IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	Docket No. ARMY 20220659
PV1 (E-1) **NELSON A. TORRESJUAREZ,** United States Army, Appellant	Tried at Fort Bliss, Texas, on 3 October 2022 and 15 December 2022, before a general court-martial appointed by the Commander, Fort Bliss, Texas, Colonel Robert L. Shuck, military judge, presiding.

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

On 11 December 2023 appellant filed his initial brief. On 9 April 2024, the government filed its answer brief. This is appellant's reply.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ACCEPTING APPELLANT'S GUILTY PLEA TO A SPECIFICATION OF UNLAWFUL ENTRY WHEN APPELLANT WAS A CO-TENANT OF THE RESIDENCE.

In its brief, the government asks this court to reject the ordinary meaning of "another," by embracing an unreasonably narrow reading of the term. In effect, the government reduces appellant's co-tenancy status to null because he did not have an absolute, unconditional right to enter the property and did not retain absolute possession of the property at the time of the charged offense. (Gov. Br. at 7). This court should reject the government's interpretation because: (1) the

government reduces the element "of another," in Article 129(b), UCMJ, to mere surplusage; (2) appellant maintained constructive possession of the property; and (3) if the court finds substantial ambiguity in a criminal statute, it must be resolved in favor of the appellant.

A. The government's interpretation of "another" contradicts two canons of statutory interpretation—the ordinary meaning canon and the surplusage canon.

1. Ordinary meaning canon

"[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon [of construction] is also the last: judicial inquiry is complete." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54, (1992) (internal quotation marks and citations omitted) (alternations added); *see also Richards v. United States*, 369 U.S. 1, 9 (1962) ("we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used."). In Article 129, UCMJ, the term "another" has a straightforward, ordinary meaning.[1]

2. Surplusage

[1] "Another" ordinarily means "different or distinct from the one first considered." *See* Webster's New Collegiate Dictionary 47 (1977).

"If possible, every word and every provision is to be given effect [ ]. None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 174 (2012). There is a presumption that every word in a statute has meaning, and Congress is presumed to have used no superfluous words. *See Platt v. Union P. R. Co.*, 99 U.S. 48, 58 (1878).

Article 129(b), UCMJ, prohibits "any person subject to this chapter who unlawfully enters – the real property of another." Unlawfulness of entry is defined as "an entry. . . made without the consent of any person authorized to consent to entry or without other lawful authority." *Manual for Courts-Martial, United States* (2019 ed.) [MCM], part IV, ¶ 79.c.(7).

When the government cites *State v. White*, 330 P.3d 482, 483 (2014) (en banc), for the proposition that the "appropriate question is whether the alleged burglar has an absolute, unconditional right to enter the home" (Gov. Br. at 7), they effectively render the element "of another" in Article 129(b), UCMJ, unnecessary surplusage. The government uses the condition of "an absolute, unconditional right to enter" as an example of how an accused may enter the real property "of another." The absence of "an absolute, unconditional right to enter" fits squarely into the MCM's definition of *unlawfulness of entry* and Article 129(b) element of "unlawful entry."

Under this logic, the element "of another" means "unlawful entry," and there is no other referent the term "of another" could be modifying. There is simply no rational, legally sound way to read Article 129(b) as using the terms "of another" subsumed into "unlawful entry" as the government would have us understand it.

B. The appellant, a co-tenant of the property, had constructive possession of the rented premises.

Citing *United States v. Vance*, 10 C.M.R. 747, 752 (A.F.B.R. 1953), the government states "[i]n determining whether, in the instant case, there was a sufficient factual basis to find appellant unlawfully entered property 'of another,' it is appropriate to consider possession rather than title alone." (Gov. Br. at 7). Even if this court adopts the government's application of *Vance* to mean property can be construed as "of another" if accused did not maintain a right to possession in the property, the government still fails to satisfy the lower burden of proof. Appellant maintained constructive possession of the property.

Appellant maintained a right of possession in his residence at the time of the charged offense. Appellant entered a lease contract, where appellant took possession of the dwelling. Appellant, by operation of the protection order, was not judicially evicted. Moreover, the protection order did not direct removal of all appellant's personal items from his residence, "[t]he Defendant will be allowed a onetime access to the protected address to retrieve *essential* personal items," (Pros. Ex. 2, p. 2) (emphasis added), and contained an expiration date. (Pros. Ex. 2, p. 2).

At the time of the charged offense, appellant was still liable for rent charges and any potential damages covered under the lease for the entire term, i.e., appellant was not released from his obligations under the lease.

"Possession means simply the owning or having a thing in one's own power; it may be actual, or it may be constructive. Actual possession exists where the thing is in the immediate occupancy of the party; constructive is that which exists in contemplation of law, without actual personal occupation." *Aqua Log, Inc. v. Georgia*, 594 F.3d 1330, 1336 (11th Cir. 2010) (internal quotation marks and citations omitted). "Constructive possession is that which exists without actual personal occupation of land . . . but with an intent and capability to maintain control and dominion." *Rodella v. United States*, 286 F.2d 306, 311 (9th Cir. 1960). Actual possession means "physical occupancy or control over property." Black's Law Dictionary 1408 (11th ed. 2019).

At the time of the charged offense, appellant had constructive possession of the property. Because appellant maintained constructive possession of the property, there is no factual basis to find appellant unlawfully entered property "of another."

C. The ordinary meaning of the element "of another" should control in this court's test for legal sufficiency but if there is any ambiguity, it must be resolved in appellant's favor.

In the event this court determines there is substantial ambiguity in the phrase "of another" in Article 129(b), UCMJ, "the rule of lenity generally holds that

criminal statutes are to be strictly construed, and any ambiguity resolved in favor of the accused." *United States v. Thomas*, 65 M.J. 132, 135 n.2 (C.A.A.F. 2007); *see also United States v. Mays*, 83 M.J. 277, 281 (finding rule of lenity inapplicable because rule of lenity applies only in cases of substantial ambiguity).

Additionally, the government argues, "perhaps most importantly—there was a sufficient factual basis to determine [redacted] apartment was property "of another" because appellant said it was." (Gov. Br. at 8). However, "[m]ere conclusions of law recited by an accused are insufficient to provide a factual basis for a guilty plea." *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996) (holding the record established matters inconsistent with appellant's plea to aggravated assault). Nonetheless, the government did not accurately cite, and cannot cite, to any point in the record where appellant said, "[redacted] apartment was 'of another.'" (Gov. Br. at 8). Appellant unequivocally stated he was a co-lessee and the lease was in effect at the time of the charged offense. (R. at 114-15). Therefore, since the guilty finding was based on appellant's entry into his own residence, the military judge's acceptance of the guilty plea for this specification was legally insufficient.

Conclusion

For the reasons above, appellant respectfully requests this honorable court set aside the military judge's finding of guilt as to the Specification of Additional Charge V.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court of Criminal Appeals and the Government Appellate Division on 16 April 2024.

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