

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20220248

Staff Sergeant (E-6)

DANIEL D. HERMAN

United States Army

Appellant

Tried at Fort Hood, Texas, on 11 April and 10-14 May 2022, before a general court-martial convened by the Commander, Headquarters, III Corps and Fort Hood, Lieutenant Colonel Scott Z. Hughes, military judge, presiding.

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

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Assignments of Error¹

**I. WHETHER THE MILITARY JUDGE ABUSED HIS
DISCRETION IN DENYING APPELLANT'S MOTION TO
SUPPRESS STATEMENTS AND DERIVATIVE EVIDENCE**

**II. WHETHER THE MILITARY JUDGE APPLIED THE
INCORRECT MAXIMUM PUNISHMENT FOR THE ARTICLE
117A SPECIFICATIONS THEREBY VIOLATING THE *EX
POST FACTO* CLAUSE.**

¹ Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in the Appendix.

Statement of the Case

On 14 May 2022, a military judge sitting as a general court-martial convicted appellant, Staff Sergeant (SSG) Daniel D. Herman, contrary to his pleas, of six specifications of wrongful broadcast of intimate visual images and one specification of false official statement in violation of Articles 117a and 107, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 917a and 907. (R. at 1076; Statement of Trial Results). The same day, the military judge sentenced appellant to a reduction to E-1, a total of thirteen months confinement,² and a bad conduct discharge. (R. at 1154; Statement of Trial Results).

On 23 May 2022, the convening authority took no action. (Convening Authority Action). On 13 June 2022, the military judge entered judgment. (Judgment of the Court). On 26 January 2023, this court docketed appellant's case. (Referral and Designation of Counsel).

² Appellant was sentenced to thirteen months for each specification, and all sentences to confinement ran concurrently. (R. at 1154; Statement of Trial Results).

Statement of Facts

This case involves the sending of intimate images through digital communications, primarily three digital images, and variations thereof,³ of [REDACTED]. (Pros. Exs. 12, 13, and 14 (all sealed)).⁴

For this appeal, the digital identity of the sender in question is “[REDACTED] [REDACTED].” (Pros. Ex. 71 and 72). “[REDACTED]” is the digital identity that sent images which formed the basis of Specifications 4 and 5 of Charge I, (Charge Sheet; R. at 751-63; R. at 902-05) and The Specifications of Additional Charge I. (Charge Sheet; R. at 555-60; R. at 530-42; R. at 683-87; Pros. Ex. 105 (sealed)). A returned warrant for the “[REDACTED]” account contained no information linking the account to appellant. (Pros. Ex. 105 (sealed); R. at 682-83).

³ Variations of the photos include edits on certain exhibits, including yellow dots over sensitive areas. *See, e.g.*, Pros. Ex. 160 (sealed).

⁴ Although presented in open court, the military judge subsequently sealed all exhibits containing the intimate images. For this appeal, descriptions of the images are unnecessary, and even where discussed on the record, no descriptions of sealed material are provided.

I. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING APPELLANT’S MOTION TO SUPPRESS STATEMENTS AND DERIVATIVE EVIDENCE

Facts Relevant to Assignment of Error

On 29 May 2020, appellant was interviewed in Kuwait by the Army Criminal Investigation Command (CID). (App. Exs. V-D, V-E, and V-F). The interview and appellant’s time in CID custody lasted just over fourteen hours. (App. Exs. V-D – V-F, time stamps reflecting a start time of 08:01:53 – 10:02:07).⁵ From 08:20:00 to 08:24:00, Special Agent (SA) [REDACTED] advised appellant of his rights under Article 31(b), UCMJ. (App. Ex. Vd). Appellant initially waived his Art. 31(b) rights. (App. Ex. VI-I).

During the interview, appellant was in custody. Specifically, [REDACTED] informed appellant he was in custody. (App. Ex. V-D at 10:25:47). In his written ruling the military judge noted appellant was “interrogated in a small CID interview room at the Camp Arifjan, Kuwait CID office. The interview room had a small desk, two chairs, one door, and no windows.” (App. Ex. XIV at 2). The

⁵ In their trial motion and response, both the government and defense acknowledge the time stamp on the video-recorded interview is approximately two-hours behind the local time. (App. Ex. V at 3; App. Ex. VI at 2). Furthermore, the date on the video-recorded interview incorrectly lists 11 June 2018 as the interview date. (App. Ex. V-d – Vf). The correct date of the interview is 29 May 2020. (App. Ex. V-b). For this brief, all time references refer to the on-screen time listed.

military judge further noted, “[t]he Accused remained in the interview room until 0003 hours local time on 30 May 2020, with the exception of multiple restroom breaks, and while being escorted by CID to retrieve devices from his living quarters” (App. Ex. XIV at 2).

After initially waiving his Article 31(b) rights, appellant was cooperative with CID for just over eight hours. (App. Exs. V-D and V-E, time stamps 08:24:00 to 04:34:26). Appellant provided consent to search three digital devices: (1) an iPhone 7 Plus; (2) a Samsung tablet; and (3) a Dell Inspiron computer. (App. Exs. VI-J and VI-K). However, during that first eight hours of his interrogation, appellant denied owning a second cell phone, denied knowledge of a “██████████” Facebook account, and denied knowledge of a Text Now application. (App. Exs. V-D at 09:34:00 – 09:34:09 and V-E at 04:11:29 – 04:11:33).

At approximately 04:34:33, appellant was being interviewed by a second CID agent, ██████████, when a third CID agent, ██████████ entered the room. (App. Ex. V-E). From approximately 04:34:33 to 04:55:00, ██████████ aggressively interrogated appellant. (App. Ex. V-E). At 04:38:55, in response to aggressive questioning from ██████████, appellant made two statements, “Imma have to [invoke]/[evoke] on

this one”.⁶ (App. Ex. V-E). “When this is over Imma have to pay somebody because this right here, no, this is definitely not fair.” (App. Ex. V-E). Without any acknowledgement of either statement, [REDACTED] continued to question appellant for another seventeen minutes. (App. Ex. V-D). Following the invocation of his right to remain silent, appellant was questioned off and on for almost six more hours. (App. Ex. V-D and V-E).

Appellant made the following statements. First, after being informed CID had a search authorization and retrieved a second phone, a Samsung Galaxy S8⁷, appellant acknowledged owning a second phone. (App. Ex. V-F at 06:32:00 – 06:34:49; App. Ex. VI-H). Second, appellant stated CID would find a Text Plus application on the phone. (App. Ex. V-F at 06:38:30). Third, appellant stated he got the name “[REDACTED]” from Facebook. (App. Ex. V-F).

Most critically, almost three hours after appellant’s invocation, appellant was asked to provide the passcode for the phone that CID seized via a valid search authorization. (App. Ex. V-F at 07:19:50).⁸ Appellant provided the pass code.

⁶ Due to the quality of the audio recording, it is difficult to discern whether the word spoken was “invoke” or “evoke.”

⁷ During trial, the phone is referred to as both a Samsung Galaxy phone and an Android phone. Both references refer to the second phone.

⁸ Prior to [REDACTED] specifically asking for appellant’s pin code, [REDACTED] stated CID was going to search the phone whether appellant provided the pin code or not. In response, appellant stated they can have the pin. (App. Ex. V-F at 07:01:26).

After receiving appellant's pass code, CID searched appellant's phone. The search produced several images that formed the basis for Specifications 4 and 5 of Charge I and The Specifications of Additional Charge I and the basis for much of the information in The Specification of Additional Charge II.

At trial, the defense filed a timely motion to suppress appellant's post-invocation statements and evidence derived from those statements. (App. Ex. V). In a written ruling, the military judge denied the motion. (App. Ex. XIV).

In addressing appellant's invocation, the military judge found appellant's statements to [REDACTED] were both equivocal and ambiguous. (App. Ex. XIV at 8). In arriving at this conclusion, the military judge "considered the Accused's actions and statements to CID *throughout the course of the entire interrogation.*" (App. Ex. XIV at 8) (emphasis added). The military judge stated "[t]he Accused made repeated statements indicating his intent to cooperate with CID in order to clear his name." (App. Ex. XIV at 8).

Additionally, the military judge found "the Accused's actual words at issue are ambiguous on their face. It is unclear what the Accused meant when he said "evoke" or "invoke" "on this one" and that he is going to 'pay somebody.'" (App. Ex. XIV at 8). The military judge assumed "the Accused may have been invoking his rights but his statements lack specificity which creates ambiguity." (App. Ex.

XIV at 8). The military judge found the parties' dispute over the use of either "invoke" or "evoke" created further ambiguity. (App. Ex. XIV at 8).

Finally, the military judge found "the Accused's use of language in the future tense creates further ambiguity because it fails to demonstrate his present desire to do something. (App. Ex. XIV at 8). The military judge concluded appellant's "statements were ambiguous pursuant to *Davis* and a 'reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel' or invoking the right to remain silent." (App. Ex. XIV at 8).

Finally, in addressing inevitable discovery, the military judge found by a preponderance of the evidence "that 'when the illegality occurred, the government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence and that the evidence would inevitably have been discovered in a lawful manner had not the illegality occurred.'" (App. Ex. XIV at 9). However, during the suppression hearing, the testimony of [REDACTED] addressing whether CID would be able to access the phone without a pass code was non-specific.

Special Agent [REDACTED] testified CID's Cellbrite advanced services supported the Samsung Galaxy S8. (R. at 173). He further testified that with a four-digit pass

code, such as appellant's, "it would be less complex than anything that involves letters as well as less complex than six digits or eight or twelve," and in his opinion, CID could possibly gain access to the phone. (R. at 174). However, when questioned by the military judge, [REDACTED] stated he would have had to coordinate with his brigade echelon to use the Cellbrite service. (R. at 176). Special Agent [REDACTED] stated, "[s]o I think the premium services would be able to get into the phone. (R. at 177). Under cross-examination, [REDACTED] stated the pin was used on all the extractions of the Samsung phone. (R. at 175).

After appellant provided his post invocation statements, a digital examination of his Samsung phone was performed. (R. at 809; 814-15). The digital examination found the "[REDACTED]" name on appellant's Samsung phone. (R. at 817-21). Specifically, [REDACTED] responded "yes" when asked if he could say "the physical device that logged in for [REDACTED] [sic] when it was first created on April 18th was from the Samsung Galaxy S8." (R. at 821). Furthermore, while referring to the warrant return for "[REDACTED]," [REDACTED] testified a photo sent on 18 and 22 April was found on appellant's phone. (R. at 823-27). Special Agent [REDACTED] further testified he found images on the Samsung phone. (R. at 827-35). Special Agent [REDACTED] also testified an email address of appellant was found on the Samsung device, and several photos, (R. 837; R. at

847-50 (referring to Pros. Exs. 14 and 146 (sealed)), and conversations between “[REDACTED]” and other users. (R. at 851-52 (referencing Pros. Ex. 148 (sealed))).

Special Agent [REDACTED] also testified to: (1) messages between the Samsung device and [REDACTED] (R. at 863-68; Pros. Ex. 150); (2) the image found in Pros. 156 (sealed) (R. at 885-90, referencing Pros. Exs. 14 and 156 (both sealed)); (3) evidence of another account, “[REDACTED]” that sent images (R. at 892-94; Pros. 159); (4) the intimate image in Pros. Ex. 161 (R. at 895-97; Pros. Ex. 161 (sealed)); (5) an interaction on the Samsung phone related to the 20 May 2020 posting that forms the basis of Specification 4 of Charge I (R. at 897-902, referencing Pros. Ex. 169 (sealed)); (6) a posting made on 24 May 2020, which forms the basis of Specification 5 of Charge I (R. at 902-03); (7) conversations found on the Samsung device (R. at 903-05, referencing Pros. Ex. 106 (sealed)); (8) the discovery of the email address [REDACTED], which was the email address listed on the warrant return for the “[REDACTED]” name (R. at 909-10); and (9) the discovery of the Text Now application. (R. at 910-11).

Standard of Review

A military judge’s ruling on a motion to suppress is reviewed for an abuse of discretion, and the evidence is considered in the light most favorable to the party

that prevailed at trial. *United States v. Mitchell*, 76 M.J. 413, 417 (C.A.A.F. 2017). However, “[t]he military judge’s determination that a confession is voluntary is a question of law, requiring independent, i.e., de novo, review.” *United States v. Burnside*, 74 M.J. 783, 789 (Army Ct. Crim. App. 2015).

Law

A. Fifth Amendment and Article 31(b)

The Self-Incrimination Clause of the Fifth Amendment reads, “No person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V, cl. 3. A communication is entitled to the privilege where it is “testimonial, incriminating, and compelled.” *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189 (2004). An accused’s communication is testimonial when it “explicitly or implicitly, relate[s] a factual assertion or disclose[s] information.” *Doe v. United States*, 487 U.S. 201, 210 (1988).

When an individual is in custody and subject to interrogation, the individual must be advised he has the right to remain silent and he has the right to have an attorney present during questioning. *Miranda v. Arizona*, 384 U.S. 436, 467-71 (1966). Rule for Courts-Martial [R.C.M.] 305(c)(3) defines “custodial interrogation” as “questioning that takes place while the accused or suspect is in custody, could reasonably believe himself or herself to be in custody, or is

otherwise deprived of his or her freedom of action in any significant way.” In determining whether an individual was in custody, this court must evaluate: ““(1) whether the person appeared for questioning voluntarily; (2) the location and atmosphere of the place in which questioning occurred ...[;] (3) the length of the questioning...[;] [(4)] the number of law enforcement officers present at the scene[;] and [(5)] the degree of physical restraint placed upon the suspect.”” *Mitchell*, 76 M.J. at 417 (quoting *United States v. Chatfield*, 67 M.J. 432, 438 (C.A.A.F. 2009)).

B. Invocation and Ambiguity

During questioning by law enforcement, “if an accused ‘indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.’” *United States v. Traum*, 60 M.J. 226, 230 (C.A.A.F. 2004) (quoting *Miranda*, 384 U.S. at 473-74); *see also United States v. Pruett*, ARMY 20180368 2019 CCA LEXIS 468 at *3 (Army Ct. Crim. App. 25 Nov. 2019) (summ. disp.). If an accused exercises his right to “cut off questioning” that right must be “scrupulously honored.” *Michigan v. Mosley*, 423 U.S. 96, 104 (1975). To invoke the right to remain silent, “no particular words or actions are required,” however, “the invocation must be unequivocal before all questioning must stop.” *Traum*, 60 M.J. at 230 (C.A.A.F. 2004).

An unequivocal or unambiguous invocation requires immediate cessation of questioning. R.C.M. 305(c)(4). This court has previously found “[t]he term ‘equivocal’ means ‘having different significations equally appropriate or plausible; capable of double interpretation; ambiguous.’” *United States v. Rittenhouse*, 62 M.J. 509, 511 (Army Ct. Crim. App. 2005).

Whether an accused has invoked his or her right to remain silent is an “objective inquiry.” *Berghuis v. Thompson*, 560 U.S. 370, 381 (2010). The appropriate analysis is whether an invocation is “‘sufficiently clear[] that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney’ or to remain silent.” *United States v. Delarosa*, 67 M.J. 318, 324 (C.A.A.F. 2009) (quoting *Davis v. United States*, 512 U.S. 452, 459 (1994)). In evaluating ambiguity “a court may consider the circumstances ‘preceding, as well as concurrent with, the invocation in the course of addressing the issue of ambiguity.’” *Pruett*, 2019 CCA LEXIS at *4 (quoting *Davis*, 512 U.S. at 459). However, in evaluating ambiguity, courts may not consider subsequent responses. *Smith v. Illinois*, 469 U.S. 91, 98-99 (1984) (in holding a court may not consider subsequent statements to determine a valid waiver of the right to counsel, the Court stated, “[u]sing an accused’s subsequent responses to cast doubt on the

adequacy of the initial request *itself* is even more intolerable.”) (emphasis in original).

C. Statements Following Unambiguous Invocation

Pursuant to Military Rule of Evidence [Mil. R. Evid.] 304(a), “[I]f the accused makes a timely motion or objection under this rule, an involuntary statement from the accused, or any evidence derived therefrom, is inadmissible at trial except as provided in subdivision (e).” Mil. R. Evid. 304(a)(1)(A) defines “involuntary statement” as “a statement obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment to the United States Constitution, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement.” “An individual may claim the most favorable privilege provided the Fifth Amendment to the United States Constitution, Article 31, or these rules.” *Mitchell*, 76 M.J. at 419 (quoting Mil. R. Evid. 301(a) (emphasis in original)).

In determining the admissibility of statements post-invocation, this court has applied the principle from *Mosely* that “the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his ‘right to cut off questioning’ was scrupulously honored.” *Burnside*, 74 M.J. at 790 (quoting *Mosley*, 423 U.S. at 104). In applying this *Mosley*

principle, the Court of Appeals for the Armed Forces (C.A.A.F.) uses a totality of the circumstances analysis:

Whether there is a violation of *Miranda* by approaching an individual after invoking his rights depends on which right was invoked, who initiates communication, the subject matter of the communication, when the communication takes place, where the communication takes place, and the time between invocation of the right and the second interview.

United States v. Watkins, 34 M.J. 344, 345 (C.M.A. 1992).

In *Mosley* the Supreme Court stated that after an individual has invoked his Fifth Amendment privilege, “any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.” *Mosley*, 423 U.S. at 99.

In *Mitchell*, C.A.A.F. found a request for a cell phone passcode following an invocation of the right to counsel violated the Fifth Amendment privilege. 76 M.J. at 418-19. Furthermore, in *United States v. Robinson*, C.A.A.F. found a request for a cell phone passcode following a lawful consent to search provided after the invocation of a right to counsel did not violate the Fifth Amendment privilege. 77 M.J. 303, 306 (C.A.A.F. 2019). However, the question left unanswered in both *Mitchell* and *Robinson* is whether requesting a cellphone passcode following an

invocation of the right to remain silent violates the Fifth Amendment when the request is made after a valid search authorization is obtained.

D. Inevitable Discovery

Pursuant to Mil. R. Evid. 304(b)(3), “evidence allegedly derived from a statement of the accused may not be admitted unless the military judge finds by a preponderance of the evidence that . . . the evidence would have been obtained even if the statement had not been made.” For this exception to apply, “the Government must ‘demonstrate by a preponderance of the evidence that when the illegality occurred, the government agents possessed, or were actively pursuing evidence or leads that would have inevitably led to the discovery of the evidence in a lawful manner.’” *Mitchell*, 76 M.J. at 420 (quoting *United States v. Wicks*, 73 M.J. 93, 103 (C.A.A.F. 2014)). Notably, “[M]ere speculation and conjecture’ as to the inevitable discovery of the evidence is not sufficient” *Wicks*, 73 M.J. at 103 (quoting *United States v. Maxwell*, 45 M.J. 406, 422 (C.A.A.F. 1996); *see also United States v. Hale*, 81 M.J. 651 (Army Ct. Crim. App. 2021)) (rejecting an inevitable discovery argument where “the centerpiece of the government’s inevitable discovery argument [was]: ‘If we hadn’t done it wrong, we would have done it right.’” (citing *United States v. Thomas*, 955 F.2d 207, 210 (4th Cir. 1992))).

E. Prejudice

In addressing constitutional errors, this court evaluates whether the error was harmless beyond a reasonable doubt. *Burnside*, 74 M.J. at 792. “Constitutional error ‘[is] not harmless beyond a reasonable doubt if there is a reasonable possibility that the evidence complained of might have contributed to the conviction.’” *Id.* (quoting *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007) and *Chapman v. California*, 386 U.S. 18, 24 (1967)).

Argument

Appellant’s statements following his unambiguous invocation of his right to remain silent were involuntary. Furthermore, in denying appellant’s motion to suppress, the military judge abused his discretion when he considered appellant’s actions throughout the entire interrogation. Specifications 4 and 5 of Charge I and Specifications 1 and 2 of The Additional Charge must be set aside because most of the evidence supporting those specifications was derived from appellant’s post-invocation statements. For the same reason, so much of The Specification of Additional Charge as relates to “Daya Henriquez” and the Text Now application must be set aside.

A. Appellant Unambiguously Invoked His Right to Remain Silent

As an initial matter, appellant was in custody. He did not appear for questioning voluntarily. Appellant was questioned in a small, windowless room at CID. (App. Ex. XIV at 2). Indeed, appellant was informed he was in custody. (App. Ex. V-D at 10:25:47).

Appellant's statements following his unambiguous invocation of his right to remain silent were involuntary. The military judge erred in finding appellant's invocation equivocal and ambiguous. First, the military judge erred in finding the use of either "invoke" or "evoke" was ambiguous on its face. (App. Ex. XIV at 8). Second, the military judge erred by failing to analyze the two separate statements of appellant's invocation. Third military judge compounded his factual errors by considering appellant's actions and statements to CID throughout the course of the entire interrogation, which is legally incorrect. (App. Ex. XIV at 8).

First, in the context of appellant's statements preceding and concurrent with his invocation, neither "invoke" or "evoke" are terms "having different significations equally appropriate or plausible; capable of double interpretation; ambiguous." *Rittenhouse*, 62 M.J. at 511.⁹ Black's Law Dictionary defines the

⁹ Appellant does not concede the term "evoke" was used. However, appellant acknowledges the audio recording is unclear.

term “invocation” as: “(1) the act of calling upon for authority or justification; [or] (2) the act of enforcing or using a legal right.” *Invocation*, BLACK’S LAW DICTIONARY (7th Ed. 1999). The verb “invoke” is not found within Black’s Law Dictionary; however, in ordinary use, the verb means: “(1) to petition for help or support; (2) to appeal to or cite as authority; (3) to call forth by incantation; (4) to make an earnest request for: SOLICIT; (5) to put into effect or operation; or (6) to bring about.” *Invoke*, MERRIAM-WEBSTER’S DICTIONARY AND THESAURUS (2006). The word “evoke” means: “to call forth or up.” *Id.*¹⁰ An examination of each term’s various definitions reveals the commonality of calling upon or for something. Therefore, irrespective of which word was spoken, it was clear appellant was calling upon or for something, here, his right to remain silent.

Moreover, as stated in *Traum*, no particular words are required – all that is required is the invocation be unambiguous. This was not a situation similar to *Rittenhouse* where an accused wrote “end of statement” after providing a written statement. 62 M.J. at 511 (finding “end of statement” could mean either not wishing to provide further information or this was the end of the overall

¹⁰ The verb “evoke” is also not contained within Black’s Law Dictionary. Black’s Law Dictionary does contain the term “evocation.” However, the definition is “French law. The act of withdrawing a case from an inferior court and bringing before a superior court.” *Evocation*, BLACK’S LAW DICTIONARY (7th Ed. 1999). In the context of appellant’s interview, this definition would be nonsensical.

statement). Furthermore, appellant did not state anything akin to “I need to take a break,” “let me think,” etc. Those types of statements are ambiguous. Here, after being subjected to an aggressive portion of the interrogation and after being prevented from providing an explanation, appellant stated, “Imma have to ‘invoke’ [or] ‘evoke’ on this one. That statement should be clear to a reasonable law enforcement officer that appellant was wishing to remain silent.

Second, the military judge erred by failing to analyze appellant’s two separate statements. Appellant made two statements. The first was, “Imma have to ‘invoke’ [or] ‘evoke’ on this one.” (App. Ex. V-E at 04:38:55). The second was, “[w]hen this is over Imma have to pay somebody because this right here, no, this is definitely not fair.” (App. Ex. V-E at 04:38:58). Appellant acknowledges the second statement, referring to “hiring someone,” standing alone, is ambiguous in that it is non-specific on who the “someone” is, and in that it is in the future tense. Consistent with *Davis*, that is the type of statement ““a reasonable law enforcement officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel’ or invoking the right to remain silent.” 512 U.S. at 459. However, in ruling “[i]t is unclear what the Accused meant” the military judge erroneously combined both statements thereby attributing a future tense to both. (App. Ex. XIV).

Third, the military judge erred by considering appellant's "actions and statements to CID *throughout the course of the entire interrogation.*" (App. Ex. XIV at 8) (emphasis added). Viewed through that lens, one may conclude appellant did not invoke his right to remain silent as he continued to speak with CID for approximately six more hours. (App. Exs. V-E and V-F). However, in the context of one's right to counsel, the Supreme Court has specifically prohibited that practice.

In *Smith*, a suspect was advised of his *Miranda* rights and asked if he understood. 469 U.S. at 92. After being asked if he understood his right to consult with a lawyer and have a lawyer present, the appellant stated, "Uh, yeah, I'd like to do that." *Id.* at 93. Questioning did not terminate, and the appellant later decided to talk. *Id.* In reversing the decision of the Illinois Supreme Court, the Court found, "[t]he courts below were able to construe Smith's request for counsel as 'ambiguous' only by looking to Smith's subsequent responses to continued police questioning and by concluding that, 'considered in total,' Smith's 'statements' were equivocal." *Id.* at 97. The Court held "that, under the clear logical force of settled precedent, an accused's post-request responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself.

Such subsequent statements are relevant only to the distinct question of waiver.”

Id. at 100.

In the context of the right to remain silent, both the C.A.A.F. and this court have reiterated and applied this principle. First, in *Delarosa* C.A.A.F. noted “[t]he courts of appeals have considered events immediately preceding, as well as concurrent with, the invocation in the course of addressing the issue of ambiguity.” 67 M.J. at 324. In reversing the military judge, C.A.A.F. examined appellant’s pre-waiver conduct, including the appellant’s stating he wanted to discuss his son’s death with detectives. *Id.* at 325. It found that Delarosa’s desire to talk to detectives demonstrated there was no ambiguity. *Id.* However, more pointedly, in *Pruett*, this court addressed an appellant’s subsequent statements that “he did not want a lawyer and ‘We can talk.’” 2019 CCA LEXIS at *2. In finding the military judge erred in failing to suppress the statement, this court found the use of “an accused’s ‘subsequent responses to cast doubt on the adequacy of the initial [invocation] itself is . . . intolerable.’” *Id.* at *5 (citing *Smith*, 469 U.S. at 98-99).

Here, the circumstances preceding and concurrent with appellant’s invocation demonstrate an unambiguous waiver. For the first eight hours of his interview, appellant was cooperative with CID. However, when questioned by [REDACTED], appellant indicated a clear break from his previous cooperative behavior. He

informed her, “Imma have to ‘invoke’ [or] ‘evoke’ on this one.” (App. Ex. V-E).

After making the second future tense statement, appellant did not just continue talking. He became silent and shook his head no, (04:39:00 to 04:39:36), all while [REDACTED] continued to question him. (App. Ex. V-E).

B. Appellant’s Statements Following his Unambiguous Invocation were Involuntary

Appellant’s invocation of his right to remain silent was not scrupulously honored and his subsequent statements, including the provision of his cell phone pass code, were obtained in violation of both the Fifth Amendment and Article 31(b), UCMJ. Under a plain reading of R.C.M. 305(c)(4), appellant’s privilege against self-incrimination was violated because, following his unambiguous invocation, questioning did not immediately cease.

Appellant’s constitutional right to remain silent under *Miranda* was also violated. In *Burnside*, this court held “‘the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his ‘right to cut off questioning’ was ‘scrupulously honored.’”” *Burnside*, 74 M.J. at 790 (quoting *Mosley*, 423 U.S. at 104). In applying *Mosely*, C.A.A.F. applies a totality of the circumstances approach which considers, “which right was invoke, who initiates communication, the subject matter of the communication,

when the communication takes place, and the time between invocation of the right and the second interview.” *Watkins*, 34 M.J. at 345.

In contrast to what happened in appellant’s case, in *Watkins* the accused’s right to remain silent was scrupulously honored. Once Watkins invoked his right to remain silent, “[t]he agent immediately ended the interview and permitted appellant to leave the CID office.” *Id.* at 346. After CID obtained additional evidence, the appellant was approached within two and one-half hours of the initial interview. *Id.* at 347. In an exchange that took place at appellant’s quarters and not the CID office, Watkins was reminded of his earlier rights. *Id.* Furthermore, when Watkins requested counsel, questioning ceased again except when Watkins reinitiated. *Id.*

An application of the *Watkins* factors to appellant’s case demonstrates appellant’s constitutional right to remain silent was indeed violated. First, appellant unambiguously invoked his right to remain silent. (App. Ex. V-E). Second, following the invocation, [REDACTED] initiated communication by continuing to ask appellant questions. (App. Ex. V-E). Third, the subject matter was a continuation of questioning surrounding appellant’s digital communications – the same subject covered over the previous eight hours. (App. Exs. V-E and V-F). Fourth, the communication took place in the same CID office and room where

appellant had been for eight hours. (App. Ex. V-E and V-F). Fifth, there was no time between the invocation and the continued interview. (App. Ex. V-E and V-F). In fact, both [REDACTED] and [REDACTED] simply ignored appellant's unambiguous invocation. (App. Ex. V-E).

C. Appellant Providing his Cell Phone Pass Code was a Testimonial Statement

Appellant's disclosure of his cell phone pass code was entitled to the Fifth Amendment privilege because it was testimonial, incriminating, and compelled. Specifically, the disclosure was testimonial because it related to the factual assertion of appellant's ability to access and exercise control over the phone.

In *Doe*, the Supreme Court discussed several principles related to testimonial communications. First, “the privilege protects a person only against being incriminated by his own compelled testimonial communications.” 487 U.S. at 207 (internal citations omitted). Second, “[i]f a compelled communication is ‘not testimonial and for that reason not protected by the privilege, it cannot become so because it will lead to incriminating evidence.’” *Id.* at n.6 (citing *In re Grand Jury Subpoena*, 826 F.2d. 1166, 1172 (2d Cir. 1987)). Third, “[t]he prohibition of derivative use is an implementation of the ‘link in the chain of evidence’ theory for invocation of the privilege, pursuant to which the ‘compelled testimony’ need not itself be incriminating if it would lead to the discovery of incriminating evidence.”

Id. at n.6. Fourth, “the Fifth Amendment privilege against self-incrimination applies to acts that imply assertions of fact.” *Id.* at 209. Fifth, “[i]t is the extortion of information from the accused,’ the attempt to force him ‘to disclose the contents of his own mind’ that implicates the Self-Incrimination Clause.” *Id.* at 211.

At issue in *Doe* was the execution of a consent directive to access foreign bank account information. The Court found the directive non-testimonial because it was “carefully drafted not to make reference to a specific account, but only to speak in the hypothetical . . . [and] the form [did] not acknowledge that an account in a foreign financial institution [was] in existence or . . . controlled by petitioner.” *Id.* at 215. Furthermore, the Court found, “[a]lthough the executed form allows the Government access to a potential source of evidence, the directive itself does not point the Government toward hidden accounts or otherwise provide information that will assist the prosecution in uncovering evidence.” *Id.* The Court found “the Government [wa]s not relying upon the ‘truthtelling’ of Doe’s directive to show the existence of, or his control over, foreign bank account records.” *Id.* Finally, the Court found, “[b]y signing the form, Doe makes no statement, explicit or implicit, regarding the existence of a foreign bank account or his control over any such account. Nor would his execution of the form admit the authenticity of any record produced by the bank.” *Id.* at 216.

In contrast to *Doe*, the facts here establish appellant's statement was testimonial. In providing the pass code, appellant was not "speaking in the hypothetical" but rather providing access to a specific piece of evidence. Furthermore, by providing the pass code, appellant was providing information that would, and ultimately did, assist the prosecution in uncovering evidence. Additionally, CID was relying on appellant's truth-telling, namely, CID wanted the pass code to access the Samsung Galaxy S8 to conduct a full search. Finally, in providing the pass code, appellant made an explicit statement acknowledging his access to and control over the phone, and he was authenticating any record recovered from a search of the phone.

D. The question unanswered in *Mitchell* and *Robinson*

The situation in this case has not been directly addressed by C.A.A.F. In *Mitchell*, C.A.A.F. addressed the circumstance where an individual is asked to provide the pass code for his phone after he invoked his right to counsel and after CID obtained an authorization to search his phone. 76 M.J. at 415-16. There, C.A.A.F. found, "[u]nder the circumstances presented, we conclude that the Government violated Appellee's Fifth Amendment right to counsel as protected by *Miranda* and *Edwards*." *Id.* at 417. The court further found, [b]y asking Appellee to enter his passcode, the Government was seeking an 'answer[] . . . which would

furnish a link in the chain of evidence needed to prosecute” *Id.* at 418.

Finally, C.A.A.F. found, “[v]iewed as a whole, the Government’s inquiries constituted ‘not only . . . express questioning, but also . . . words or actions . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.’” *Id.* (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)).

Because *Mitchell* was decided under the *Edwards* rule, C.A.A.F. did not address “whether Appellee’s delivery of his passcode was ‘testimonial’ or ‘compelled,’ as each represents a distinct inquiry.” *Id.* at 419 (citing *Hübel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 189 (2004)).

In *Robinson*, C.A.A.F. addressed whether Robinson was asked for consent to search a phone after invoking his right to counsel. There, C.A.A.F. reiterated that asking for consent to search was not “interrogation.” *Robinson*, 77 M.J. at 306. The court held that “[asking] Appellant for the passcode to that cell phone for the sole purpose of effectuating the search that he had just voluntarily consented to, that second inquiry was merely a natural and logical extension of the first permissible inquiry.” *Id.* Critically, the court found, “[t]hus, because of its nature, purpose, and scope, this second inquiry did not rise to the level of a reinitiation of interrogation.” *Id.* Again, the court did not address the right against self-incrimination vice the right to counsel. (In his dissent Judge Stucky took exception

to the court's distinction from *Mitchell* and stated, "[o]ur decision in *Mitchell* did not turn on the nature of the search. Instead, our analysis focused on whether the accused was in custody and subject to interrogation. Having found both, we deemed the contents of the accused's phone inadmissible."). *Id.* at 307-08.

This case addresses the questioned unanswered in *Mitchell* and *Robinson*. Here, as stated by [REDACTED], appellant was in custody. (App. Ex. V-D). Appellant was subject to interrogation because, as soon as he initially waived his Article 31(b) rights, he was subject to formal questioning in which an incriminating response was sought or was a reasonable consequence of such questioning. R.C.M. 305(b)(2). As in *Mitchell*, by the time CID asked for appellant's pass code, it already had a valid search authorization for the phone. Therefore, CID was asking appellant to provide a link in the chain of evidence needed to prosecute. However, beyond that, CID was asking appellant to provide a testimonial statement that acknowledged appellant's ownership and control over the phone. Therefore, appellant's statement in response to [REDACTED] request for the pass code was testimonial, incriminating, and compelled.

E. The Discovery of Evidence on the Samsung Galaxy S8 was not Inevitable

Contrary to the government's assertion and the military judge's ruling, the government did not "demonstrate by a preponderance of the evidence that when

the illegality occurred, the government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of evidence in a lawful manner.” *Mitchell*, 76 M.J. at 420.

The testimony of [REDACTED] showed only that CID had access to programs that he thought could access the phone. (R. at 172-74; 177). Importantly, [REDACTED] did not know how the program worked. (R. at 176). All he knew is the phone would have to be sent to his brigade, and if the brigade could not get into the phone, then they would send it to Cellbrite. (R. at 176-78). This testimony is an example of “mere speculation and conjecture.” *Maxwell*, 45 M.J. at 406. However, perhaps most telling about the mere speculation and conjecture of [REDACTED] is that every time the phone was accessed, it was accessed using the pass code obtained in violation of appellant’s Fifth Amendment right. (R. at 175).

This case is similar to *Mitchell*. In *Mitchell*, CAAF rejected the government’s argument that it could have legally compelled the appellee to press his finger to the phone and thereby unlock it. Pertinently, CAAF stated, “the record discloses no guarantee that this procedure would have succeeded, and the Government therefore cannot demonstrate inevitability.” *Mitchell*, 76 M.J. at 420. The same is true here.

F. Prejudice

The violation of appellant's Fifth Amendment right was prejudicial because the images at issue in Specifications 4 and 5 of Charge I and the Specifications of Additional Charge I were all received from the user "[REDACTED]." The only evidence of appellant's knowledge of "[REDACTED]" came from appellant's post-invocation statements including the pass code he provided granting access to his Samsung phone. Also, without the post-invocation statements, appellant would not have been convicted of the language in The Specification of Additional Charge II pertaining to either "[REDACTED]" or the Text Now application. Therefore, it is impossible to find there is not a reasonable possibility that the evidence complained of might have contributed to the convictions for those specifications.

Conclusion

Appellant's constitutional right to remain silent was violated. This court should set aside and dismiss with prejudice Specifications 4 and 5 of Charge I and The Specifications of Additional Charge I as well as so much of The Specification of Additional Charge II that relates to statements addressing "[REDACTED]" and the Text Now application.

II. WHETHER THE MILITARY JUDGE APPLIED THE INCORRECT MAXIMUM PUNISHMENT FOR THE ARTICLE 117A SPECIFICATIONS THEREBY VIOLATING THE *EX POST FACTO* CLAUSE.

Statement of Facts

On dates appellant was alleged to have committed the offenses under Article 117a, UCMJ, there was no enumerated maximum punishment for Article 117a. (Charge Sheet). The Executive Order establishing the maximum punishment for a violation of Article 117a, UCMJ, at a dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years, did not come into effect until 26 January 2022. Exec. Order No. 14,062, 87 Fed. Reg. 4763 (Jan. 26, 2022). Trial defense counsel argued the maximum punishment for each specification should be four-months confinement and two-thirds forfeiture of pay. (R. at 1081). Specifically, trial defense counsel argued Art. 117a was not closely related to another offense, and there was no analogous United States Code provision. (R. at 1084). Therefore, trial defense counsel argued the appropriate maximum punishment was for that of a general disorder. (R. at 1084).

In denying the defense request for a maximum punishment of four months confinement and forfeiture of two-thirds pay per month for four months, the military judge focused his analysis on Section 2(b) of Exec. Order No. 14,062, which states:

[n]othing in these amendments shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to the date of this order, and any such nonjudicial punishment, restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

(R. at 1130-31).

Specifically, the military judge focused on the “may proceed” language in stating:

“even if it does say what you think it says, the permissive language of ‘may’ does not mandate that we even follow, if that’s what it does actually say, it does not mandate that we follow it because the executive order, and I’m sure that whoever drafted it for the president [sic] would have—written the language ‘shall’ instead of ‘may.’”

(R. at 1131).

The military judge ended his verbal ruling by stating, “[m]y reading of it is, and I may be wrong and I’ll let ACCA figure that one out, is to whether it just says we can continue to proceed with these whatever it may be [REDACTED], investigation, restraint, or whatever, it doesn’t invalidate those ongoing proceedings.” (R. at 1132). Neither party nor the military judge addressed whether applying the newly promulgated maximum punishment was a violation of the ex post facto clause.

Standard of Review

The consideration of the maximum punishment authorized for an offense is a question of law reviewed de novo. *United States v. Beaty*, 70 M.J. 39, 41 (C.A.A.F. 2011). Although courts review a “military judge’s sentencing determination under an abuse of discretion standard . . . where a military judge’s decision was influenced by an erroneous view of the law, that decision constitutes an abuse of discretion.” *Id.*

Law

“The Constitution forbids the passage of ex post facto laws, a category that includes [e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, *when committed.*” *United States v. Busch*, 75 M.J. 87, 88 (C.A.A.F. 2016) (quoting *Peugh v. United States*, 133 S. Ct. 2072, 2077-78 (2013)) (emphasis added).

Rule for Courts-Martial 1003(c)(1)(B) addresses the maximum punishment for offenses not listed in Part IV of the Manual for Courts-Martial. The first part of that rule calls for determining whether the offense not listed is “included in or closely related to” a listed offense. R.C.M. 1003(c)(1)(B)(i). The second part of the rule states, “[a]n offense not listed in Part IV and not included in or closely related to any offense listed therein is punishable as authorized by the United

States Code, or as authorized by custom of the service.” R.C.M. 1003(c)(1)(B)(ii). In looking at the definition of “custom of the service,” C.A.A.F. has stated, “we find that the ‘custom of the service,’ as used in R.C.M. 1003(c)(1)(B)(ii), simply means the penalty authorized for those offenses which have traditionally been used in the military justice system to charge service members under the same or similar factual circumstances.” *Busch*, 75 M.J. at 93.

In addressing Article 134, UCMJ, offenses that do not fall into any category of R.C.M. 1003(c)(1)(B), C.A.A.F. has set the maximum punishment at four months confinement and forfeiture of two-thirds pay per month for four months. *United States v. Beaty*, 70 M.J. 39, 45 (C.A.A.F. 2011); *See also United States v. Holdman*, ARMY 20190040, 2020 CCA LEXIS 102, *8-9 (Army Ct. Crim. App. 31 Mar. 2020) (mem. op.) (reducing appellant’s sentence to confinement by four months after finding a novel Article 134 offense that used almost identical elements to Article 117a was factually insufficient).¹¹

The offense of wrongful broadcast or distribution of intimate visual images was enacted in the National Defense Authorization Act for Fiscal Year 2018. Pub.

¹¹ In *Holdman*, the novel Article 134 offense did not include the language, “financial loss . . . or to harm substantially [the alleged victim] with respect to her health, safety, business, calling, career, financial condition, reputation, or personal relationships.”

L. No. 115-91, 131 Stat. 1389-90 (2017). The President did not promulgate a maximum punishment until 26 January 2022. Exec. Order 14,062.

Argument

Here, appellant's sentence for the Article 117a offenses violates the ex post facto clause because application of Exec. Order 14,062 inflicted a greater punishment on appellant than the law annexed to the crime when committed.

Busch, 75 M.J. at 88. At the time of the alleged offenses, a period spanning 21 March 2020 to 24 May 2020, an enumerated maximum punishment for Article 117a did not exist. (Charge Sheet). The offense under Article 117a is neither included nor closely related to any other UCMJ offense under R.C.M.

1003(c)(1)(B)(i). Furthermore, under R.C.M. 1003(c)(1)(B)(i), there is no analogous federal offense, nor an offense that has traditionally been used to charge servicemembers under the same or factually similar circumstances. Consequently, the appropriate maximum punishment was a sentence of four months confinement and forfeiture of two-thirds pay per month for four months. *Beaty*, 70 M.J. at 40.

A. Rule for Courts-Martial 1003(c)(1)(B)(i) analysis

Article 117a was neither included in nor closely related to a another enumerated offense. The only potential offense for comparison is indecent broadcasting under Article 120c, UCMJ. However, as the trial defense counsel

aptly noted, “[t]here are differences between 120c, which involves the nonconsensual creation or filming or recording of images. If you compare the elements of 117a and 120c, there’s [sic] more elements that they do not have in common than they have in common.” (R. at 1084). Additionally, neither the military judge nor the government disagreed with this part of the defense counsel’s argument. (R. at 1084-1088).

Given there was not an enumerated punishment for Article 117a at the time of the commission of the alleged offenses, the appropriate analysis is under R.C.M. 1003(c)(1)(B)(ii).

B. Rule for Courts-Martial 1003(c)(1)(B)(ii) analysis

When the maximum punishment for an offense cannot be determined under R.C.M. 1003(c)(1)(B)(i), the next step is to determine whether the offense is punishable under the United States Code. Here, the United States Code does not contain an Article 117a analogue.

The final step in the R.C.M. 1003(c)(1)(B)(ii) analysis is to determine whether the maximum punishment may be established through “custom of the service.” In applying C.A.A.F.’s definition of “custom of the service,” there is no offense that has traditionally been used to charge servicemembers under the same or similar factual circumstances. This case is not similar to *Busch*. In *Busch*, the

appellant pled guilty to sexual abuse of a child under Article 120b, UCMJ. 75 M.J. at 88. Like this case, Busch committed the offense after the newly enacted Article 120b but before the executive order promulgating the maximum punishment. *Id.* at 89. The defense argued the appropriate maximum confinement was one-year because it was analogous to indecent exposure, as that offense existed from 2007 to 2012. *Id.* The military judge ultimately applied R.C.M. 1003(c)(1)(B)(i) because the offense was “‘closely related’ to the offense of indecent liberties with a child under Article 120(j) of the 2008 edition of the MCM, which carries a maximum confinement of fifteen years.” *Id.* at 92.

Although it ultimately agreed the maximum punishment of fifteen years was appropriate, C.A.A.F. found the appropriate analysis was R.C.M. 1003(c)(1)(B)(ii)’s custom of the service analysis. *Id.* at 93. In reaching its holding, C.A.A.F. found “both indecent exposure and indecent acts or liberties with a child have been used in the past as the basis for charges under these circumstances.” *Id.* The court specifically noted , “from this court and the Courts of Criminal Appeals from 1951 to 2012, revealed that indecent acts or liberties with a child was charged in twenty-nine cases while indecent exposure was charged in nine cases.” *Id.* at 93-94. The court ultimately concluded “[t]aking into account the charging discretion of convening authorities, it appears that the


‘general usage of the service’ has been to charge the offense of indecent liberties with a child under these factual circumstances.” *Id.*

In *Beaty*, the court reached a different conclusion. There, the appellant pled guilty to an Article 134 specification charged under clauses one and two for “wrongfully and knowingly [possessing] . . . one or more visual depictions of what appears to be a minor engaging in sexually explicit conduct” 70 M.J. at 40. There, in order to arrive at a maximum sentence of ten years confinement, the military judge relied on 18 U.S.C. § 2252 which criminalized the possession of images involving the use of a minor engaging in sexual conduct. *Id.* The court disagreed and found the applicable federal provision did not include “what appears to be minors.” *Id.* at 41. In applying the “custom of the service” analysis, C.A.A.F. found there was no custom of the service specific to the appellant’s offense. *Id.* at 44. The court found the general disorder at issue was not listed, not closely related to or included in a listed offense, not described as an act criminal under the United States Cod, and not punishable as a custom of the service. *Id.* at 45. The court held the appropriate maximum punishment was a sentence of four months confinement and forfeiture of two-thirds pay per month for four months. *Id.*

This case is similar to *Beaty*. The offense of 117a, UCMJ, is neither included in nor closely related to another enumerated offense. There is no analogous federal offense. Finally, there is no offense that has traditionally been used to charge servicemembers under the same or factually similar circumstances. This is evidenced by two points. First, because no specific offense covered the factual situation under Article 117a, Congress enacted the offense. Second, *Holdman* demonstrates that prior to Article 117a this type of offense was charged as an Article 134 offense. Moreover, while the court did not conduct an R.C.M. 1003(c)(1)(B) analysis, *Holdman* is instructive in that this court's sentence re-assessment reduced the appellant's term of confinement by four months.

In this case, the military judge violated the ex post facto clause by retroactively applying the two-year maximum sentence. Because of this, appellant's sentence for the Article 117a specifications must be set aside, and the sentenced must be re-assessed.

Conclusion

This court should set aside and dismiss with prejudice Specifications 4 and 5 of Charge I and the Specifications of Additional Charge I as well as so much of The Specification of Additional Charge II that relates to statements addressing “” and the Text Now application. Furthermore, this court should

set aside the sentence for each of the Article 117a specifications and reassess the sentence.



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Appendix A: Matters Submitted Pursuant to *United States v. Grostefon*

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

I. Whether dilatory post-trial processing warrants relief where it took the government 241 days to mail the record of trial to the Clerk of Court.

Here, the entry of judgment was signed on 13 June 2022. (Entry of Judgment). However, processing of appellant's case halted for 108 days from 13 June to 29 September 2022. (Post-trial Processing Delay Memorandum). The two reasons the government provided for this were: (1) "Since the beginning of May 2022, III Corps had only one court Reporter. In August, we received one additional court reporter school graduate"; and (2) "The Trial Counsel were unavailable for errata." (Post-trial Processing Delay Memorandum). Movement on appellant's case again halted from 3 October 2022 to 17 November 2022. (Post-trial Processing Delay Memorandum). No explanation was provided. (Post-trial Processing Delay Memorandum). Finally, appellant's case sat for another twenty-five days from 16 December 2021 [sic] to 10 January 2023. (Post-trial Processing Delay Memorandum). Again, no explanation was provided.

II. Whether there is a fatal variance in proof for Specification 3 of Charge I.

In Specification 1 of Charge III, the government charged the language, “on or about 1 May 2020.” At trial, five witnesses provided testimony to that specification, and all five witnesses simply referenced, “May 2020.”

“A variance between pleadings exists when evidence at trial establishes the commission of a criminal offense by the accused, but the proof does not conform strictly with the offense alleged in the charge.” *United States v. Allen*, 50 M.J. 84, 86 (C.A.A.F. 1999). In order to prevail on a fatal variance claim, “appellant must show that the variance was material and that it substantially prejudiced him.” *Id.*

In this instance five witnesses testified to photographs received in May of 2020. Furthermore, the government did not use either “divers occasions” or “one or more occasions.” Therefore, appellant is not protected from double-jeopardy.

III. Whether the military judge allowed impermissible human lie detector testimony.

Appendix B: Unpublished Decisions



Caution

As of: July 2, 2023 3:47 PM Z

United States v. Pruett

United States Army Court of Criminal Appeals

November 25, 2019, Decided

ARMY 20180368

Reporter

2019 CCA LEXIS 468 *

UNITED STATES, Appellee v. Sergeant JOSHUA R. PRUETT, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by [United States v. Pruett, 2021 CAAF LEXIS 563, 2021 WL 2953896 \(C.A.A.F., June 21, 2021\)](#)

Review denied by [United States v. Pruett, 2021 CAAF LEXIS 691 \(C.A.A.F., July 22, 2021\)](#)

Prior History: [*1] Headquarters, 1st Infantry Division and Fort Riley. Robert L. Shuck, Military Judge, Colonel Jerrett W. Dunlap, Jr., Staff Judge Advocate.

Core Terms

invocation, military, questioning, ambiguous, unambiguous, suppress, remain silent, circumstances, abused, talk

Case Summary

Overview

HOLDINGS: [1]-If an accused unequivocally invokes his or her right to remain silent, questioning must cease immediately, Mil. R. Evid. 305(c)(4), Manual Courts-Martial; [2]-As appellant's invocation of his right against self-incrimination was unambiguous, it was improper for the military judge to consider appellant's subsequent responses to Special Agent ET to "cast doubt on the adequacy" of appellant's invocation; [3]-Because appellant's invocation was unambiguous and the military judge erred in his application of the law to appellant's suppression motion, the military judge abused his discretion in failing to suppress appellant's statement to Special Agent ET; [4]-The probative value of appellant's confession, without other overwhelming evidence of guilt, precluded the court from being convinced that the erroneously admitted interview did not contribute to his convictions.

Outcome

The findings and sentence were set aside. A rehearing was authorized.

LexisNexis® Headnotes

Military & Veterans Law > ... > Courts
Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > Military Justice > Judicial
Review > Standards of Review

[HNI](#) **Evidence, Evidentiary Rulings**

A military judge's decision to exclude evidence is reviewed for an abuse of discretion. A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect. Whether an accused has invoked his right to silence is a question of law. Questions of law are reviewed de novo.

Criminal Law &
Procedure > ... > Interrogation > Miranda Rights > Self-Incrimination Privilege

[HN2](#) **Miranda Rights, Self-Incrimination Privilege**

During law enforcement questioning, if an accused indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. Once an accused has exercised his or her right to cut off questioning, the right must be scrupulously honored. No particular words or actions are required to exercise one's [Fifth Amendment](#) right to silence, but the invocation must be unequivocal before all questioning must stop.

Criminal Law &

Procedure > ... > Interrogation > Miranda Rights > Self-Incrimination Privilege

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Self-Incrimination Privilege

[HN3](#) **Miranda Rights, Self-Incrimination Privilege**

Whether an accused has invoked his or her right to silence is an "objective inquiry." The inquiry analyzes whether an accused's invocation is sufficiently clear that a reasonable police officer in the circumstances would understand the statement to be a request to remain silent. Courts may consider the circumstances preceding, as well as concurrent with, the invocation in the course of addressing the issue of ambiguity.

Criminal Law &

Procedure > ... > Interrogation > Miranda Rights > Self-Incrimination Privilege

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Self-Incrimination Privilege

[HN4](#) **Miranda Rights, Self-Incrimination Privilege**

If an accused unequivocally invokes his or her right to remain silent, "questioning must cease immediately." Mil. R. Evid. 305(c)(4), Manual Courts-Martial. If however, the invocation is equivocal or ambiguous, law enforcement agents are not required to halt questioning. The term "equivocal" means having different significations equally appropriate or plausible; capable of double interpretation; ambiguous. The government cannot use statements made after an unambiguous invocation to cast doubt on the adequacy of the initial request to remain silent.

Criminal Law &

Procedure > ... > Interrogation > Miranda Rights > Self-Incrimination Privilege

[HN5](#) **Miranda Rights, Self-Incrimination Privilege**

It is necessary to consider the circumstances preceding, as well as concurrent with, the invocation in the course of addressing the issue of ambiguity. However, using an accused's subsequent responses to cast doubt on the adequacy

of the initial invocation itself is intolerable.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Harmless Error

Evidence > Burdens of Proof > Allocation

Criminal Law &

Procedure > ... > Interrogation > Miranda Rights > Self-Incrimination Privilege

[HN6](#) **Harmless & Invited Error, Harmless Error**

Because an appellant's right to remain silent is of constitutional magnitude, the government bears the burden to demonstrate the error was harmless beyond a reasonable doubt. An error is harmless beyond a reasonable doubt when there was no reasonable possibility that the error might have contributed to the conviction.

Military & Veterans Law > Military Justice > Courts Martial > Evidence

[HN7](#) **Courts Martial, Evidence**

An accused's confession is probably the most probative and damaging evidence that can be admitted against an accused.

Counsel: For Appellant: Lieutenant Colonel Tiffany D. Pond, JA; Major Angela D. Swilley, JA; Major William M. Grady, JA (on brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Craig Schapira, JA; Captain Brian Jones, JA (on brief).

Judges: Before BURTON, RODRIGUEZ, and FLEMING, Appellate Military Judges.

Opinion

SUMMARY DISPOSITION

Per Curiam:

Appellant raises four assignments of error, one of which merits discussion and relief. Specifically, we find the military judge abused his discretion in denying appellant's motion to suppress his statement to Special Agent (SA) ET, and the

error is not harmless beyond a reasonable doubt.¹ Because of the relief provided in the decretal paragraph, we need not reach the remaining assignments of error, nor the matters personally raised by appellant.²

BACKGROUND

The government charged appellant with, among other things, one specification of raping and several specifications of sexually abusing his three biological daughters, all under the age of twelve at the time of the alleged abuse.

As part of the [*2] investigation into the allegations, appellant was interviewed by Army Criminal Investigations Command (CID) SA ET. After gathering some administrative information and engaging in some preliminary discussions unrelated to the allegations, SA ET advised appellant of his Article 31, UCMJ, rights. After appellant indicated he understood his rights, the following colloquy ensued:

SA ET: "Do you want to talk to me at this time?"

Appellant: "No."

SA ET: "Okay. So, do you want a lawyer?"

Appellant: "No."

SA ET: "Or you want . . . so which one is it? You want a lawyer, or you want to talk to me?"

Appellant: "We can talk."

Special Agent ET then began questioning appellant about the allegations of rape and sexual abuse, and appellant made significant incriminating admissions related to the charged conduct.

Before trial, appellant moved to suppress his statements to SA ET. The military judge denied the motion, concluding that appellant's "No" response was ambiguous. The military judge further reasoned that appellant's subsequent statements that he did not want a lawyer and "We can talk," clarified the ambiguity, permitting continued questioning by SA ET.

Appellant's video-recorded CID interview with SA [*3] ET was ultimately admitted at trial as Pros. Ex. 23.

¹The government concedes error and an inability to establish harmlessness in its brief.

²A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of sexual abuse of a child, in violation of [Article 120b, Uniform Code of Military Justice](#), [10 U.S.C. § 920b](#) [UCMJ]. The convening authority approved the adjudged sentence of a dishonorable discharge and confinement for six years.

LAW AND DISCUSSION

HN1^[↑] "A military judge's decision to exclude evidence is reviewed for an abuse of discretion." [United States v. Lewis](#), [78 M.J. 447, 452 \(C.A.A.F. 2019\)](#) (citation omitted). A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect. *Id.* (citing [United States v. Olson](#), [74 M.J. 132, 134 \(C.A.A.F. 2015\)](#)). Whether an accused has invoked his right to silence is a question of law. [United States v. Sager](#), [36 M.J. 137, 139 n.2 \(C.M.A. 1992\)](#). Questions of law are reviewed de novo. [United States v. Rittenhouse](#), [62 M.J. 509, 511 \(Army Ct. Crim. App. 2005\)](#) (citing [United States v. Kosek](#), [41 M.J. 60, 63 \(C.M.A. 1994\)](#)).

HN2^[↑] During law enforcement questioning, if an accused "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." [Miranda v. Arizona](#), [384 U.S. 436, 473-74, 86 S. Ct. 1602, 16 L. Ed. 2d 694 \(1966\)](#). Once an accused has exercised his or her "right to cut off questioning," the right must be "scrupulously honored." [Michigan v. Mosley](#), [423 U.S. 96, 104, 96 S. Ct. 321, 46 L. Ed. 2d 313 \(1975\)](#). "[N]o particular words or actions are required to exercise one's [Fifth Amendment](#) right to silence," but the "invocation must be unequivocal before all questioning must stop." [United States v. Traum](#), [60 M.J. 226, 230 \(C.A.A.F. 2004\)](#); *see also* [Berghuis v. Thompson](#), [560 U.S. 370, 381, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 \(2010\)](#) (adopting the [Davis v. United States](#), [512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 \(1994\)](#) unequivocal invocation of the right to counsel standard in cases involving the invocation of the right to silence).

HN3^[↑] Whether an accused has invoked his or her right to silence is an "objective inquiry." [Thompson](#), [560 U.S. at 381](#). The inquiry analyzes whether an accused's invocation is "sufficiently [*4] clear that a reasonable police officer in the circumstances would understand the statement to be a request . . . to remain silent." [United States v. Delarosa](#), [67 M.J. 318, 324 \(C.A.A.F. 2009\)](#) (citing [Davis](#), [512 U.S. at 459](#)). Courts may consider the circumstances "preceding, as well as concurrent with, the invocation in the course of addressing the issue of ambiguity." *Id.*

HN4^[↑] If an accused unequivocally invokes his or her right to remain silent, "questioning must cease immediately." Mil. R. Evid. 305(c)(4). If, however, the invocation is equivocal or ambiguous, law enforcement agents are not required to halt questioning. [Thompson](#), [560 U.S. at 381-82](#). "The term 'equivocal' means having different significations equally appropriate or plausible; capable of double interpretation; ambiguous." [Rittenhouse](#), [62 M.J. at 511](#) (citations omitted). The government cannot use statements made *after* an

unambiguous invocation to "cast doubt on the adequacy of the initial request" to remain silent. [*Smith v. Illinois*, 469 U.S. 91, 98-99, 105 S. Ct. 490, 83 L. Ed. 2d 488 \(1984\)](#).

Based on our review of appellant's interview with SA ET, we find his response of "No" to SA ET's question, "Do you want to talk to me at this time," was neither equivocal nor ambiguous.

In his ruling, the military judge relied on our superior court's decision in [*Delarosa*, 67 M.J. at 325](#), for the premise that the phrase "No" is not *per se* unambiguous, so it is necessary to consider the surrounding [*5] circumstances of appellant's invocation. We agree with the military judge [HN5](#)³ that it is necessary to consider the circumstances "preceding, as well as concurrent with, the invocation in the course of addressing the issue of ambiguity." [Id. at 324](#). However, using an accused's "subsequent responses to cast doubt on the adequacy of the initial [invocation] *itself* is . . . intolerable." [Smith](#), 469 U.S. at 98-99 (emphasis in original).

Considering the circumstances preceding and concurrent with appellant's invocation, we find his response of "No" was unambiguous, and a reasonable law enforcement officer would understand appellant's response to be an invocation of his right against self-incrimination.³ As appellant's invocation of his right against self-incrimination was unambiguous, it was improper for the military judge to consider appellant's subsequent responses to SA ET to "cast doubt on the adequacy" of appellant's invocation. [Smith](#), 469 U.S. at 98-99. Because appellant's invocation was unambiguous and the military judge erred in his application of the law to appellant's suppression motion, we find the military judge abused his discretion in failing to suppress appellant's statement to SA ET.

Finding that appellant's invocation was unambiguous [*6] and his statement should have been suppressed does not end our analysis, as we must still determine whether appellant was prejudiced by the error. [HN6](#)⁴ Because an appellant's right to remain silent is of constitutional magnitude, the government bears the burden to demonstrate the error was harmless beyond a reasonable doubt. [United States v. Tovarchavez](#), 78 M.J. 458, 466 (C.A.A.F. 2019) (citing [Chapman v. California](#), 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). An error is harmless beyond a reasonable doubt when "there was no reasonable possibility that the error might have contributed to the conviction." [Id. at 460](#).

Consistent with the government's concession, we are not convinced that appellant's erroneously admitted statements did not contribute to his convictions. [HN7](#)⁵ An accused's "confession is probably the most probative and damaging evidence that can be admitted against [an accused]." [Arizona v. Fulminante](#), 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). The government relied on appellant's "probative and damaging" confession in closing argument, and as noted in its brief, the government offered "relatively little testimonial [or] physical evidence" at trial to prove the allegations against appellant. The probative value of appellant's confession, without other overwhelming evidence of guilt, precludes us from being convinced that the erroneously admitted CID interview did not contribute [*7] to his convictions.

CONCLUSION

The military judge abused his discretion denying appellant's motion to suppress his statement to SA ET, and the error is not harmless beyond a reasonable doubt. Accordingly, the findings and sentence are SET ASIDE. A rehearing is authorized.

End of Document

³ We note that SA ET appeared to have been under the mistaken belief that an accused's right against self-incrimination and right to consult with an attorney are somehow mutually exclusive.

United States v. Holdman

United States Army Court of Criminal Appeals

March 31, 2020, Decided

ARMY 20190040

Reporter

2020 CCA LEXIS 102 *

UNITED STATES, Appellee v. Private E2 DARIUS B.
HOLDMAN, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, Fort Stewart. David H. Robertson, Military Judge, Colonel Steven M. Ranieri, Staff Judge Advocate.

Core Terms

visual image, sentence, images, posting, nude, broadcast, beyond a reasonable doubt, Specification, on-line, pics

Case Summary

Overview

HOLDINGS: [1]-In appellant's court-martial for assaulting his wife, threatening to kill her, and posting nude photographs of her on Snapchat, in violation of Unif. Code Mil. Justice art. 134, [10 U.S.C.S. § 934 \(2016\)](#), the government failed to prove that appellant broadcast the photos without her explicit consent because she sent him a message saying, "Go ahead and post your pics" and later orally told him "do what you want to do" regarding the images; [2]-The wife's mistaken personal belief that appellant would never actually post her nude images online did not negate the fact that she explicitly told him, in writing, to go ahead and post the images.

Outcome

findings of guilty of The Specification of The Additional Charge and The Additional Charge are SET ASIDE and DISMISSED. The remaining findings of guilty are AFFIRMED. The sentence is AFFIRMED.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

[HNI](#) **Judicial Review, Standards of Review**

An appellate court reviews factual sufficiency de novo. 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, the appellate court is convinced of the appellant's guilt beyond a reasonable doubt. In conducting this unique appellate review, the appellate court takes a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > Military Justice > Defenses

Military & Veterans Law > Military Offenses > Indecent Assault

[HN2](#) **Trial Procedures, Burdens of Proof**

A fact-finder may consider evidence of consent at two different levels: (1) as raising a reasonable doubt as to whether the prosecution has met its burden on an element; and (2) as to whether the defense has established an affirmative defense. Regardless of whether the evidence negates an element of the charged offense or is considered in support of an affirmative defense, it is always the government's burden to prove all elements beyond a reasonable doubt even when evidence relevant to an element is pertinent to an affirmative defense on which the defense bears the burden. The Constitution precludes shifting the burden of proof from the

government to the defense with respect to a fact which the State deems so important that it must be either proved or presumed in order to constitute a crime.

Military & Veterans Law > Military Justice > Defenses

Military & Veterans Law > Military Offenses > Indecent Assault

[HN3](#) **Military Justice, Defenses**

Consent, once given, can be revoked either expressly or impliedly. Once given, a woman's consent to sexual intercourse and fondling may be revoked. It is axiomatic that a woman may revoke consent to sexual intercourse at any time—even immediately after initially consenting to it. Similarly, while consent might be given, the facts and circumstances surrounding how and when consent was purportedly given could negate any finding of actual consent. In other words, context matters when evaluating consent.

Military & Veterans Law > Military Justice > Courts Martial > Sentences

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

[HN4](#) **Courts Martial, Sentences**

A court of criminal appeals must assure that the sentence is appropriate in relation to the affirmed findings of guilty, and that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed. If the court can determine to its satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error.

Counsel: For Appellant: Lieutenant Colonel Tiffany D. Pond, JA; Major Benjamin A. Accinelli, JA; Captain Zachary A. Gray, JA (on brief on specified issues).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Craig Schapira, JA; Captain Brian Jones, JA (on brief on specified issues).

Judges: Before ALDYKIEWICZ, SALUSSOLIA, and WALKER Appellate Military Judges. Judge SALUSSOLIA and Judge WALKER concur.

Opinion by: ALDYKIEWICZ

Opinion

ALDYKIEWICZ, Judge:

Contrary to appellant's pleas, a military judge sitting as a general court-martial convicted appellant of threatening to kill his wife, Specialist (SPC) RC¹, and knowingly and wrongfully broadcasting "intimate visual images" of her without her consent, both offenses in violation of [Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934 \(2016\)](#) [UCMJ].² Upon review of the entire record, we find appellant's conviction of the novel [Article 134](#) offense of wrongfully broadcasting intimate visual images factually insufficient and provide relief in our decretal paragraph.³

BACKGROUND

Appellant and SPC RC met during Advanced Individual Training [*2] (AIT) prior to graduating in November 2016. They married in February 2017. Following AIT, SPC RC, an Army National Guard soldier, returned to her home in New York City, New York while appellant reported to Hunter Army Airfield, Georgia.

The marriage quickly unraveled and by the summer of 2017, SPC RC wanted a divorce. Appellant did not. In June 2017, they argued over the phone and SPC RC blocked appellant's calls. Through the messaging feature of the Snapchat application, appellant sent SPC RC a message reading, "I

¹ By the time of appellant's court-martial, PFC RC had been promoted to the rank of specialist. Though the charge sheet refers to her as PFC, we refer to her throughout this opinion as SPC RC.

² Pursuant to appellant's pleas, the military judge also convicted him of one specification each of absence without leave terminated by apprehension, disrespect toward a non-commissioned officer, aggravated assault, and disorderly conduct in violation of [Articles 86, 91, 128, and 134, UCMJ](#). Appellant was sentenced to confinement for fifteen months and a bad-conduct discharge, however, consistent with the pretrial agreement, the convening authority only approved confinement for fourteen months and a bad-conduct discharge.

³ Pursuant to [United States v. Grostefon, 12 M.J. 431 \(C.M.A. 1982\)](#), appellant personally presented one matter for this court's consideration: that the military judge erred when he denied appellant's motion to dismiss the Additional Charge as barred by preemption. We have given full and fair consideration to this matter and find it to be without merit.

swear to God, if you don't call me [right now]⁴, your naked photos will all be on social media in the next fucking five minutes try me. And that is the least that I am capable off [sic]. Try me." She understood that he was referring to nude photos that she had taken of herself and sent to him in February 2017. She responded, "Go ahead and post your pics. I am not even going to get a lawyer." Appellant replied with a threat: "If you report me, [RC], I [swear to God] on my everything I love, I will kill you."

In August 2017, SPC RC started speaking to appellant again and they planned for him to visit her in New York City in October 2017. She purchased a plane ticket for appellant [*3] and picked him up at the airport. Shortly after appellant's arrival, the couple again began to argue. The tumultuous visit culminated in a physical altercation during which appellant pushed SPC RC off of a bed and choked her three times, the last of which was with sufficient force such that SPC RC had difficulty breathing and was unable to cry out for help. Later that morning, following the assault, SPC RC asked appellant to leave and he flew back to Georgia.

A few days later, SPC RC's friends alerted her that something had happened to her Snapchat account. She logged into Snapchat to find the nude photos she had sent to her husband in February 2017 posted on Snapchat for public consumption. Appellant used SPC RC's password to log into her Snapchat account to post the photos.

During appellant's court-martial, the military judge questioned SPC RC about her initial text response to appellant's threat to post her nude images on social media. Specifically, the military judge asked SPC RC why she told appellant, "Go ahead and post your pics." The following colloquy occurred:

SPC RC: Because, when he first said that he was going to send it to my mom, I remember we had a conversation about it [*4] after, and he said that he just said that because he would never do something like that. So, once he said that again, I was like, "Okay, go ahead and do what you want to do." But I never thought he was going to do it.

MJ: So, you thought this threat was a hollow threat?

SPC RC: Yes, sir.

MJ: Were you intending to give him permission to post your pics?

SPC RC: No, sir.

MJ: Were you intending to call his bluff? In other words, you thought he was just bluffing, and you were

challenging him on it?

SPC RC: Yes, sir.

LAW AND DISCUSSION

We conclude that appellant's conviction of The Specification of The Additional Charge is factually insufficient as the government failed to carry its burden of proving lack of consent beyond a reasonable doubt.

HNI[↑] This court reviews factual sufficiency de novo. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987). In conducting this unique appellate review, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" [*5] to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." Washington, 57 M.J. at 399.

As charged, The Specification of The Additional Charge alleges that appellant:

Did, at Hunter Army Airfield, Georgia, on or about 17 October 2017, knowingly, wrongfully, and without the explicit consent of PFC R.C. broadcast intimate visual images of PFC R.C., who was at least 18 years of age when the visual images were created and is identifiable from the visual images or from information displayed in connection with the visual images, when he knew or reasonably should have known that the visual images were made under circumstances in which PFC R.C. retained a reasonable expectation of privacy regarding any broadcast of the visual images, and when he knew or reasonably should have known that the broadcast of the visual images was likely to cause harm, harassment, intimidation, or emotional distress for PFC R.C., such conduct being to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.⁵

⁵ The government's charged specification borrows elements directly from Article 117a (Wrongful broadcast or distribution of intimate visual images), UCMJ (2019). We note that appellant's conduct was not chargeable under Article 117a because his 17 October 2017 conduct predates the effective date of the new punitive statute, 12 December 2017. See *National Defense Authorization Act for Fiscal Year 2018*, Pub. L. No. 115-91, Div. A, Title V, Subtitle D, § 533(a),

⁴ Common short hand social media acronyms have been written out for the sake of clarity, though the original Snapchat messages in the record contain the abbreviated versions of these phrases.

The government was obligated to prove, beyond a reasonable doubt, that appellant broadcast [*6] intimate visual images of SPC RC *without her explicit consent*. [HN2](#)[↑] A fact-finder "may consider evidence of consent at two different levels: (1) as raising a reasonable doubt as to whether the prosecution has met its burden on [an element]; and (2) as to whether the defense has established an affirmative defense." [United States v. Neal](#), 68 M.J. 289, 300 (C.A.A.F. 2010). Regardless of whether the evidence negates an element of the charged offense or is considered in support of an affirmative defense, it is always the government's burden to prove all elements beyond a reasonable doubt even when evidence relevant to an element is pertinent to an affirmative defense on which the defense bears the burden. *Id.* "The Constitution precludes shifting the burden of proof from the government to the defense 'with respect to a fact which the State deems so important that it must be either proved or presumed' in order to constitute a crime." *Id.* at 298 (quoting [Patterson v. New York](#), 432 U.S. 197, 215, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977)).

The burden was squarely on the government to prove that SPC RC *did not* consent to appellant posting her nude photos online—a necessary element that separates wrongful from otherwise lawful conduct. The government did not carry this burden. On the contrary, the government entered documentary evidence of consent, [*7] a Snapchat text message from SPC RC to appellant explicitly telling him, "Go ahead and post your pics." Additionally, during the government's case-in-chief, SPC RC testified that she told appellant orally to "do what you want to do" regarding the images, a statement made some time *after* previously telling appellant to "Go ahead and post your pics." Her explanation for seemingly condoning appellant's actions (i.e., his on-line posting of the images) was that she was calling (what she believed to be) appellant's bluff.

On the facts before us, we conclude simply that the government failed to establish that SPC RC did not consent to appellant posting her nude images online. Specialist RC's mistaken personal belief that appellant would never actually post her nude images online does not negate the fact that she explicitly told appellant, in writing, to go ahead and post the images. Specialist RC gave appellant unqualified consent to post the images and did nothing to revoke or withdraw that consent. While we acknowledge that the images were posted four months after consent was first given, the government failed to establish that SPC RC's previously given consent had been withdrawn, revoked, [*8] or limited in some manner, that SPC RC's consent somehow expired with the passage of time, or that appellant knew or should have known that SPC

RC did not consent to appellant's posting of the images online.⁶

For the foregoing reasons we conclude the government failed to prove beyond a reasonable doubt that SPC RC did not consent to appellant's action of posting her nude images on Snapchat.

SENTENCE REASSESSMENT

We are able to reassess the sentence in this case, and do so after a thorough analysis and in accordance with the principles articulated by our superior court in [United States v. Winckelmann](#), 73 M.J. 11, 15-16 (C.A.A.F. 2013), and [United States v. Sales](#), 22 M.J. 305, 307-08 (C.M.A. 1986). [HN4](#)[↑] A court of criminal appeals must "assure that the sentence is appropriate in relation to the affirmed findings of guilty, [and] that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed." [Sales](#), 22 M.J. at 307-08 (quoting [United States v. Suzuki](#), 20 M.J. 248, 249 (C.M.A. 1985)). "If the court can determine to its satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error" [Sales](#), 22 M.J. at 308.

The dismissal of The Specification of The Additional Charge reduces appellant's exposure from a maximum confinement [*9] of seven years and eight months to seven years and four months, an insignificant change in the penalty landscape. The gravamen offenses remain — that appellant choked his wife three times and threatened to kill her. Although addressed during her testimony, very little of SPC RC's presentencing testimony discussed the impact on her from appellant's actions in the specification we now set aside. Instead, her testimony focused on the impact of experiencing domestic violence in her marriage and the fear she felt when

⁶ We recognize that [HN3](#)[↑] consent, once given, can be revoked either expressly or impliedly. See [United States v. Dill](#), ARMY, 2005 CCA LEXIS 457, at n.1 (Army Ct. Crim. App. 21 Sep. 2005) (this court expressly rejecting the notion that once given, a woman's consent to sexual intercourse and fondling was unable to be revoked); [United States v. Wilson](#), NMC 201700098, 2018 CCA LEXIS 451, at * 10 (N.M. Ct. Crim. App. 20 Sep. 2018) (the Navy Marine Corps Court discussing revoked consent in the context of sexual assault, reasoning, "It is axiomatic that a woman may revoke consent to sexual intercourse at any time—even immediately after initially consenting to it."). Similarly, while consent might be given, the facts and circumstances surrounding how and when consent was purportedly given could negate any finding of actual consent. In other words, context matters when evaluating consent.

appellant threatened to kill her.

Lastly, appellant was sentenced by a military judge and the remaining offenses are of the type with which this court has experience and familiarity. We are confident we can reliably determine what sentence would have been imposed at trial. Having conducted the required reassessment, we AFFIRM appellant's approved sentence of confinement for fourteen months and a bad-conduct discharge.

CONCLUSION

The findings of guilty of The Specification of The Additional Charge and The Additional Charge are SET ASIDE and DISMISSED. The remaining findings of guilty are AFFIRMED. The sentence is AFFIRMED. All rights, privileges, and property, of which appellant [*10] has been deprived by virtue of that portion of the findings set aside by this decision are ordered restored.

Judge SALUSSOLIA and Judge WALKER concur.

End of Document

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army
Court and Government Appellate Division on July 25, 2023.



MICHELLE L.W. SURRATT
Paralegal Specialist
Defense Appellate Division

