

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20230020

Specialist (E-4)

RICHARD N. GROCE,

United States Army,

Appellant

Tried at Fort Campbell, Kentucky on
31 October 2022, 20 December 2022,
and 10–12 January 2023, before a
general court-martial convened by the
Commander, 101st Airborne Division,
COL Travis L. Rogers, military judge,
presiding.

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

Assignments of Error¹

**I. WHETHER THE IMPACT OF UNLAWFUL
COMMAND INFLUENCE REQUIRES SETTING
ASIDE THE FINDINGS AND SENTENCE.**

**II. WHETHER THE MILITARY JUDGE ERRED
BY ADMITTING PROSECUTION EXHIBIT 7.**

**III. WHETHER APPELLANT’S CONVICTION FOR
ASSAULT CONSUMMATED BY BATTERY IS
LEGALLY AND FACTUALLY INSUFFICIENT.**

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 12 January 2023, an enlisted panel, sitting as a general court-martial, found appellant guilty, contrary to his pleas, of one specification of aggravated assault by inflicting substantial bodily harm and one specification of assault consummated by battery in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928 (2019) [UCMJ]. (Statement of Trial Results). The panel sentenced appellant to a bad conduct discharge. (R. at 590).

The Staff Judge Advocate (SJA) rendered his advice on 3 February 2023, the Convening Authority approved the findings and sentence on 3 February 2023, and the military judge entered judgment on 14 February 2023. (SJA Advice; Convening Authority Action; Judgment of the Court).

Assignments of Error

I. WHETHER THE IMPACT OF UNLAWFUL COMMAND INFLUENCE REQUIRES SETTING ASIDE THE CHARGES AGAINST APPELLANT.

Facts Relevant to Assignment of Error

On 31 December 2020, Clarksville, Tennessee police officers arrested appellant for public intoxication and resisting arrest, later learning of an incident with Mr. ■² and adding a charge for aggravated assault. (App. Ex. III., 9, 163;

² Mr. ■ was, at the time of the incident, SGT ■. (R. at 323–24).

App. Ex. XII, 2). On 30 April 2021, appellant entered a pre-trial diversion program, under which the state reduced the aggravated assault charge to simple assault and dropped the public intoxication and resisting arrest charges. (App. Ex. XII, 2, 163–69). Appellant successfully completed the terms of the diversion program on 29 October 2021. (App. Ex. III. 164).

Ten months later, on 29 June 2022, appellant's company commander, CPT [REDACTED], preferred charges for the exact same conduct after consulting with his trial counsel, CPT [REDACTED]. (App. Ex. III at 171). Prior to preferral, the military justice advisor made no attempt to determine whether civilian authorities had exercised jurisdiction, despite being given the civilian case number during a conversation with the arresting officer. (R. at 49–52). There is no indication anyone informed CPT [REDACTED] or the Summary Court Martial Convening Authority (SCMCA) of the civilian disposition prior to preferral. Likewise, neither the trial counsel nor the Staff Judge Advocate (SJA) informed the General Court-Martial Convening Authority (GCMCA) of the civilian disposition until referral, when the acting SJA provided the following, limited advice:

Army Regulation (AR) 27-10 paragraph 4-2 outlines the procedure for exercising UCMJ jurisdiction over a case previously charged by civilian authorities. In this case, the Government was unaware of the civilian charges until informed by Defense at the preliminary hearing; thus, there is no report from a subordinate commander requesting to take action. Due to the severity of the misconduct and the nature of the disposition by the civilian

authorities, I recommend the charge and its specifications be referred to trial by General Court-Martial.

(App. Ex. IV, at 14); (App. Ex. XII at 2). The record does not indicate any further qualification or description of “the severity of the misconduct” or “the disposition by the civilian authorities” beyond the text reproduced above. (App. Ex. IV, at 14).

Appellant filed a pre-trial motion to dismiss the Charge and its Specifications for defective preferral. (App. Ex. III, 1). During argument, CPT [REDACTED] stated CPT [REDACTED] initiated the discussion about preferring charges—an idea which ran contrary to CPT [REDACTED] original intent to separate Appellant under Chapter 14-12(c) of AR 600-20. (R. at 20–21) (“I’m about to switch out of command and you are going to have to do some convincing when you come down and talk to me about it.”); (App. Ex. III, at 171). CPT [REDACTED] changed his course of action because of his discussion with CPT [REDACTED]. (R. at 20–27); (App. Ex. III, at 171); (App. Ex. XII, at 2). Specifically, CPT [REDACTED] left CPT [REDACTED] with the impression that “there’s enough attention at ‘Division’ . . . that if you don’t read the charges, it will likely happen, either from the next commander . . . or . . . it would go to battalion level, and if not battalion, then it would go to brigade, and eventually . . . the charges would be pursued.” (R. at 22). Had CPT [REDACTED] known appellant had been tried and punished in a civilian court, he would not have preferred charges. (R. at 27).

The court found CPT [REDACTED] testimony “genuine, detailed, and credible.” (App. Ex. XII at 4). The military judge, however, denied appellant’s motion, finding “CPT [REDACTED] properly preferred charges” as “[t]here is no credible evidence [Appellant] has faced any prejudice as a result of the absence of civilian disposition information in the preferral packet.” (App. Ex. XXII, 9).

The victim, Mr. [REDACTED], did not want to participate in trial, only appearing pursuant to a subpoena. (R. at 338). He, instead, supported separation under Chapter 10 of AR 635-200. (R. at 338). The arresting officer, Officer [REDACTED], who exercised discretion over charging appellant, *chose* not to charge appellant with an assault on his person because Officer [REDACTED] determined such a charge was not “appropriate[.]” (R. at 231–22).

Standard of Review

This court reviews claims of unlawful command influence (UCI) de novo and accepts the military judge’s findings of fact unless they are clearly erroneous. *United States v. Gilmet*, __ M.J. __, 2023 CAAF LEXIS 564, at *9 (C.A.AF. 3 Aug. 2023).

Law

Unlawful command influence is the mortal enemy of military justice. *United States v. Boyce*, 76 M.J. 242, quoting *United States v. Thomas*, 22 M.J. 388, at 393. Every individual subject to the UCMJ is proscribed from attempting to

“influence the action of a court martial” in a fashion which “materially prejudices the substantial rights of the accused.” 10 U.S.C. § 837(a)(3); 10 U.S.C. § 837(c).

Two types of UCI arise in the military justice system: actual and apparent.³

Boyce, 76 M.J. at 247.

Actual UCI is an improper manipulation of the criminal justice process which negatively affects “the fair handling and/or disposition of a case.” *Id.* To establish a prima facie claim of actual UCI, appellant must show: 1) facts, which if true, constitute UCI; 2) the proceedings were unfair; and 3) the unlawful command influence was the cause of the unfairness. *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013). Once the accused meets this low burden, the burden shifts to the government to prove beyond a reasonable doubt: 1) the predicate facts do not exist; 2) the facts do not constitute UCI; or 3) the UCI did not affect the findings or sentence. *Id.*

In the absence of actual UCI, the court makes an objective assessment as to whether the government’s conduct created the appearance of UCI. *Boyce*, 76 M.J. at 248 (quoting *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006)). As with challenges to military judges or panel members, apparent UCI analysis concerns “the perception of fairness in the military justice system as viewed

³ The Court of Appeals for the Armed Forces (CAAF) has not spoken as to whether the amendments to Article 37, UCMJ impact existing caselaw. *Gilmet*, at *3, n.2.

through the eyes of a reasonable member of the public.” *Id.* The government has the burden of establishing beyond a reasonable doubt “an objective disinterested observer . . . would not harbor a significant doubt about the fairness of the proceeding.” *Id.* at 249 (“the government may . . . seek to prove beyond a reasonable doubt that the [UCI] did not place an intolerable strain upon the public’s perception of the military justice system[.]”). Jeopardizing the perception of fairness in the military justice system directly implicates the due process rights of the accused. *See United States v. Haney*, 64 M.J. 101, 108 (C.A.A.F. 2006) (finding public perception of military justice system constitutes a due process violation); *see also Bergdahl*, 80 M.J. 230, 246 (C.A.A.F. 2020) (Sparks, J., concurring in part and dissenting in part) (describing “long recognized” the relationship between due process and UCI).

Legal advisors serve as conduits for UCI. *United States v. Hamilton*, 41 M.J. 32, 36 (C.A.A.F. 1994); *see also United States v. Kitts*, 23 M.J. 105, 108 (C.M.A. 1986) (a staff judge advocate generally acts with the mantle of command authority.”). While not every expression or opinion by a legal advisor is attributed to his or her commander, it is incumbent upon judge advocates to “make it clear when they are expressing the view of their commanders and when they are expressing their own legal opinions.” *Hamilton*, 41 M.J. at 36. “[N]o person may be ordered to prefer charges which that person does not believe are warranted.” *Id.*

see also Rule for Court Martial (RCM) 307(a), discussion (“No person may be ordered to prefer charges to which that person is unable to make truthfully the required oath.”).

Army Regulation 27-10 sets the rules for UCMJ action against Soldiers where a civilian authority has previously exercised criminal jurisdiction over the same offense. Army Reg. 27-10, Legal Services: Military Justice, paras. 4-1–4-3 (20 Nov. 2020) [AR-27-10]. “No UCMJ action . . . will be initiated without GCMCA approval” in cases where state authorities have exercised criminal jurisdiction. *Id.* When an officer exercising summary court-martial jurisdiction over the soldier “*believes* that trial by court martial is appropriate[] in a case where the civilian authorities exercised . . . criminal jurisdiction over the same matter” that officer “*will*” cause a full written report “complete with draft charges” to be forwarded to the GCMCA. *Id.* at para. 4-3 (emphasis added). Only *after* consulting with a supporting SJA may the GCMCA either dispose of charges him or herself, or “authorize a subordinate to take such action.” *Id.*; *see also* RCM 306 (governing disposition of charges).

The Department of Justice (DoJ) limits subsequent prosecutions in a similar fashion. Department of Justice, Justice Manual⁴ § 9-2.031, <https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.031>, (last visited 4 September 2023). Under the *Petite* Policy,⁵ Assistant United States Attorneys are precluded from bringing a subsequent prosecution where the same acts formed the basis for a state prosecution, unless that state prosecution left behind a substantially unvindicated federal interest. *Id.* The DoJ protects against unwarranted, successive prosecutions by requiring prior approval from the Assistant Attorney General, the highest-ranking attorney in the Criminal Division of the DoJ. *Id.*

Argument

If no member of the military justice office—not the military justice advisor, not the trial counsel, not the acting staff judge advocate—is required to follow the rules, the regulation governing military justice is a dead letter. Like the *Petite* policy, AR 27-10 *requires* prior approval from the highest levels before pursuing a subsequent prosecution because in most instances, a subsequent prosecution is

⁴ The Justice Manual, previously known as the United States Attorneys' Manual, was comprehensively revised and renamed in 2018. Department of Justice, *Justice Manual*, <https://www.justice.gov/jm/justice-manual> (last visited 4 September 2023).

⁵ Named after *Petite v. United States*, 361 U.S. 529 (1960).

unfair or unwarranted. No subsequent prosecution was warranted here because no unvindicated interest existed. Mr. ■ did not want to participate. (R. at 338). Officer ■ did not feel charges were warranted for assault against a police officer. (R. at 231–22). Appellant fully complied with the terms of his punishment. (App. Ex. III. 164). Had the rules been followed, appellant never would have been charged.

The failure of judge advocates to follow AR 27-10, to take the time to inform their commanders of a prior prosecution and seek the requisite approval, compounded the error of applying pressure from “division” and coerced CPT ■ into preferring charges. Had the trial counsel or military justice advisor done the bare minimum and looked up the case number they had in hand, the government would have discovered civilian authorities not only exercised jurisdiction over appellant, but charged, sentenced, and supervised appellant through completion of his pre-trial diversion program *before* CPT ■ was pressured into preferring charges. (App. Ex. III, 163–69). Had the trial counsel acted in adherence with longstanding caselaw, he would have made it clear he was expressing his own opinion regarding appellant’s conduct and not that of battalion, brigade, or critically, “division.” (R. at 22); *Hamilton*, 41 M.J. at 36. Lastly, had the acting SJA properly advised the GCMCA of the requirements under AR 27-10, appellant’s prosecution would have paused, first for the GCMCA to receive the full

benefit of a written report from the SCMCA to determine whether further action was appropriate, and second, the GCMCA decision to either take action at his level or specifically authorize CPT [REDACTED] to bring charges. Instead, a GCMCA uninformed by his attorneys or subordinates, rolled on with referral, without first stopping to consider whether preferral had been warranted in the first place

CPT [REDACTED] would not have preferred charges had the Fort Campbell military justice office followed AR 27-10. (R. at 27) (“[Q. If you had known [Appellant] had been tried and punished you would not have preferred charges. Is that an accurate statement? A. Yes.”). No policy prohibited CPT [REDACTED] from disposing of appellant’s misconduct administratively, which was, in fact, his intended course of action. (R. at 19). This paucity of knowledge taken in tandem with pressure from division forced CPT [REDACTED] hand—he charged appellant with crimes he would not have charged but for the advice of his attorney. The court’s conclusion—“[t]here is no credible evidence [Appellant] faced any prejudice as a result of the absence of civilian disposition information in the preferral packet”—is simply wrong. (App. Ex. XXII, 9).

Appellant’s court-martial was fatally undermined by actual UCI. *See Salyer*, 72 M.J. at 423 (listing three-pronged test). The military judge’s key conclusion, that CPT [REDACTED] testimony merely represented a “potential change of heart,” is simply incorrect. (App. Ex. XXII, 8). CPT [REDACTED] felt compelled to prefer

charges, as trial counsel's pressure regarding division-level command had been compounded by woefully incomplete advice concerning civilian disposition. The resultant unfairness manifested in charges being preferred where they otherwise would not have been—where appellant had already been tried and convicted for the same conduct. This unfairness resulted from legal advisors serving as a conduit for UCI by applying division-level pressure on a company commander, without first stopping to follow mandatory procedure, a procedure rooted in fairness.

The government cannot meet their burden of showing, beyond a reasonable doubt, that these facts do not constitute UCI or that such UCI did not affect the findings or sentence. *Id.* However, assuming *arguendo* a lack of actual UCI, the instant proceedings would undoubtedly raise concerns regarding the perception of fairness in the military justice system. *Boyce*, 76 M.J. at 248. None of the interested parties wanted this to go to court-martial—not the victim, not the arresting officer, and not the commander who charged appellant. Though the instant appeal does not implicate the Double Jeopardy Clause, proceeding with a second prosecution appears deeply unfair in the absence of any remaining federal or military interest. Tennessee took stock of appellant's actions. The individuals impacted did not feel another pound of flesh was warranted. Prosecuting appellant under such circumstances poses a severe enough threat to the perception of fairness

in the military justice system as to directly implicate his due process rights.

Haney, 64 M.J. at 108. Appellant, therefore, respectfully request this honorable court set aside the findings and sentence.

**II. WHETHER THE MILITARY JUDGE ERRED BY
ADMITTING PROSECUTION EXHIBIT 7
WITHOUT PROPER AUTHENTICATION AND IN
VIOLATION OF THE RULE AGAINST HEARSAY.**

Facts Relevant to Assignment of Error

The government offered for admission Prosecution Exhibit (Pros. Ex.) 1—records from Vanderbilt Hospital and Clarksville Hospital—through Mr. [REDACTED], an expert witness who never treated Mr. [REDACTED]. (R. at 346, 369–70). Appellant objected to “hearsay as well as authentication.” (R. at 367). The government asserted the document was admissible under Military Rule of Evidence (MRE) 803(6)⁶ as a record of a regularly conducted activity. (R. at 367).

The court overruled the hearsay objection without analysis but allowed for additional argument concerning authentication. (R. at 367). The government asserted Pros. Ex. 1 had been properly authenticated, stating the “first page” of Pros. Ex. 1 met MRE 902(11). Appellant argued the affidavit, from Vanderbilt

⁶ Appellant notes the proffered evidence would not be eligible for admission under MRE 803(4) as the records would have concerned statements by treatment providers, not statements made by Mr. [REDACTED] to treatment provider. *See United States v. Sola*, Army 20210322, 2023 CCA Lexis 2378, 2023 CCA Lexis 237, at *7 ([mem. op.](#)) (“the . . . test specifically requires that the statement be made by the *patient*” (emphasis in original)).

Hospital, did not properly authenticate pages two and three of Pros. Ex. 1, as those two pages were records from Clarksville Hospital. (R. at 369–70). The military judge overruled appellant’s authentication objection, stating, sua sponte, he was taking judicial notice that “higher level trauma patients” get sent to Vanderbilt and that they bring with them “all of the medical documentation that has been created thus far.” (R. at 371).

After the military judge overruled appellant’s objections, the trial counsel stated he would be redacting all “other pages” besides pages two and three of Pros. Ex. 1. The military judge then asked, “[s]o, you’re withdrawing your request, your motion to admit evidence” to which the trial counsel replied, “That’s correct, Your Honor.” (R. at 378). The government subsequently moved for the admission of Pros. Ex. 7, what had previously been “pages 2 and 3” of Pros. Ex. 1, without any attestation certificate. (R. at 395). Appellant renewed his objections to authentication and hearsay. (R. at 396). The military judge summarily overruled appellant’s objections and admitted the evidence. (R. at 396).

The two pages of Pros. Ex. 7 contain two reports, both from the date of the incident, both signed by Dr. [REDACTED], and both detailing diagnoses, examination techniques, and clinical findings regarding Mr. [REDACTED] injuries. (Pros. Ex. 7). Prosecution Exhibit 7 represents the only evidence of medical records describing Mr. [REDACTED] injuries. The other descriptions of Mr. [REDACTED] injuries came

either from individuals who were inebriated the night of the incident or in the form of opinion testimony, and not from Dr. [REDACTED] as the treating physician. (R. at 239, 266, 378). Prosecution Exhibit 7, however, lacks any affidavit from a records custodian attesting to the authenticity of materials contained therein. The trial counsel saved Pros. Ex. 7 for the final two slides of his closing statement, quoting from that exhibit as proof positive of what injuries Mr. [REDACTED] suffered, when those injuries occurred, and whether those injuries constituted “grievous bodily harm.”⁷ (R. at 437–38).

Standard of Review

This court reviews a military judge’s decision to admit evidence for an abuse of discretion. *United States v. Cucuzzella*, 58 M.J. 477, 482 (C.A.A.F. 2003). An abuse of discretion occurs “when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact.” *Id.* (quotation omitted). “[W]here the military judge placed on the record his analysis, deference is clearly warranted.” *United States v. Finch*, 79 M.J. 389, 397 (C.A.A.F. 2020) (quotation omitted). However, where “the military judge fails to place his findings and analysis on the record, less deference will be accorded.” *Id.*

Law

⁷ Appellant was charged and convicted of causing substantial bodily harm, not the more severe charge of causing grievous bodily harm. (Charge Sheet); (R. at 438).

In order to be admitted as self-authenticating, a record must meet “the requirements of [MRE] 803(6)(A)–(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. MRE 902(11).

Military Rule of Evidence 803(6)(A)–(C) exempts records of regularly conducted activity from the rule against hearsay when those records are accompanied by a certificate attesting to the following:

(A) the record was made at or near the time by - or from information transmitted by - someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a uniformed service, business, institution, association, profession, organization, occupation, or calling of any kind, whether or not conducted for profit; [and]

(C) making the record was a regular practice of that activity[.]

Admitting an ostensibly self-authenticating document in the absence of “any proper attestation certificate” constitutes an abuse of discretion. *United States v. Gonzalez*, ARMY 20190850, 2021 CCA Lexis 650, at *6–*7 (Army Ct. Crim Ap. 2 Dec. 2021) ([summ. disp.](#)).

“For preserved nonconstitutional evidentiary errors, the test for prejudice is whether the error had a substantial influence on the findings.” *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019). (cleaned up). The court weighs: 1)

the strength of the government's case; 2) the strength of the defense case; 3) the materiality of the evidence in question; and 4) the quality of the evidence in question. *Id.*

Argument

For no discernable reason, the trial counsel withdrew his motion to admit Pros. Ex. 1. (R. at 378). It was his choice, as the proponent of the evidence to offer Pros. Ex. 7 without the required certificate. However, as it was also the trial counsel's burden to provide the court with admissible evidence, the court abused its discretion by admitting facially inadmissible evidence in the form of Pros. Ex. 7. *Gonzalez*, ARMY 20190850, 2021 CCA Lexis 650, at *6–*7.

Admitting Pros. Ex. 7 is prejudicial error because these two pages constituted the only medical evidence offered against appellant. In the government's closing argument, the trial counsel saved the signed, dated report attesting to the severity of Mr. [REDACTED] injuries for his last slide. (R. at 437–38). The trial counsel went as far to argue the injuries constituted “grievous bodily harm”—a severity of injury not charged. (R. at 437–38). There was no reason the government could not have called Dr. [REDACTED] to testify regarding his findings. Further, there was no reason the government failed to produce a certificate from the correct hospital authenticating Dr. [REDACTED] records. Under these circumstances, the admission of Pros. Ex. 7, severely impacted Appellant's ability

to contest a critical element of the charge against him—the severity of Mr. [REDACTED] injuries.

All four *Kohlbeek* factors favor appellant. The government’s case would have struggled to definitively establish the severity of Mr. [REDACTED] injuries absent any actual medical diagnosis of his injuries. Appellant’s case was relatively strong, bolstered by the fact that civilian authorities only saw fit to charge appellant with simple assault. (R. at 321). Lastly, the evidence was material to the government’s case and of high quality. It offered the only evidence of the actual diagnoses against appellant, and that materiality was demonstrated by the position it held in closing argument—the last piece of evidence the trial counsel presented to the panel. (R. at 437–38). That materiality cannot be understated. The probative weight of testimony evidence from lay witnesses who were inebriated at the time of the incident pales in comparison to the value of medical evidence straight from a physician who evaluated Mr. [REDACTED] the night of the incident. For the foregoing reasons, appellant requests this court set aside the findings and sentence.

III. WHETHER APPELLANT’S CONVICTION FOR ASSAULT CONSUMMATED BY BATTERY IS LEGALLY AND FACTUALLY INSUFFICIENT

Facts Relevant to Assignment of Error

The government charged appellant with assault upon a person in the execution of law enforcement duties by grabbing onto Officer [REDACTED] “body,

clothing, and vest.” (Charge Sheet). Officer [REDACTED] encountered Appellant and two friends waiting outside an apartment building, intoxicated. (R. at 313–16). Appellant approached his friends and Officer [REDACTED] too closely, causing officer [REDACTED] to ask Appellant to “maintain arm’s distance . . . just for officer safety.” (R. at 315–16). Officer [REDACTED] then walked all three males to the sidewalk in front of the building. (R. at 316).

Appellant got too close to Officer [REDACTED] again. (R. at 316). Officer [REDACTED] responded by reminding appellant not to get too close, and by putting his hand on appellant’s chest to illustrate the distance of an arm’s length. (R. at 316). Appellant then grabbed Officer [REDACTED] outer vest and only his vest. (R. at 316) (“Q. . . . the only part that he grabbed was your vest? A. Yes.”). Officer [REDACTED] gave verbal commands to get his hands off; when appellant didn’t reply, Officer [REDACTED] grabbed appellant’s hands and determined it was time to take appellant into custody because “he met the criteria for public intoxication.” (R. at 318). At this point in time, Officer [REDACTED] did not know about any altercation involving appellant and Mr. [REDACTED] (R. at 319).

During trial, Officer [REDACTED] testified he was not “injured in any way.” (R. at 320). Further, as a civilian police officer, Officer [REDACTED] exercised discretion in charging decisions. (R. at 321). Officer [REDACTED] determined, in his experience as an officer with extensive experience dealing with “subjects of varying levels of

aggression and passivity[,]” it would be inappropriate to charge appellant with assault. (R. at 321–22). The panel convicted appellant of the lesser-included offense of assault consummated by battery. (R. at 472).

Standard of Review

This court reviews questions of legal sufficiency de novo. *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019). The court considers whether, “any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt[,]” and does so drawing every reasonable inference in favor of the prosecution. *Id.* (citation and quotation omitted).

This court reviews the factual sufficiency of evidence de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The court “may affirm only such findings of guilty..., as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.” Article 66(d)(1), UCMJ.

Law

Assault consummated by battery consists of the following elements: 1) “that the accused did bodily harm to a certain person;” and 2) “that bodily harm was done with unlawful force or violence.” *United States v. Bonner*, 70 M.J. 1, 3 (C.A.A.F. 2011) (quotation omitted). Bodily harm is defined as “any offensive touching of another, however slight.” *Id.* That contact must, at a minimum, “be offensive given the ordinary understanding of what it means to be offensive.” *Id.*

see also United States v. Alston, 69 M.J. 214, 216 (C.A.A.F. 2010) (stating “words used in a statute will be given their common, ordinary and accepted meaning” in the context of defining what constitutes an offensive touching).

Black’s Law Dictionary defines offensive, in relevant part, as “[c]ausing displeasure, anger or resentment; esp., repugnant to the prevailing sense of what is decent or moral[.]” *Blacks Law Dictionary* 1188 (9th ed. 1999). A conviction for assault consummated by battery is legally insufficient where there was no indication the purported victim found appellant’s conduct offensive or the purported victim was unable to protest his actions. *United States v. Johnson*, 54 M.J. 67, 69 (C.A.A.F. 2000).

Argument

Appellant’s conviction for assault consummated by battery is legally insufficient because the government failed to offer any evidence from which a reasonable fact-finder could infer the Officer [REDACTED] suffered an offensive touching within the plain meaning of the word. There is nothing to indicate appellant’s actions caused Officer [REDACTED] displeasure, anger, or resentment, or that it would be repugnant to the prevailing sense of decency. Rather, to the contrary, Officer [REDACTED], in his training and experience, determined assault was an inappropriate charge based on circumstances where: 1) Officer [REDACTED] grabbed appellant first; 2) Appellant

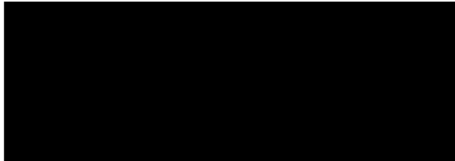
only grabbed officer [REDACTED] outer vest; and 3) appellant did not injure Officer [REDACTED] “in any way[.]” (R. at 319–21).

The government’s conviction, in part, rests on a charge sheet which exaggerates appellant’s criminality, asserting appellant grabbed on to Officer [REDACTED] body and clothing, in addition to his vest—an assertion flatly rejected by Officer [REDACTED] on the stand. (Charge Sheet); (R. at 320). Taken as a whole, without any assertion by Officer [REDACTED] to the offensive or harmful nature of Appellant touching his vest, Appellant reaching out and grabbing Officer [REDACTED] vest—and only his vest—in a fashion which caused absolutely no injury does not meet the legal definition of “offensive” touching. *Johnson*, 54 M.J. at 69; *Black’s Law Dictionary* 1188 (9th ed. 1999).

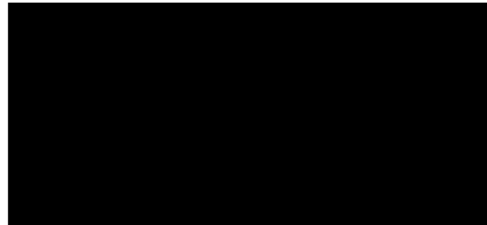
Appellant’s conviction is, likewise, factually insufficient. There simply is not sufficient evidence to support the conclusion that Officer [REDACTED] suffered an offensive touching. Therefore, this court should exercise its powers under Article 66, UCMJ by setting aside this finding.

Conclusion

Wherefore, appellant respectfully asks this honorable court to set aside the findings and sentence.



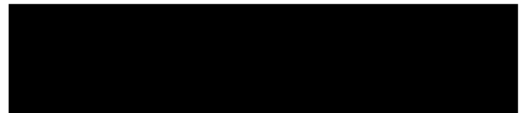
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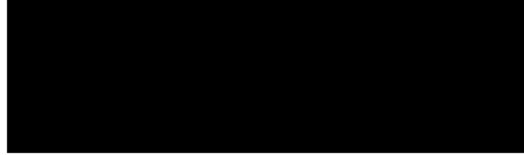
Appendix A: Matters Submitted Pursuant to *United States v. Grostefon*

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:

- 1. WHETHER APPELLANT'S CONVICTION FOR AGGRAVATED ASSAULT IS FACTUALLY AND LEGALLY INSUFFICIENT WHERE APPELLANT RAISED VALID DEFENSES OF SELF-DEFENSE AND ACCIDENT?**
- 2. WHETHER THE ARMY'S FAILURE TO ENSURE APPELLANT RECEIVED HIS PAY OR HAVE ACCESS TO HIS COMMON ACCESS CARD CONSTITUTED UNLAWFUL PRE-TRIAL PUNISHMENT?**

Certificate of Filing and Service

I certify that a copy of the foregoing was electronically submitted to the
Army Court and Government Appellate Division on 18 September 2023.



Kevin T. Todorow
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division