much closer to the experience of the second panel member in *Terry*. While it is true that his wife's assault had occurred more than 10 years earlier and did not come up on a regular basis in his house, he was aware of details of his wife's assault, including the identity of the assailant, that the incident involved both force and alcohol, that it had occurred when she was between 11 and 13 years old, that it had been at least a partial cause of his mother-in-law's divorce of the assailant, and that his wife had gone through therapy as a result of the experience.

Even assuming [redacted] "pronounced and distinct" experience with sexual assault was not enough on its own to disqualify him, his concealment of it on the panel questionnaire and failure to explain why he did so is doubly concerning. A panel member is dishonest when he fails to exhibit "complete candor." . . . [T]he test for member dishonesty is not whether the panel members were willfully malicious or intended to deceive—it is whether they gave objectively correct answers. . . . Moreover, because "[a] panel member is not the judge of his own qualifications," each member must answer fully and correctly on voir dire

regardless of his own subjective "evaluation of either the importance of the information or his ability to sit in judgment." *Commisso*, 76 M.J. at 322. [redacted] was not honest when filling out the panel questionnaire. It defies logic to attribute this to a mere oversight rather than an intentional concealment on his part, when the questionnaire itself lists "wife" as an example for someone a member may know as a victim of a similar crime.

The military judge failed to properly inquire into or consider [redacted] concealment of this information when making his ruling. He only mentioned that it had happened without asking *why* it had occurred. (R. at 201). The "basic integrity of the court-martial process [is] undermined [when] the military judge fail[s] to examine the full extent of [a member's] lack of candor and to remedy the harm it caused." *Commisso*, 76 M.J. at 323. The integrity of the process is further undermined when the military judge fails to "adequately investigate the scope and causes of the panel member[']s] failure to accurately answer straightforward questions at voir dire." *Commisso*, at 323. Here, the process was undermined because of [redacted] concealment and the failure of the military judge to inquire into it.

In considering the totality of the circumstances – [redacted] experience as an investigator of sexual harassment and recommendations of severe punishment, his "law enforcement family," and his experience with the sexual assault of his wife

and father, the military judge should have granted the defense's challenge for cause of [redacted], especially considering his lack of candor concerning his wife. While [redacted] made asserted that he would be able to serve as an impartial and fair panel member, "in certain contexts mere declarations of impartiality, no matter how sincere, may not be sufficient." *Nash*, 71 M.J. at 89. The military judge did not properly consider the totality of the circumstances of each of these issues with [redacted], instead considering them each on their own. The judge should have considered not whether each discrete issue was sufficient on its own to sustain the implied bias challenge, but that the three issues combined amounted to a situation where the public, members of the armed forces, and appellant himself could reasonably question the integrity of the process. *Peters*, 74 M.J. at 34.

Considering the liberal grant mandate, the military judge should have decided this challenge in favor of the appellant. *See e.g. Peters,* 74 M.J. at 37 (finding that the military judge abused his discretion by not erring "on the side of caution" by granting a challenge to a panel member who had a close working relationship with the TC); *Woods*, 74 M.J. at 245 (finding the reviewed challenge against a panel member who expressed beliefs contrary to the law was "at minimum, a close question," and setting aside the findings and sentence); *United States v. Kunishige*, 79 M.J. 693, 714 (N.M. Ct. Crim. App. 2019) (finding that "unquestionably close questions" should have been granted); *United States v.*

*Hollenbec*k, ARMY 20170237, 2019 CCA LEXIS 286, *10 (Army Ct. Crim. App. 27 June 2019) (mem. op) ("Appellate courts will overturn a military judge's ruling where the judge 'clearly abuses his discretion in applying the liberal grant mandate' in a 'close case.'").

Conclusion

In failing to dismiss [redacted], the military judge denied appellant his constitutional and regulatory rights to a fair and impartial trial. *Commisso*, 76 M.J. at 321. For the foregoing reasons, appellant respectfully requests that this Honorable Court set aside and dismiss the findings and sentence and restore all rights, property, and privileges to appellant.

IV.

IV. APPELLANT WAS DENIED THE RIGHT TO A UNANIMOUS VERDICT UNDER THE SIXTH AMENDMENT AND THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FIFTH AMENDMENT.[3]

Additional Facts

Motion for Unanimous Verdict

Before trial, defense moved for the court "to require a unanimous verdict for any finding of guilty and to modify the instructions accordingly," or in the

[3] This issue is presently before the Court of Appeals for the Armed Forces in *United States v. Anderson*, 82 M.J. 440 (C.A.A.F. 2022) (order).

alternative, to "provide an instruction that the Panel President must announce whether any finding of guilty was or was not the result of a unanimous vote without stating any numbers or names." The defense asserted that, in light of the Supreme Court's decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), appellant was entitled to a unanimous verdict under the Sixth Amendment and the Due Process and Equal Protection clauses of the Fifth Amendment. (App. Ex. IV).

The Government opposed the motion. (App. Ex. V). The military judge did not issue a written ruling, stating during an Article 39(a) session that "I'm going to deny the motion…because of the current state of the law, both on the voting procedures and of the panel president alerting the court as to whether the vote was unanimous, there are specific rules on what panel members can speak to, and that is not on the list." (R. at 19). He noted that there were cases pending before both this court and the C.A.A.F. and stated that "if the state of the law changes in a binding way, we will revise the voting procedures in accordance to however the Army or Armed Forces Courts state." (R. at 19).

Appellant's Forum Rights, Election of Forum, and Plea

The military judge advised appellant that he had the right to be tried by a court consisting of eight members and that, if he elected trial by members, three-fourths of the members must vote to convict him. (R. at 10). Appellant pled not guilty to the Charges and their Specifications and elected to be tried by a panel of

enlisted members. (R. at 11, 12). The panel ultimately consisted of eight members – five officer members and three enlisted members. (R. at 228-229).

The military judge's instructions

During voir dire, the military judge instructed the panel that the Government bore the burden of proving appellant's guilt beyond a reasonable doubt. (R. at 85). After the parties' closing arguments, the military judge provided procedural instructions to the members, including that "the influence of superiority in rank will not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment" and "[t]he concurrence of at least three-fourths of the members present when the vote is taken is required for any finding of guilty. Since we have eight members, that means six members must concur in any finding of guilty." (R. at 585, 586).

Findings of the court martial

The panel convicted appellant of four of the six total specifications. (R. at 598). It is unclear how many members concurred in the findings as the members' vote was not disclosed.

Standard of Review

The constitutionality of a statute is a question of law reviewed de novo. *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000).

Law and Argument

Almost three years ago, the Supreme Court guaranteed the right to a unanimous verdict to all state court defendants. *Ramos*, 140 S. Ct. 1390. Defendants prosecuted in federal court already enjoyed this right vis-à-vis the Sixth Amendment. Following *Ramos*, a court-martial is the *only* forum where a defendant can be tried and convicted of a serious offense by a non-unanimous finding of guilty.

In incorporating the Sixth Amendment jury-unanimity right to the states, the Supreme Court found that the term "trial by an impartial jury" meant that "[a] jury must reach a unanimous verdict to convict." 140 S. Ct. at 1395. In *United States v. Lambert*, this Court held that "the Sixth Amendment requirement that the jury be *impartial* applies to court-martial members" and this requirement covers "their conduct during the trial proceedings and the *subsequent deliberations*." 55 M.J. 293, 294 (C.A.A.F. 2001)(emphasis added). Because the Supreme Court explicitly equated the term impartial with unanimity, and in light of this Court's holding in *Lambert*, it is apparent that, following *Ramos*, a non-unanimous guilty verdict at a court-martial cannot be impartial. As such, servicemembers have a constitutional right to be convicted by a unanimous verdict under the Sixth Amendment and this Court's jurisprudence.

Additionally, servicemembers have the right to a unanimous verdict under the Fifth Amendment's Due Process Clause and the Fifth Amendment's right to equal protection of the laws. The jury-unanimity right announced in *Ramos* was heralded as "vital," "essential," "indispensable," and as being "fundamental to the American scheme of justice." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1573 (2021) (Kagan, J., dissenting); *Ramos*, 140 S. Ct. at 1397. Given this emphatic language, it is clear that the jury-unanimity right enshrined in *Ramos* is a fundamental right incorporated to the states pursuant to the Fourteenth Amendment *because* this right was both "fundamental to [the American] scheme of ordered liberty" and "deeply rooted in our Nation's history and tradition." *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010).

For servicemembers charged with serious offenses under the UCMJ, "the factors militating in favor of [requiring a unanimous verdict] are so extraordinarily weighty as to overcome the balance struck by Congress.'" *Weiss v. United States,* 510 U.S. 163, 177-78 (1994). Because a unanimous verdict and the burden of proof beyond a reasonable doubt are inextricably intertwined, a non-unanimous verdict demonstrates that the Government has failed to prove a servicemember guilty beyond a reasonable doubt. As such, a system of non-unanimous verdicts "sanctions the conviction at trial or by guilty plea of some defendants who might

not be convicted under the proper constitutional rule[.]" *Ramos*, 140 S. Ct. at 1417 (Kavanaugh, J., concurring).

Lastly, in *Ortiz v. United States*, the Supreme Court recognized that the "essential character" of the military justice system is "judicial," stating "[t]he procedural protections afforded to a service member are 'virtually the same' as those given in a civilian criminal proceeding, whether state or federal." 138 S. Ct. 2165, 2174 (2018). It emphasized that "[t]he sentences meted out [by a court-marital panel] are also similar," as a court-martial can impose "terms of imprisonment and capital punishment." *Id.* at 2175. Servicemembers may also be tried for a "for a vast swath of offenses, including garden-variety crimes unrelated to military service." *Id*. at 2174. Therefore, as elucidated in *Ortiz*, military servicemembers and federal and state defendants are "in all relevant respects alike." *United States v. Begani,* 81 M.J. 273, 280 (C.A.A.F. 2021), *cert. denied*, 142 S. Ct. 711 (2021). Nonetheless, servicemembers are denied a fundamental right guaranteed to their civilian brethren. Because servicemembers are similarly situated to their civilian counterparts, servicemembers are entitled to a unanimous verdict to ensure equal protection of the law.

Until the right to a unanimous guilty verdict is guaranteed to servicemembers tried by courts-martial, each servicemember who takes an oath to support and defend the Constitution is denied a fundamental Constitutional

right guaranteed to every defendant accused of a crime in state and federal court. As such, justice in the military justice system erodes with every non-unanimous verdict. This Court can, and should, ensure that servicemembers are guaranteed the same Constitutional rights they support and defend for their civilian brethren.

PRAYER FOR RELIEF

WHEREFORE, appellant respectfully requests that this Honorable Court grant the requested relief.

For WILLIAM E. CASSARA, Esq.
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SARAH H. BAILEY
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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was sent via electronic mail to the Court and served on the Government Appellate Division, the Army Court of Criminal Appeals and the Defense Appellate Division on 22 February 2023.

SARAH H. BAILEY
Captain, Judge Advocate
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