IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Chief Warrant Officer (CW2) **ANDRE X. TATE,** United States Army, Appellant	**BRIEF ON BEHALF OF APPELLEE (ART 69, UCMJ APPEAL)** Docket No. ARMY 20200590 Tried at Fort Bragg[1], North Carolina, on 27 August and 19-22 October 2020, before a general court-martial convened by Commander, 82d Airborne Division, Colonel J. Harper Cook, military judge, presiding.

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

Assignments of Error

I. WHETHER THE EVIDENCE IS LEGALLY INSUFFICIENT AS TO CHARGES I AND IV

II. WHETHER THE ADMISSION OF EVIDENCE THAT THE MOTORCYCLE CLUB "OUTCAST" WAS IN A NCIC GANG DATABASE VIOLATED APPELLANT'S CONFRONTATION CLAUSE RIGHTS AND WAS INADMISSIBLE HEARSAY

Statement of the Case

On 22 October 2020, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of violating a lawful regulation, one specification of domestic violence, and one specification of

[1] At the time of trial, the installation was named Fort Bragg. On 2 June 2023, the installation was officially renamed Fort Liberty.

conduct unbecoming an officer, in violation of Articles 92, 128b, and 133, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 928b, 933 (2018) [UCMJ].[2] (Statement of Trial Results [STR]; R. at 669). The military judge sentenced appellant to a reprimand and confinement for six months.[3] (STR). The convening authority approved appellant's sentence and reprimanded him on 25 January 2021. (Action). The military judge entered judgment on 28 January 2021. (Judgment).

Appellant acknowledged his post-trial and appellate rights on 17 October 2020. (App. Ex. XXVI). The military judge announced the sentence on 22 October 2020. (R. at 669). On 16 June 2021, an attorney "designated by the Judge Advocate General," Rule for Courts-Martial [R.C.M.] 1201(a), completed "appellate review in accordance with [R.C.M.] 1201(a)." (Certification of Completion of Appellate Review dated 16 June 2021). This attorney documented that "[t]he findings of guilty and sentence adjudged on 22 October 2020 . . . have been determined to be correct in law and fact." (Certification of Completion of Appellate Review dated 16 June 2021).

On 2 July 2021, appellant timely filed his Article 69, UCMJ application for relief from his general court-martial conviction. (Dep't of Army, Form 3499,

---

[2] Appellant was acquitted of Charge II, wrongful possession of a Schedule III controlled substance. (STR).

[3] The six months' confinement was only attributed to Charge III, the domestic violence conviction. (STR).

Application for Relief from Court-Martial Findings and/or Sentence Under the Provisions of Title 10, United States Code, Section 869 (Jan. 2019) [DA Form 3499]). On 18 November 2021, in a document titled Action, Pursuant to Article 69, Uniform of Military Justice, the Criminal Law Division denied relief after review of appellant's matters. On the same day in a memorandum addressed to appellant, the Criminal Law Division notified appellant "the Judge Advocate General, decided not to set aside the findings or sentence, in whole or in part, on the grounds stipulated in Article 69(c), UCMJ, or take other actions in [appellant's] case." (Office of The Judge Advocate General, Criminal Law Division [OTJAG-CLD] Letter to Appellant, dated 18 November 2021). On 11 January 2022, appellant petitioned this court to review TJAG's 18 November 2021 action.

On 22 February 2022, this court granted Appellant's application for review as to one issue and specified another. Appellee filed a motion and brief on 14 and 15 March 2022, respectively. On 9 September 2022, this court vacated its grant of review, holding its initial grant of review was void *ab initio* because TJAG did not take personal action on appellant's Art. 69, UCMJ application. *United States v. Tate*, ARMY 20200590 (Army Ct. Crim. App. 9 Sep. 2022) (mem. op.). On 23 September 2022, appellant filed a petition for extra-ordinary relief in the nature of a writ of mandamus. *Tate v. United States*, ARMY MISC 20220470. This court

denied the petition on 27 October 2022. On 4 November 2022, appellant filed a petition for grant of review to the Court of Appeals for the Armed Forces [CAAF].

In the interim, TJAG denied appellant's application on 5 October 2022. Appellee filed an answer and moved to attach this denial and the OTJAG-CL notification letter on 9 November 2022. The CAAF granted appellee's motion and denied appellant's writ-appeal petition on 6 December 2022. *Tate v. United States*, ARMY MISC 20200470 (C.A.A.F. 6 Dec. 22) (order). On 13 December 2022, CAAF dismissed appellant's petition without prejudice. *United States v. Tate*, 83 M.J. 138, 2022 CAAF LEXIS 887 (C.A.A.F. 13 Dec. 22).

On 20 December 2022, appellant applied to this court for a grant of review of TJAG's action. Appellant filed his brief on the same day. On 16 August 2023, this court granted review as to one issue and specified another.

Statement of Facts

Appellant married Chief Warrant Officer Two [CW2] [redacted] in May of 2016. (R. at 241). During the court-martial, CW2 [redacted] testified that she was aware appellant was a member of the Outcast Motorcycle Club [OMC] prior to their marriage because appellant talked about it and wore OMC attire. (R. at 241, 244–45). This attire included a "one percent diamond tag thing that he wore." (R. at 252; Pros. Ex. 4). Appellant would also go to the OMC clubhouse in Georgia. (R. at 242; Pros. Ex. 3).

At trial, the government admitted photographs of appellant wearing OMC attire. (Pros. Ex. 3). Appellant's motorcycle club attire included a face covering depicting OMC insignia and the denotation "1%." (Pros. Ex. 3; Pros. Ex. 5). [redacted], a lead intelligence analyst for CID, with five years of specialization in outlaw motorcycle gangs, testified as a government witness. (R. at 444, 446, 449–86). Specifically, [redacted] was recognized by the court as an "expert in gang identification and outlaw motorcycle groups" in Georgia, South Carolina, and North Carolina. (R. at 477). [redacted] testified that the OMC is a gang listed in the National Crime Information Center [NCIC]. (R. at 458, 483). The NCIC classifies organizations as gangs when they have "[i]ncidents and then ongoing incidents or criminal acts." (R. at 459). The OMC has operated in Georgia, South Carolina, and North Carolina since at least 2015. (R. at 477). According to [redacted], the 1% symbol is a self-proclaimed way to identify their gang as being at the top of the hierarchy. (R. at 460). In his expert opinion, "A lot of it is . . . [e]mbedded in criminal activity." (R. at 460). Given "[t]he extensive criminal activity that comes with all of these clubs, it is easy to show that they wear it, they live it, they act it out." (R. at 460).

Assignment of Error I

WHETHER THE EVIDENCE IS LEGALLY INSUFFICIENT AS TO CHARGES I AND IV[4]

Standard of Review

Questions of legal sufficiency are reviewed de novo. *United States v. Washington,* 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

A. Legal sufficiency.

The standard 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." *United States v. Turner*, 25 MJ 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). In resolving questions of legal sufficiency, the court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). During its legal sufficiency review, the court considers all available facts within the record and is "not limited to the

[4] Charge I is a violation of a general regulation, in violation of Article 92, UCMJ, and Charge IV is conduct unbecoming an officer, in violation of Article 133, UCMJ.

appellant's narrow view of the record." *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996).

B. Article 92, UCMJ.

An individual violates Article 92 when he "violates or fails to obey any lawful general . . . regulation." "Participation in criminal gangs . . . by Army personnel is inconsistent with the responsibilities of military service." Army Reg. 600-20, Personnel—General: Army Command Policy, para. 4-12(g) (6 Nov. 2014) [AR 600-20]. "Soldiers are prohibited from participation in gangs or their activities." AR 600-20, para. 4-12(g)(3). "Criminal gangs and activities are ones that advocate the planning or commission of one or more criminal offenses, by persons who share a group identity, and may share a common name, slogan . . . clothing style or color." AR 600-20, para. 4-12(g)(1). "Penalties for violations of these prohibitions include the full range of statutory and regulatory sanctions [under the UCMJ]." AR 600-20, para. 4-12(g)(3). "[E]xamples of active participation . . . specific to criminal gangs [includes] . . . knowingly wearing gang colors or clothing." AR 600-20, para. 4-12(g)(3)(a).

C. Article 133, UCMJ.

Article 133, UCMJ, criminalizes "conduct unbecoming an officer and a gentleman." The nature of the offense is "action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally,

seriously compromises the person's standing as an officer. *Manual for Courts-Martial* (2019 ed.) [*MCM*, 2019], pt. IV, ¶ 90.c(2). "There are certain moral attributes common to the ideal officer . . . a lack of which is indicated by acts of . . . lawlessness . . . or cruelty." *MCM*, 2019, pt. IV, ¶ 90.c(2). "This article prohibits conduct by a commissioned officer . . . which, taking all the circumstances into consideration, is thus compromising." *MCM*, 2019, pt. IV, ¶ 90.c(2). "This article includes acts made punishable by any other article, provided these acts amount to conduct unbecoming of an officer." *MCM*, 2019, pt. IV, ¶ 90.c(2).

Violations of Article 133 can be expansive in that "[the Court of Appeals for the Armed Forces] has previously held an officer's conduct need not violate other provisions of the UCMJ or even be otherwise criminal to violate Article 133." *United States v. Meakin*, 78 M.J. 396, 403 (C.A.A.F. 2019). "The gravamen of the offense is that the officer's conduct disgraces him personally or brings dishonor to the military profession such as to affect his fitness to command the obedience of his subordinates so as to successfully complete the military mission." *Id.* (quoting *United States v. Lofton*, 69 M.J. 386, 388 (C.A.A.F. 2011)).

The expansive nature of Article 133 is highlighted in that "the conduct of an officer may be unbecoming even when it is private." *Id*. (quoting *United States v. Moore*, 38 M.J. 490, 493 (C.A.A.F. 1994)). Furthermore, "even conduct that has

no bearing on military discipline might establish the basis for an Article 133, UCMJ, charge." *Id*. at 404.

Argument[5]

A. Charge I and its Specification is legally sufficient.

The record is rife with evidence, to include photographs, of appellant's active participation and membership in the criminal biker gang known as the OMC. (R. at 241–45; Pros. Ex. 3–5).

1. [redacted], an expert in gang identification and outlaw motorcycle groups, testified that the OMC is a known criminal gang.

[redacted], an expert in "gang identification and outlaw motorcycle groups" provided a wealth of evidence that confirmed the OMC is a known criminal gang. (R. at 444–86). First, MP testified that the OMC has been operating in North Carolina, South Carolina, and Georgia since at least 2015, and the gang has clubhouses in Fayetteville, North Carolina and Georgia. (R. at 477–78). Second, the OMC operating in North Carolina has a reputation for committing violent acts. (R. at 475). [redacted] even attended the funeral of a South Carolina OMC member who was gunned down and murdered outside a bar. (R. at 480). This evidence shows

[5] In appellee's brief, filed 15 March 2022, the government argued the evidence related to NCIC corroborated other evidence that OMC was a criminal gang under AR 600-20, para. 4-12(g). However, upon further review and consideration, the government submits the amended argument herein.

the OMC is an organization that advocates the planning or commission of criminal offenses and thus, a criminal gang under AR 600-20, para. 4-12(g).

2. Appellant knowingly wore gang colors and clothing.

The prosecution exhibits, CW2 [redacted]'s testimony, and [redacted]'s testimony confirmed appellant wore gang colors and clothing—which violates AR 600-20, para. 4-12(g). (R. at. 252, 459–60, Pros. Ex. 3–5). Appellant's own wife referenced the "one percent diamond tag thing that he wore" during her testimony. (R. at 252). Furthermore, [redacted] identified the "1%" symbol depicted on appellant's OMC attire as indicative of being an "outlaw biker." (R. at 459–60). To wear the attire of a "one percenter" as appellant did, [redacted] testified that "their club has to be an outlaw club." (R. at 461; *see also* R. at 474–75). [redacted] further testified that all "[outlaw motorcycle gangs wear] the one percent diamond." (R. at 462).

A member of an outlaw motorcycle gang earns the right to wear the "one percenter" insignia through criminal acts, acts against a rival, or something business oriented for the club. (R. at 462).

3. Chief Warrant Officer [redacted]'s testimony confirmed appellant's active participation in the Outcast Motorcycle Club.

Chief Warrant Officer Two [redacted] testified she knew appellant was a member of the OMC prior to their marriage in May of 2016 because appellant talked about it and wore OMC attire. (R. at 241, 244–45). She further testified appellant went to the OMC clubhouse when he came to visit her in North Carolina. (R. 242). After

their marriage, appellant would also go to events at the OMC clubhouse in Georgia. (R. at 242–43). Appellant would leave their home "wearing his [OMC] gear, and on his motorcycle." (R. at 245). Chief Warrant Officer Two [redacted] even identified photographs from 2019 of appellant wearing his OMC attire and "one percenter insignia." (R. at 248–52; Pros. Ex. 3–5).

The evidence in the record is clear and overwhelming. The OMC is a motorcycle gang of which appellant had been an active participant in both North Carolina and Georgia since on or about 1 January 2016. In addition to CW2 [redacted] confirming appellant's active participation in the motorcycle gang, appellant also regularly donned the club's attire and "one percenter" insignia, boldly signaling his membership and support of a criminal organization. (Pros. Ex. 3–5). Appellant's active participation and membership in the OMC violated the prohibition against "[s]oldiers . . . participat[ing] in gangs or their activities." AR 600-20, para. 4-12(g)(3). Accordingly, appellant's conviction under Article 92 for violation of a lawful general regulation is legally sufficient.

Appellant's contention that the government offered no "competent" evidence that the OMC is a criminal gang is belied by the evidence. (Appellant's Br. 7).[6] [redacted] testified the OMC in North Carolina had a reputation for committing

[6] Of note, appellant did not contest his membership in the Outcast Motorcycle Club. (Appellant's Br. 7–9).

violent acts. (R. at 475). Appellant's "one percenter" attire further underpins the evidence in support of the OMC as a criminal gang because the "1%" symbol depicted on appellant's OMC attire is indicative of being an "outlaw biker." (R. at 459–60; Pros. Ex. 3). Put simply, to wear the attire of a "one percenter" as appellant did, "their club has to be an outlaw club." (R. at 461). Appellant's blatant wear of the OMC vestments—combined with [redacted]'s expert testimony—firmly supports the legal sufficiency of the charged offense. (R. 444–86).

B. Charge IV and its Specification is legally sufficient.

Appellant's active participation OMC clearly "compromises [his] standing as a commissioned officer." *MCM*, 2019, pt. IV, ¶ 90.c(2); *United States v. Forney*, 67 M.J. 271, 275 (C.A.A.F. 2009) ("An officer's conduct that . . . brings dishonor to the military professions affects his fitness to command the obedience of his subordinates so as to successfully complete the military mission . . . is the gravamen of the offense proscribed in Article 133."). By appellant's own admission, he joined the OMC in May of 2015. (R. at 516). The OMC has self-proclaimed status as an "outlaw" organization and has a reputation for violent acts. (R. at 444–86). Still, appellant broadcasted his membership by making frequent visits to the OMC's clubhouse and by wearing its affiliated gang vestments. (Pros. Ex. 3–5; R. at 242). As such, appellant's actions are clearly "conduct unbecoming an officer and a gentleman." Article 133, UCMJ.

Appellant, a commissioned officer in the United States Army, demonstrated his status as a "one percenter" or "outlaw," (Pros. Ex. 3–4), by virtue of his membership in the OMC. This status is in direct contrast to the "moral attributes common to the ideal officer . . . a lack of which is indicated by acts of . . . lawlessness." *MCM*, 2019, pt. IV, ¶ 90.c(2). Appellant does not contest his membership, participation, and endorsement of the Outcast Motorcycle Club, and argues only that the government failed to provide evidence of the club's criminality. (Appellant's Br. 7–9). To the contrary, [redacted], in his capacity as an expert in "gang identification and outlaw motorcycle groups," (R. at 449), testified that the OMC has a reputation for committing violent acts. (R. at 475).

Appellant claimed that as a prospective member, he only picked up trash, cleaned the clubhouse, and was not required to commit any crime to become a member of the OMC or to earn any patches. (R. at 516–18). He further claimed the 1% symbol is simply a "piece of jewelry." (R. at 519). However, appellant's self-serving claims were contradicted by the government's expert witness in gangs, [redacted], who testified that the 1% symbol is associated with criminal acts. (R. at 459–60). Thus, this court should reject appellant's testimony in favor of [redacted]'s. *See United States v. Nicola*, 78 M.J. 223, 227 (C.A.A.F. 2019) ("[B]ut one risk of testifying, recognized long ago, is that the trier of fact may disbelieve the accused's testimony and then use the accused's statement as substantive evidence of guilt 'in

connection with all the other circumstances of the case.'") (quoting *Wilson v. United States*, 162 U.S. 613, 620–21 (1896)).

As such, the evidence is legally sufficient because when viewed in a light most favorable to the government, the evidence established the elements of the offense. *See United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011) ("The Supreme Court stated that in reviewing for legal sufficiency of the evidence, 'the relevant question' an appellate court must answer is 'whether, after viewing the evidence in the light most favorable to the prosecution,' which preserves 'the factfinders role as weigher of evidence.'") (quoting *Jackson v. Virginia*, 443 U.S. 307, 320 (1979)).

Assignment of Error II

WHETHER THE ADMISSION OF EVIDENCE THAT THE MOTORCYCLE CLUB "OUTCAST" WAS IN A NCIC GANG DATABASE VIOLATED APPELLANT'S CONFRONTATION CLAUSE RIGHTS AND WAS INADMISSIBLE HEARSAY.

Additional Facts

A. Pre-Trial

Appellant filed and litigated "Defense Daubert Challenge of [MP]/ Motion to Exclude "Expert" Testimony in Gang Identification," dated 8 October 2020. (R. at 117–67; App. Ex. XI; *see also* App. Ex. XII at 11). One of the bases for this motion was that [redacted]'s testimony would constitute testimonial hearsay in violation

of *Crawford v. Washington* because his knowledge was derived from interviews of other gang members. (R. at 155–56; App. Ex. XI).

At the motions hearing, [redacted] said his expert opinion relied upon interviews, confidential informants, police reports, intel sharing meetings, conferences, training, surveillance missions, investigations of which he had been a part, some in a joint environment with other federal agencies, and criminal databases such as NCIC. (R. at 134). The government argued [redacted]'s testimony about NCIC was to show his opinion was reliable. (R. at 143, 158–59; *see also* R. at 129). Otherwise, [redacted] would explain gang clothing to the factfinder. (R. at 160–62).

The military judge denied defense's motion in a written ruling. He reasoned that the danger of [redacted]'s opinion being confusing, misleading, and unfairly prejudicial would arise if the members "mistakenly believe[d] that his testimony regarding the FBI's nationwide gang classification standard [was] being offered to usurp their role in deciding this case against the standard stated in AR 600-20, para 4-12(g)." (App. Ex. XXII at 7). But members could understand the FBI's validation process was simply offered to understand the specialized methodology upon which [redacted] relied. *Id.*

Addressing confrontation concerns, the military judge wrote: "To the extent [redacted] has relied on testimonial hearsay to acquire his specialized knowledge and to

render his opinion . . . he will not repeat that information on the merits." (App. Ex. XXII at 8; *see also* R. at 148–49).

After this ruling, appellant confirmed his request for trial before military judge alone. (App. Ex. XXI; R. at 207).

B. Trial

At trial, the military judge recognized [redacted] as an expert in the field of outlaw motorcycle gangs over appellant's renewed objection. (R. at 449–50).

On direct examination, [redacted] testified about NCIC—the components of the database as well as its validation by the FBI and annual auditing processes. (R. at 452–57). He also stated that the purpose of this database was officer safety. (R. at 456–57, 465–66, 473–74). At the outset of this line of questioning, appellant objected based on "improper opinion testimony," arguing [redacted] was "putting himself in the place of the factfinder." (R. at 452–53). The military judge overruled this objection and referred to his written pre-trial ruling:

> The reference to the NCIC . . . was to demonstrate to the factfinder that this isn't just the expertise of [MP] calling something a gang. But that in the specialized field of classifying gangs, there is some rigor to it. And so, that is the only reason I am letting in this term "validate a gang." But the court will decide if the government has proven beyond a reasonable doubt that . . . there was an Outcast Motorcycle Club and if that club is a criminal gang as defined by AR 600-20. So, nothing that I [hear] from this witness is going to usurp the court's role in that regard.

(R. at 452–53). [redacted] went on to testify that the Outcast Motorcycle Club [OMC] was a gang listed in NCIC and last validated in NCIC in 2018 by the Fayetteville Police Department in North Carolina. (R. at 458).

During cross-examination, defense counsel questioned NCIC's reliability and purpose. (R. at 466–67). [redacted] indicated he had investigated OMC for about four years and much of the information he received about it came from informants within the club. (R. at 466–67). But his investigations did not go into NCIC, he did not validate gangs in NCIC, and he did not know what Fayetteville Police Department knew or why they validated the gang in 2018. (R. at 467; *see also* R. at 476–77).

The military judge separately examined [redacted] about his personal experience and knowledge about OMC and NCIC. (R. at 477– 78). On re-direct, [redacted] testified that based on networking, meetings, and conferences with other experts in the field he believed OMC may have been listed in NCIC earlier than 2016. (R. at 480–83).

[redacted] said that what distinguished motorcycle enthusiasts or clubs from outlaw motorcycle gangs was the "one percenter diamond" patch that can be earned through criminal acts. (R. at 460–63). On cross-examination, [redacted] stated each motorcycle club established the criteria to earn the patch and a member did not necessarily have to commit a crime to earn the patch. (R. at 468–70). However, the patch is significant; its wearer would have to defend wearing it. (R. at 475).

Appellant testified he joined OMC in 2015 and it was a fraternity, not a gang. (R. at 517–19, 574). He said he would not know if a club member individually engaged in criminal activity. (R. at 578). He was awarded the "one percenter" patch for "acts of brotherhood." (R. at 516–17, 519, 524, 574).

C. Findings

Based on [redacted] and appellant's testimonies, the military judge found OMC was a criminal gang. (R. at 671–72; AE XXV at 1–2). He cited to appellant and [redacted]'s corroborating testimonies about "unique symbology, language, and internal practices used by members of the [OMC]." (R. at 671–72; AE XXV at 1–2).

Standard of Review

"Whether admitted evidence constitutes testimonial hearsay is a question of law reviewed de novo." *United States v. Baas*, 80 M.J. 114, 120 (C.A.A.F. 2020); *United States v. Tearman*, 72 M.J. 54 (C.A.A.F. 2013) (citing *United States v. Blazier (Blazier I)*, 68 M.J. 439, 441–42 (C.A.A.F. 2010)).

But "[w]hen an appellant does not raise an objection to the admission of evidence at trial, the Court first must determine whether the appellant waived or forfeited the objection." *United States v. Jones*, 78 M.J. 37, 44 (C.A.A.F. 2018). Generally, there is a presumption against finding a waiver of constitutional rights. *United States v. Sweeney*, 70 M.J. 296, 304 (C.A.A.F. 2011). If waived, then the Court may not review at all. *Jones*, 78 M.J. at 44. If merely forfeited, then the

Court may review the objection for plain error. *Id.* Moreover, whether a constitutional error was harmless beyond a reasonable doubt is a question of law reviewed de novo. *Tearman*, 72 M.J. at 62.

Law

A. Testimonial Hearsay.

The Sixth Amendment to the Constitution provides, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. The protections contained in the Sixth Amendment's Confrontation Clause apply in prosecutions of members of the armed forces. *United States v. Jacoby*, 29 C.M.R. 244, 246–47 (C.M.A. 1960).

The primary concern of the Sixth Amendment is testimonial hearsay. *Crawford v. Washington*, 541 U.S. 36, 53 (2004). Thus, a witness's testimony against an appellant is inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (citing *Crawford*, 541 U.S. at 51). In short, the Confrontation Clause prohibits untested testimonial statements. *United States v. Katso*, 74 M.J. 273, 278 (C.A.A.F. 2015).

While declining to provide a comprehensive definition of "testimonial," the Supreme Court in *Crawford* identified a "core class" of testimonial statements which include (i) ex parte in-court testimony or its functional equivalent (e.g.,

affidavits, whether sworn or unsworn), (ii) extrajudicial statements, and (iii) "statements made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." 541 U.S. at 52, 68; *see Bullcoming v. New Mexico*, 564 U.S. 647 (2011) (holding the admission of a lab report of petitioner's blood alcohol level violated his right to confront the analyst who prepared the report); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) (holding the admission of affidavits reporting the results of forensic analysis violated petitioner's confrontation rights).

In determining the third class of testimonial statements—the primary purpose of a statement—military courts consider the formality and knowledge of the declarant. *Baas*, 80 M.J. at 121 (primary purpose of a statement in a lab test was diagnostic, not evidentiary); *Katso*, 74 M.J. at 279 (chain of custody function and computer-generated raw data were not testimonial); *Tearman*, 72 M.J. at 58 ("The focus has to be on the purpose of the statements in the drug testing report itself, rather than the initial purpose for the urine being collected and sent to the laboratory for testing."). The Court in *United States v. Rankin* also raised a non-exhaustive list of contextual considerations:

> First, was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry? Second, did the 'statement' involve more than a routine and objective cataloging of unambiguous factual matters? Finally, was the primary purpose for making, or eliciting,

> the statements the production of evidence with an eye toward trial?

64 M.J. 348, 352 (C.A.A.F. 2007).

B. Expert Testimony.

Expert testimony can implicate Confrontation Clause concerns where the expert acts as a "surrogate expert" or "mere conduit for the testimonial statements of another." *Katso*, 74 M.J. at 275 (distinguishing from *Bullcoming*, 564 U.S. at 661–62 and *United States v. Blazier (Blazier II)*, 69 M.J. 218, 226 (C.A.A.F. 2010)). To determine whether an expert witness's testimony runs afoul of the Confrontation Clause, appellate courts will inquire whether: (1) the expert's testimony relied on out-of-court statements that were testimonial, and (2), "if so, was the expert's testimony nonetheless admissible because he reached his own conclusions [. . .] such that the expert himself" was the witness against the accused. *Katso*, 74 M.J. at 279. The second prong is a highly fact-specific inquiry.

The testimony of experts is further governed by Military Rules of Evidence [Mil. R. Evid.] 703. While the expert witness must have a proper basis for their opinion to be admissible, the underlying facts or data need not themselves be admissible. Mil. R. Evid. 703. The military judge must determine "whether the conclusion could reliably follow from the facts known to the expert and the methodology used." *United States v. Sanchez*, 65 M.J. 145, 150 (C.A.A.F. 2007).

In *Williams v. Illinois*, the Court clarified that out-of-court statements "related by an expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause." 567 U.S. 50, 57 (2012) (referring to an outside lab report which was part of the expert's case file review).

C. Plain Error.

Under plain error review, a court may grant relief only where (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the accused. *Sweeney*, 70 M.J. at 304.

Nevertheless, "relief for Confrontation Clause errors will be granted only where they are not harmless beyond a reasonable doubt." *Tearman*, 72 M.J. at 62 (citing *Sweeney*, 70 M.J. at 306). This inquiry focuses on whether "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Tearman*, 72 M.J. at 62 (citing *Blazier II*, 69 M.J. at 226-27).

The CAAF has adopted the balancing test in *Delaware v. Van Arsdall* to determine whether a Confrontation Clause error is harmless beyond a reasonable doubt, considering factors such as: "(1) the importance of the unconfronted testimony in the prosecution's case, (2) whether that testimony was cumulative, (3) the existence of corroborating evidence, (4) the extent of confrontation permitted, and (5) the strength of the prosecution's case." *Sweeney*, 70 M.J. at 306 (citing

Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)). Of note, "[t]his list of factors is not exhaustive and '[the] determination is made on the basis of the entire record.'" *Tearman*, 72 M.J. at 62 (citations omitted).

Argument

A. Plain error review applies because appellant forfeited the objection.

Appellant forfeited the Confrontation Clause objection relating to OMC's listing in the NCIC database. This issue was neither raised nor litigated in trial or in appellant's pre-trial motion to exclude [redacted]'s expert testimony.

In pre-trial proceedings, the parties addressed various aspects of [redacted]'s proffered testimony including: gang validation against the NCIC database and information derived from OMC informants. (R. at 147–49; App. Ex. XI at 2, 5–7, App. Ex. XXIII, App. Ex. XXII). Appellant raised Confrontation Clause objections only with respect to the latter aspect:

> What the government is attempting to do, through this witness, is establish . . . that a gang exists. The way they're trying to do this is by using some of the "reliable" evidence, which is other individuals telling him things and other individuals explaining to him these--what these symbols mean. . . . That is testimonial hearsay. . . . There was no evidence presented today on how [redacted] came to any of his conclusions when he was talking to these individuals. We don't know who these individuals are. We don't know what type of criteria was used to vet any of these individuals. All we know is that [redacted] spoke to individuals, individuals told him a thing, and then he uses this thing to . . . establish . . . what is this case.

(R. at 155–56; *see* App. Ex. XI at 2, 5–7). The government assured the military judge that [redacted] would not repeat, and the government would not elicit, what another confidential information said. (R. at 148–49). Thereafter, the military judge issued a ruling on that exact matter. (App. Ex. XXIII; App. Ex. XXII).

In contrast, appellant did not raise a Confrontation Clause objection to [redacted]'s testimony about NCIC. The government proffered and the military judge acknowledged [redacted]'s testimony about NCIC was offered to demonstrate reliability and a basis for [redacted]'s expert opinion. (R. at 143, 158–59). Then at trial, appellant objected to [redacted]'s testimony about the NCIC database as "improper opinion testimony" for usurping the role of the factfinder, not Confrontation Clause grounds. (R. at 452). Neither party raised or otherwise addressed this issue. Thus, it is reasonable to infer that appellant's failure to make the Confrontation Clause objection was unintentional, such that appellant forfeited the objection rather than waived it. *Compare Jones*, 78 M.J. at 44.

B. There was no error.

1. The statement was offered for a nonhearsay purpose.

The statement at issue arose from [redacted]'s testimony that OMC was listed in a NCIC gang database. However, this statement was offered to establish the basis and reliability for [redacted]'s expert testimony—i.e., a nonhearsay purpose. The Confrontation Clause "does not bar the use of testimonial statements for purposes

other than establishing the truth of the matter asserted." *Williams*, 567 U.S. at 70 (quoting *Crawford*, 541 U.S. at 59-60). The government proffered [redacted]'s testimony about NCIC was to show his opinion was reliable. (R. at 143, 158–59; *see also* R. at 129). The military judge determined this testimony was admissible because it demonstrated to the factfinder that OMC gang identification is not based solely on personal views, but instead are grounded in a nation-wide standard. (R. at 452–53; App. Ex. XII at 5–6).

In so finding, the military judge relied upon correct law.[7] (App. Ex. XXII at 5–6). *See, e.g.*, *Sanchez*, 65 M.J. at 150 ("Whether attempting to determine if there is 'too great an analytical gap between the data and the opinion proffered' . . . or whether the proffered testimony falls 'outside the range where experts might reasonably differ, the goal is to ensure that expert testimony or evidence admitted is relevant and reliable, as well as to shield the panel from junk science.'"). Thus, the admissibility of the statement at issue is governed by Mil. R. Evid. 702 and 703, not the Confrontation Clause.

[7] The military judge's ruling relied upon *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579 (1993); *United States v. Henning*, 75 M.J. 187 (C.A.A.F. 2016); *United States v. Flesher*, 73 M.J. 303 (C.A.A.F. 2014); *United States v. Billings*, 61 M.J. 163 (C.A.A.F. 2005); *United States v. Griffin*, 50 M.J. 278 (C.A.A.F. 1999); *United States v. Houser*, 36 M.J. 392 (C.M.A. 1993).

Moreover, this was a trial before military judge alone. "When the judge sits as the trier of fact, it is presumed that the judge will understand the limited reason for the disclosure of the underlying inadmissible information and will not rely on that information for any improper purpose." *Williams*, 567 U.S. at 69 ("There is a 'well-established presumption' that 'the judge [has] adhered to basic rules of procedure' when the judge is acting as a factfinder.").

2. The statement at issue was not testimonial.

This primary purpose for designating OMC as a gang in NCIC was not to produce evidence with an eye toward trial. Instead, its primary purpose was to serve as a background check to ensure officer safety. (R. at 456). *Compare Baas*, 80 M.J. at 121. OMC's listing was included in NCIC as early as 2016 when appellant was not yet under suspicion. (R. at 480–83). *Compare Williams*, 567 U.S. at 58. [redacted] testified that he did not know the underlying reasons the Lafayette Police Department validated OMC as a gang in NCIC, but the criteria for the classification of a criminal gang in the NCIC was evidence of "ongoing three or more, common interest, criminal acts or delinquent acts." (R. at 450–453, 467). Therefore, testimony about the NCIC database was not testimonial and its admission did not violate appellant's Sixth Amendment right to confrontation.

3. [redacted] reached his own conclusions.

Even if the statement was testimonial, [redacted]'s expert testimony was nevertheless admissible because he reached his own conclusions, such that [redacted] himself was the witness against the accused. *Katso*, 74 M.J. at 279; *cf. Bullcoming*, 564 U.S. at 662 (noting the State did not assert that the testifying expert had an independent opinion). At the time of trial, [redacted] had independently investigated OMC for about four years, receiving information directly from OMC members themselves. (R. at 466–67). His opinion was also based on networking, meetings, and conferences with other experts in the field. (R. at 483). The military judge ensured [redacted] drew upon his own knowledge and experience of gang identification. (R. at 477–78). Thus, [redacted] was neither acting as a "surrogate expert" or "mere conduit for the testimonial statements of another." *Bullcoming*, 564 U.S. at 661–62. No error, plain or obvious, was committed.

C. Even if there was plain error, the error was harmless beyond a reasonable doubt.

Employing the balancing test, if error was committed, that error was harmless. *See Sweeney*, 70 M.J. at 306. Appellant was able to challenge the reliability of NCIC through [redacted]'s cross-examination. (R. at 466–67). The importance of the testimony about OMC's listing in NCIC in the prosecution's case was low, bearing only on the weight of [redacted]'s expert opinion. The crux of his testimony was to explain the significance of certain clothing in gang culture. (R. at

460–63, 468–70, 475–76; *see also* R. at 162). This is clear from the military judge's findings that cited to [redacted]'s testimony about the "unique symbology, language and internal practices" and appellant's corroborating statements. (R. at 671–72; AE XXV at 1–2). He repeatedly assured proper use of the statements, not the establishment of an ultimate issue. (App. Ex. XXII at 7; R. at 452–53). As the military judge did not rely on testimony about NCIC to determine whether OMC met the definition of a criminal gang, there was no reasonable possibility it contributed to the ultimate conviction. *Tearman*, 72 M.J. at 62 (citing *Blazier II*, 69 M.J. at 226-27).

Instead, it was cumulative to [redacted]'s independent knowledge, CW2 [redacted]'s testimony, and appellant's own admissions. *See supra* AE I, Argument A. Even without mention of the NCIC database, the prosecution's evidence established that the OMC was a criminal gang as defined under AR 600-20, para. 4-12(g).

Conclusion

WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and sentence and deny relief.

[redacted]
VY T. NGUYEN
CPT, JA
Branch Chief, Government
Appellate Division

[redacted]
CHASE C. CLEVELAND
MAJ, JA
Branch Chief, Government
Appellate Division

[redacted]
JACQUELINE J. DEGAINE
LTC, JA
Deputy Chief, Government
Appellate Division

CERTIFICATE OF SERVICE, U.S. v. TATE (20200590)

I certify that a copy of the foregoing was sent via electronic submission to Mr. Robert Feldmeier, civilian appellate defense counsel, at [redacted], and the Defense Appellate Division, at [redacted], on the 14th day of September, 2023.

[redacted]

DANIEL L. MANN
Senior Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546
[redacted]