IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES	Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.		Docket No. ARMY 20220088
Staff Sergeant (E-6) **GARY L. GOINS** United States Army	Appellant	Tried at Fort Bragg,[1] North Carolina, on 28 May 2021, 21 October 2021, 24 November 2021, 31 January 2022, 1–2 March 2022, before a general court-martial convened by Commander, Headquarters, Fort Bragg, Colonel Gregory Batdorff, Military Judge, presiding.

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

Assignments of Error[2]

I. WHETHER THE SPECIFICATION OF CHARGE II FAILS TO STATE AN OFFENSE WHERE THE UNDERLYING REGULATION HAD BEEN RESCINDED MORE THAN SIX MONTHS BEFORE THE ALLEGED VIOLATION.

II. WHETHER APPELLANT'S COUNSEL WERE INEFFECTIVE WHEN, AMONG OTHER ERRORS, THEY HAD APPELLANT NAKED PLEA TO ALL

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[1] At the time of trial, the installation was named Fort Bragg. Effective 2 June 2023, the installation was officially redesignated as Fort Liberty: https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN38392-AGO_2023-13-000-WEB-1.pdf.

[2] The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits they lack merit. Should this Court consider any of those matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

PANEL NO. 2

CHARGES, INCLUDING VIOLATING A RESCINDED REGULATION THAT HAD EXCEPTIONS, MISUNDERSTOOD THE CONFRONTATION CLAUSE, AND THERE WAS A VIABLE DEFENSE TO MOST OF THE ALLEGATIONS.

III. WHETHER THE JUDGE ERRED BY ALLOWING, OVER OBJECTION, THE PARTY-HOST/ALCOHOL-PROVIDER TO UTILIZE 1001(C) TO PRESENT MATTERS TO THE SENTENCING AUTHORITY AND WHETHER THE CONTENTS OF EACH OF THE 1001(C) STATEMENTS WERE ADMISSIBLE.

IV. WHETHER THE JUDGE VIOLATED *UNITED STATES V. GOMEZ* WHEN HE LET [redacted] DISCUSS HER MENTAL HEALTH CONDITIONS AND THEN AN EXPERT TO PROVIDE AN OPINION BASED ON THAT INFORMATION WHILE PROHIBITING THE DEFENSE FROM SEEING THE ASSOCIATED RECORDS.

V. WHETHER THE JUDGE ERRED BY ALLOWING HEARSAY EVIDENCE WHICH DID NOT MEET ANY ENUMERATED EXCEPTION.

VI. WHETHER THE JUDGE ERRED IN ORDERING DEPOSITIONS WHEN HE MISTATED THE APPROPRIATE TEST AND MADE NO FINDINGS OF FACT OR CONCLUSIONS OF LAW.

VII. WHETHER THE EVIDENCE FOR SPECIFICATION 3 OF CHARGE I WAS FACTUALLY AND LEGALLY SUFFICIENT WHEN THE LANGUAGE USED WAS NOT OVERTLY SEXUAL ESPECIALLY IN THE CONTEXT OF THE VICTIM'S OTHER MESSAGES/DAILY USE AND THE JUDGE DID

NOT DISCUSS THE FIRST AMENDMENT AS REQUIRED BY *BYUNGGU-KIM*.

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Statement of the Case

On 1 March 2022, a military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification of sexual assault of a child, four specifications of sexual abuse of a child, one specification of violation of a lawful general order, and one specification of obstructing justice, in violation of Articles 92, 120b, 131b Uniform Code of Military Justice, 10 U.S.C. §§ 892, 920b, 931b [UCMJ]. (R. at 265; Statement of Trial Results [STR]). The next day, the military judge sentenced appellant to confinement for 42 months, reduction to the grade of E-1, and a dishonorable discharge.[1] (R. at 421; STR). The convening authority took no action on the adjudged sentence. (Action). On 26 May 2022, the military judge entered judgment. (Judgment).

[1] The military judge adjudged concurrent sentencing as follows:

Charge	Specification	Confinement
I	1	42 months
I	2	24 months
I	3	12 months
I	4	18 months
I	5	18 months
II	THE	4 months
III	THE	8 months

(R. at 421; STR).

Statement of Facts

On 24 December 2020, appellant met Miss [redacted] at a Christmas party on the Aramco Compound in Dhahran, Saudi Arabia. (R. at 201–02). He and other members of his unit were guests in Mr. [redacted] and Ms. RW's house. (R. at 202, 209). Appellant drank alcohol that was provided at the party and gave Miss [redacted] a sip out of his cup. (R. at 207, 209–10, 219, 229–30). During presentencing proceedings, Miss [redacted] testified he also gave her a cup of her own. (R. at 294).

As they talked, flirted, and exchanged phone numbers, other guests warned him Miss [redacted] was in high school. (R. at 207, 223–24, 239, 242–43; Pros. Ex. 112). In fact, when he met her, she was standing in a group of other teenagers. (R. at 208). Thirty-nine-year-old appellant knew Miss [redacted] was fifteen years old. (R. at 207–08, 247).

Eventually, appellant and Miss [redacted] found themselves near a hallway closet where appellant touched her buttocks to gratify his own sexual desire. (R. at 218–20, 226). During presentencing proceedings, Miss [redacted] testified he put his hand down the back of her pants and grabbed her buttocks. (R. at 296–97). Appellant insisted he was not drunk. (R. at 219–20, 229–30). Due to the length of time between the party and the trial, appellant did not have an independent recollection of this event, but he believed her account based on his attraction to her and the flirtatious interactions he had with her that night. (R. at 218–20, 224, 227).

Nevertheless, appellant remembered that as the night progressed, they were in the bathroom together. (R. at 232, 238). They kissed, he touched her breast with his hand, then he performed oral sex on her while she was seated on the sink. (R. at 231–33, 235, 298). Moving to the bathroom floor, he penetrated her vulva with his penis until she started to bleed. (R. at 237, 298–99).

The next day, appellant texted her asking if she was okay and sending messages such as, "I am sorry you are so sexy," "You are sexy," "When was the last time you had sex?" and "You make me so horny." (R. at 239–41, 243–45; Pros. Ex. 18–19). Fearing an investigation into what occurred in the bathroom, appellant repeatedly instructed Miss [redacted] to delete their texts. (R. at 250–58).

Additional facts are incorporated below.

Assignment of Error I

WHETHER THE SPECIFICATION OF CHARGE II FAILS TO STATE AN OFFENSE WHERE THE UNDERLYING REGULATION HAD BEEN RESCINDED MORE THAN SIX MONTHS BEFORE THE ALLEGED VIOLATION.

Additional Facts

Appellant received orders onto Active Duty to deploy to Saudi Arabia with a report date of 9 July 2020. (R. at 213–14). Pursuant to the government's request, the military judge took judicial notice of CENTCOM General Order 1C (GO-1C), dated 21 May 2013, and its punitive nature. (R. at 196; App. Ex. XXVI). Defense

affirmatively waived any objections. (R. at 196). Appellant testified he received a pre-deployment briefing on GO-1C's prohibition on distributing alcohol prior to arriving in theater. (R. at 217). He also indicated no exceptions to this prohibition applied to him at the time of the offense. (R. at 216).

Standard of Review

This Court reviews de novo whether a specification states an offense. *United States v. Turner*, 79 M.J. 401, 404 (C.A.A.F. 2020) (citation omitted). "A flawed specification first challenged after trial . . . is viewed with greater tolerance than one which was attacked before findings and sentence." *Id.* at 403 (quoting *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986)). In such case, the specification will be viewed with "maximum liberality." *Id.* (quoting *United States v. Bryant*, 30 M.J. 72, 73 (C.M.A. 1990)). As soon as the finder of fact announces a guilty verdict regarding the facially deficient specification, the trial has ended, and the "liberal construction" and "greater tolerance" standards apply. *Id.* at 405.

Law

A. Waiver.

An unconditional guilty plea is "an affirmative waiver of a failure to state an offense claim for the pleaded-to offense." *United States v. Sanchez*, 81 M.J. 501, 504 (Army Ct. Crim. App. 2021); *see generally* R.C.M. 907(b)(3), 910(j).

Nevertheless, this court may overlook waiver pursuant to its "should be approved" power under the version of Article 66, UCMJ applicable to this case. *See United States v. Steele*, 83 M.J. 188, 190 (C.A.A.F. 2023); *United States v. Chin*, 75 M.J. 220 (C.A.A.F. 2016).

B. Notice.

The military is a "notice pleading jurisdiction." *United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019) (citation omitted). This means that the government must allege in each specification, "either expressly or by necessary implication every element of the offense, so as to give the accused notice of the charge against which he must defend and protect him against double jeopardy." *Turner*, 79 M.J. at 403 (internal quotation marks and citation omitted); *see also* R.C.M. 307(c)(3).

If a specification fails to state an offense, the remedy is dismissal unless the Government can demonstrate that this constitutional error was harmless beyond a reasonable doubt. *Turner*, 79 M.J. at 403.

C. UCMJ art. 92.

Article 92 of the UCMJ criminalizes violations of a lawful general order. The elements of this offense are: (i) that there was in effect a certain lawful general order; (ii) that appellant had a duty to obey it; and (iii) that appellant violated the order. General orders are those orders generally applicable to the command of the officer issuing them throughout the command or a particular

subdivision thereof which are issued by a general or flag officer in command. UCMJ art. 92c.

Argument

A. Waiver.

Appellant waived this claim when he knowingly and voluntarily pled guilty to this offense. *Sanchez*, 81 M.J. at 504. While this court may overlook waiver, it should decline to do so. First, the military judge adjudged four months' confinement for his offense concurrent with the specifications of Charge I (forty-two months) and III (eight months).[2] (R. at 421; STR). *See United States v. Malone*, ARMY 20230151, 2024 CCA LEXIS 217, *n.4 (Army Ct. Crim. App. 23 May 2024)(mem op.), *pet. for recon. filed*. Second, the training mission policy appellant seeks to attach solely provides guidelines for obtaining a GO-1D exception to policy (ETP) that would have allowed him to distribute alcohol, not evidence that he was granted one. (Def. App. Ex. C). Nor is there an exception in either General Order that permits distribution of alcohol to a minor.

Third, appellant nevertheless received sufficient notice of the charge. Except for reference to commands and missions that did not exist in 2013,

[2] Although appellant pled without the protection of a plea agreement, the wide disparity between the confinement ranges each party recommended to the court shows it was more beneficial for appellant to do so, nonetheless. (R. at 402 (twenty-five years), 415 (eighteen months); Def. App. Ex. A at 2 (thirteen years)).

clarification of certain non-alcoholic beverages, and a requirement to forward waivers to the USCENTCOM Chief of Staff and CCJA, the prohibited conduct involving distribution of alcohol in GO-1C and GO-1D are identical. *Compare* GO-1C, paragraph 2a *with* GO-1D, paragraph 2a. Thus, this court should decline to pierce waiver.

B. Remedy.

To the extent this court finds waiver does not apply or that it should be pierced, the government concedes GO-1C was not in effect on 24 December 2020. (Def. App. Ex. B). General Order 1D rescinded GO-1C on 26 June 2020. (Def. App. Ex. B; App. Ex. XXVI-A). The government disagrees with appellant's contention that this constitutes a failure to state an offense. Instead, the specification of Charge II is factually and legally insufficient. As such, the government concurs this court should set aside and dismiss this specification.

Additionally, appellant asks this court to dismiss the specification of Charge II and reassess the sentence because "the judge found the violation of GO-1C warranted the highest sentence of any other offense and was on par with sexual assault of a child." (Appellant's Br. 10–11, 14). However, appellant is mistaken; for this offense, the military judge adjudged four months' confinement concurrent

with the specifications of Charge I (forty-two months) and III (eight months).[3] (R. at 421; STR). Thus, reassessment is unnecessary.

Assignment of Error II

WHETHER APPELLANT'S COUNSEL WERE INEFFECTIVE WHEN, AMONG OTHER ERRORS, THEY HAD APPELLANT NAKED PLEA TO ALL CHARGES, INCLUDING VIOLATING A RESCINDED REGULATION THAT HAD EXCEPTIONS, MISUNDERSTOOD THE CONFRONTATION CLAUSE, AND THERE WAS A VIABLE DEFENSE TO MOST OF THE ALLEGATIONS.

Standard of Review

Allegations of ineffective assistance of counsel are reviewed de novo. *United States v. Cueto*, 82 M.J. 323, 327 (C.A.A.F. 2022) (citations omitted).

Law

Military courts evaluate ineffective assistance claims using the Supreme Court's framework from *Strickland v. Washington*, 466 U.S. 668 (1984). *United States v. Furth*, 81 M.J. 114, 117 (C.A.A.F. 2021). "Under Strickland, an appellant bears the burden of demonstrating that (a) defense counsel's performance was deficient, and (b) this deficient performance was prejudicial." *Id*. (quoting *Strickland*, 466 U.S. at 687). Courts need not apply the *Strickland* test in any

[3] The maximum punishment for this offense is two years' confinement. Manual for Courts-Martial [MCM], App'x 12.

particular order; rather, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *United States v. Captain*, 75 M.J. 99, 103 (C.A.A.F. 2016) (citing *Strickland*, 466 U.S. at 697); *United States v. Datavs*, 71 M.J. 420, 421 (C.A.A.F. 2012)).

In evaluating performance, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Captain*, 75 M.J. at 103 (C.A.A.F. 2016) *(quoting Strickland*, 466 U.S. at 689, 694). This presumption can be rebutted by "showing specific errors [made by defense counsel] that were unreasonable under prevailing professional norms." *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001) (citations omitted). Appellant must show that "counsel's representation fell below an objective standard of reasonableness" to demonstrate deficiency. *Strickland*, 466 U.S. at 688. Further, a court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id*. at 690.

Even where counsel has committed an unreasonable error, it "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. Appellant must "affirmatively prove prejudice." *Id*. at 693. This means appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the

result of the proceeding would have been different." *Captain*, 75 M.J. at 103. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. In other words, "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). This requires consideration of "the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. In short, appellant must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

An appellate court can order a rehearing based on the accumulation of errors not reversible individually. *United States v. Castillo*, 74 M.J. 39, 43 (C.A.A.F. 2015) (quoting *United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996) (considering the nature and number of errors, their interrelationship, and combined effect, how the trial court dealt with the errors as they arose, and strength of the government's case)) (quotation marks omitted).

Argument[4]

Defense's presentencing strategy at trial reasonably addressed the R.C.M. 1002(f) sentencing factors. (R. at 410–16). The premise of their case was

[4] If this court "finds that allegations of ineffective assistance and the record contain evidence which, if unrebutted, would overcome the presumption of competence," the government requests this court order "a response from trial defense counsel in order to properly evaluate the allegations" in accordance with *United States v. Melson*, 66 M.J. 346, 350–51 (C.A.A.F. 2008).

appellant's recognition of the seriousness and wrongfulness of his conduct, willingness to take accountability, and demonstrated ability to rehabilitate. *See* R.C.M. 1002(f)(2). In so doing, defense counsel walked a delicate line in addressing R.C.M. 1002(f)(1) impact.

Now on appeal, appellant contends four categories of deficient performance: failures to (1) interview witnesses; (2) investigate; (3) object; and (4) understand the law. The government addresses each in turn:

A. Obligation to Interview Witnesses.

Appellant contends trial defense counsel should have interviewed appellant's wife and other witnesses who could rebut his first sergeant's unit impact testimony. (Appellant's Br. 30–31).

First, defense counsel are not ineffective for relying on law enforcement or other written materials to determine the need for further interviews. As appellant's wife states in her affidavit, defense counsel told her that they reviewed her interview with law enforcement. (Def. App. Ex. E). Also, appellant's wife was not at the party that night and thus would only be a pre-sentencing witness, making an interview of her less important in case preparation.

Second, it is not unreasonable for defense counsel to decide against presenting the testimony of a spouse who continues to believe in her husband's innocence at his guilty plea. (Def. App. Ex. E). Her testimony could look to the

military judge as the appellant's lack of acceptance of responsibility and negate his credit for pleading guilty.

Even without her testimony, defense was able to portray appellant as someone who is giving, helpful and takes accountability from the perspectives of a long-time family friend, student, supervising non-commissioned officer, and commanding officer. (R. at 412–15). Appellant's unsworn statement also addressed the concerns he had for his children and profession. (R. at 393). Even if his wife were to testify, the weight of that testimony likely would have been minimal at best. Moreover, the theme of his presentencing case was accountability. There is neither deficient performance nor prejudice for trial defense counsel to ensure his wife is neither involved unnecessarily, nor counterproductive to their presentencing strategy. *See United States v. Scott*, 81 M.J. 79 (C.A.A.F. 2021) ("The additional evidence that trial defense counsel should have looked into . . . was mitigating. But that is not enough under Strickland to establish prejudice.").

Third, appellant does not specify which individuals could rebut 1SG LV's testimony nor provide their affidavits detailing the same. (Def. App. Ex. A). Thus, bearing in mind the nature of military deployment, the location of appellant's crimes, and the time that had passed since their commission, the substance and significance of potential witness testimony remains speculative.

Moreover, there is no information about when appellant identified these witnesses, the quality of the information he provided to his counsel, what contact information he may have provided to his counsel, or the timeliness of the same. Thus, appellant has not overcome the presumption his trial defense counsel acted reasonably. *See Strickland*, 466 U.S. at 690.

B. Obligation to Investigate.

1. Victim Credibility.

Appellant asserts his counsel failed to investigate Miss [redacted] credibility and motivation to lie. (Appellant's Br. 34, 38). He points to digital forensic examination (DFE) preliminary findings and KaS and KS's depositions having information that may undermine Miss [redacted] credibility. However, defense counsel did have this information. (Approved Request for Defense DFE Expert Consultant; Pros. Ex. 41–45 for identification). No further investigation was necessary to properly assess and prepare for appellant's case.

Further, at trial, appellant admitted to and took responsibility for sexually assaulting Miss [redacted] It is not unreasonable for defense counsel to refrain from then cross-examining a minor victim and her mother on body image, virginity, and other adolescent issues. Instead, trial defense counsel's presentencing case was in part focused on diminishing the government's argument about irreversible loss of childhood innocence by arguing Miss [redacted] was only a few months away from the

age of consent at the time of the incident, she was intelligent, resilient and had a good support system, and her demeanor on the stand demonstrated her maturity. (R. at 411, 413). The method appellant now suggests on appeal would have undermined this presentencing theory and likely, the overall strategy. Thus, trial defense counsel's representation did not fall below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688.

2. Rescinded Regulation.

First, in evaluating defense counsel conduct, GO-1C was an order that remained in effect for over seven years. There is no evidence any member of the prosecution or the military judge, as someone familiar with this area of operation (R. at 362), was aware GO-1D had superseded it. Many attorneys reviewed this case, and this error was not identified until it reached this court. As many other attorneys missed this issue, appellant has not shown "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688.

Second, there is no prejudice as the government concurred with appellant that this court should set aside and dismiss the specification of Charge II. Moreover, as previously discussed, even though GO-1D superseded GO-1C at the time of appellant's offense, (i) he was on notice of the prohibition, (ii) there is no evidence a waiver to distribute alcohol applied to appellant, and (iii) neither

General Order contains an exception to distribute alcohol to a minor.[5] As the appellant ultimately benefited from the government's mistake, there is a lack of any prejudice. *Captain*, 75 M.J. at 103.

C. Obligation to Object.

1. Mil. R. Evid. 513.

As discussed *infra* Assignment of Error IV, after appellant admitted his guilt and while in presentencing proceedings, the evidence in question was of little materiality and quality. Thus, there was no prejudice. *Captain*, 75 M.J. at 103.

2. Article 15.

Appellant recalls trial defense counsel failed to object to the admission of an Article 15. (Pros. Ex. 111). But the military judge explicitly disregarded it. (R. at 419). Thus, this error had no effect on the judgment and appellant cannot demonstrate prejudice.[6] *Strickland*, 466 U.S. at 691.

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[5] Appellant also contends trial defense counsel's awareness that his "commander, first sergeant, and another E-7 were at the party with alcohol . . . should have prompted questions or cross-examination." (Appellant's Br. 30). Indeed, defense counsel did attempt to do so on cross of 1SG LV. (R. at 279).

[6] Appellant also notes that defense counsel failed to argue impermissible pre-trial punishment circumstances that led to this Article 15. (Appellant's Br. 34). But appellant twice affirmed with the court that he had not been illegally punished in any way prior to trial. (R. at 269).

D. Obligation to Understand the Law.

1. First Amendment.

As discussed *infra* Assignment of Error VII, the First Amendment was not implicated in this case. As this defense was neither available to appellant nor raised by the record at trial, defense counsel's performance was not deficient.

2. Confrontation Clause.

Appellant points to trial defense counsel's decision not to cross-examine the victim, mother, and a special agent during a motions hearing. (Appellant's Br. 36 (citing R. at 119–21, 126, 131)). Their testimonies were presented in support of the government's motions to pre-admit text messages and reconsider its ruling relating to a portion of Ms. KS's deposition. (R. at 109–10, 134–35). Ultimately, the government withdrew its motion to pre-admit text messages and the court sustained its deposition ruling in favor of defense. (R. at 134–35). At trial, the government properly laid foundation before the factfinder for the text messages—as defense wanted—and Ms. KS's deposition was never moved into evidence. (R. at 300). Thus, there is no prejudice.

E. Remedy.

Appellant seeks disapproval of the findings, alleging he would not have pled guilty to Charge II (GO-1C violation) and Specification 3 of Charge I (lewd text messages) if his counsel had informed him differently. (Appellant's Br. 36–37).

Again, the government concurs the court should set aside and dismiss his conviction for the specification of Charge II for factual and legal insufficiency. However, for the reasons explained *infra* Assignment of Error VII, the defense he proposes with respect to Specification 3 of Charge I was not available to him; his texts were clearly indecent. If appellant did not plead guilty, he risked receiving a higher sentence. *See* R.C.M. 1001(g)(1) ("[A] plea of guilty is a mitigating factor."). As appellant's asserted error lacks merit, it does not combine to create error. *Castillo*, 74 M.J. at 43.

Assignment of Error III

WHETHER THE JUDGE ERRED BY ALLOWING, OVER OBJECTION, THE PARTY-HOST/ALCOHOL-PROVIDER TO UTILIZE 1001(C) TO PRESENT MATTERS TO THE SENTENCING AUTHORITY AND WHETHER THE CONTENTS OF EACH OF THE 1001(C) STATEMENTS WERE ADMISSIBLE.

Additional Facts

During the presentencing proceeding, defense objected to the unsworn statements of Mr. [redacted] and Mrs. [redacted] contending they were not R.C.M. 1001(c)(2)(A) crime victims. (R. at 358–61). The military judge overruled the objection, reasoning that as a co-host of the gathering where appellant committed the crimes, it was foreseeable there could be direct impacts on Mr. [redacted] (R. at 361, 366; App. Ex. XXXVI). Mrs. [redacted] as the victim's mother, was also permitted to

testify, excepting the portions of the statement that "attempted to or appeared to attempt to besmirch defense counsel [for] fulfilling their roles and responsibilities[.]" (R. at 366–68, 372–73; App. Ex. XXXVII).[7]

Mr. [redacted] spoke about the emotional harms to his family, namely, social and psychological impacts, including his wife's sleepless nights and loss of friendships. (R. at 370). Mrs. [redacted] similarly told the court about emotional harms to her family, namely, psychological impacts, including Miss [redacted] experience with [redacted] anxiety, nightmares, and mistrust leading to adverse effects on the victim academically. (R. at 372–73). During Mrs. [redacted] sworn statement, she mentioned Miss [redacted] anxiety and depression as well. (R. at 316).

Standard of Review

Interpreting R.C.M. 1001(c)(1) is a question of law this Court reviews de novo. *See United States v. Barker*, 77 M.J. 377, 382 (C.A.A.F. 2018) (considering the admissibility of a victim's unsworn statement under R.C.M. 1001A (2016 ed.)).

However, a military judge's decision to admit a victim's unsworn statement is reviewed for an abuse of discretion. *United States v. Harrington*, 83 M.J. 408, 418 (C.A.A.F. 2023); *United States v. Edwards*, 82 M.J. 239, 243 (C.A.A.F. 2022)

[7] The handwritten marking on Mrs. [redacted] impact statement appears as "XXXVIII" but should be "XXXVII." (R. at 366–69; DD Form 490; App. Ex. XXXVIII (Illinois Statute)). For consistency throughout this brief, the government will refer to her impact statement as App. Ex. XXXVII.

(citations omitted). A military judge abuses his discretion when his legal findings are erroneous or when he makes a clearly erroneous finding of fact. *Edwards*, 82 M.J. at 243 (citing *Barker*, 77 M.J. at 383; *United States v. Eugene*, 78 M.J. 132, 134 (C.A.A.F. 2018).

Law and Argument

A. Crime Victims.

A crime victim of an offense of which appellant has been found guilty has the right to be reasonably heard at the presentencing proceeding relating to that offense. R.C.M. 1001(c)(1). The crime victim may make a sworn statement, unsworn statement, or both. R.C.M. 1001(a)(3)(A). A "crime victim" is an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty. R.C.M. 1001(c)(2)(A). This is a fact-specific analysis. *See United States v. Bailey*, ACM 39935, 2021 CCA LEXIS 380, at *3 (A.F. Ct. Crim. App. 30 July 2021) (unpub. op.) (aff'd on other grounds) (reciting the military judge's reasoning that the definition was "broad enough" to encompass the mother of two named victims in the case); *see also United States v. Da Silva*, ACM 39599, 2020 CCA LEXIS 213, *49–50 (A.F. Ct. Crim. App. (25 June 2020) (unpub. op.) ("[T]he military judge must make an individual decision about each person who seeks to exercise their right to be reasonably heard."); *United States v. Dunlap*, ACM

39567, 2020 CCA LEXIS 148, at *19 (A.F. Ct. Crim. App. 4 May 2020)(unpub. op.) (declining to determine *per se* victims in the context of adultery).

In this case, Mr. [redacted] and Mrs. [redacted] were crime victims. Mr. [redacted] was the co-host of the gathering at which appellant distributed alcohol to and sexually assaulted Miss [redacted] (R. at 369). He suffered emotional harm as a direct result of appellant committing crimes in his home. R.C.M. 1001(c)(2)(A). Similarly, Mrs. [redacted] as Miss [redacted] mother, was harmed emotionally as a direct result of appellant's crimes against her daughter. (R. at 372–73). *See Harrington*, 83 M.J. at 419 ("If a victim elects to make an unsworn statement—as the parents of Appellant's shooting victim did in this case—the unsworn statement may be delivered orally[.]"). Accordingly, both Mr. [redacted] and Mrs. [redacted] had a right to be reasonably heard at the presentencing proceeding.

B. Victim Impact Statement.

The "right to be reasonably heard" means the right to make an unsworn statement. R.C.M. 1001(c)(2)(D)(ii). Unsworn victim statements are not evidence. *United States v. Tyler*, 81 M.J. 108, 112 (C.A.A.F. 2021). The contents of such statements may only include in relevant part, victim impact. R.C.M. 1001(c)(3). "Victim impact" includes any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which appellant had been found guilty. R.C.M. 1001(c)(2)(B). Although the

crime victim may not be cross-examined upon it, the defense may rebut any statements of fact therein. R.C.M. 1001(c)(5)(A).

Here, the contents of Mrs. [redacted] unsworn statement were admissible. Her victim impact statement described psychological harms she and her family endured and were continuing to suffer, including having to leave their home of twelve-years in Saudi Arabia to return to the United States to support their daughter. (R. at 372–73). Yet, appellant contends portions of Mrs. [redacted] testimony (i) were a veiled attack against defense counsel and (ii) and improper smuggling of evidence subject to the military judge's Mil. R. Evid. 513 ruling. (Appellant's Br. 48–49). The government addresses each in turn.

First, no admitted portion of her unsworn statement constituted an attack on defense. A plain reading of the statement shows the portion referring to "those in the courtroom" appears in the paragraph where Mrs. [redacted] describes alienation. (App. Ex. XXXVII). It follows her sentence referring to "everyone in this [courtroom]," without distinction between prosecution, defense, bailiff, gallery, or judge. Not even trial defense counsel interpreted the admitted portions of her statement as what appellant claims on appeal.[8] Thus, the military judge committed

[8] In fact, defense counsel objected to the portions that appeared to attack defense counsel and the military judge sustained that objection. (R. at 366–68, 372–73; App. Ex. XXXVII). The military judge showed particular sensitivity to this issue through his colloquy with the government and those objectionable portions were removed accordingly. (R. at 367–68).

no error.

Second, the military judge's Mil. R. Evid. 513 ruling did not prohibit the introduction of such evidence nor limit defense's ability to cross-examine a witness on these matters. (App. Ex. XXVIII) (sealed). Military Rule of Evidence 513 addresses confidential patient-psychotherapist communications, not mere mention of mental health issues. Additionally, for the first time on appeal, appellant contends defense was prevented from exploring alternate causes of Miss [redacted] condition.[9] (Appellant's Br. 34). Not only are those communications not necessary to effectuate such cross, but this line of questioning would have undermined trial defense counsel's presentencing strategy.

C. No Prejudice.

The test for prejudice is whether the error substantially influenced the adjudged sentence. *Barker*, 77 M.J. at 384 (quotation omitted). The government bears the burden of showing the error was harmless but need not show harmlessness beyond a reasonable doubt. *Harrington*, 83 M.J. at 422 (citation omitted). When determining whether an error had a substantial influence on a sentence, this Court considers the following four factors: (1) the strength of the government's case; (2) the strength of the defense case; (3) the materiality of the

[9] At trial, trial defense counsel sought in camera review and to compel discovery in hopes of finding inconsistent statements. (App. Ex. V, V-A) (sealed).

evidence in question; and (4) the quality of the evidence in question. *Barker*, 77 M.J. at 384 (quotation omitted). Here, to the extent this court considers there was error in the admission of sentencing evidence, appellant suffered no prejudice.

The government's case was strong. Aggravation evidence included the circumstances relating to and resulting from appellant's crimes through Miss [redacted] First Sergeant (1SG) LV, Mrs. [redacted] Mrs. RW, and Miss JW's testimonies as well as Mrs. VG's redacted deposition. (R. at 274–75, 286–304, 313–14, 324–31, 337–38; Pros. Ex. 112). In particular, Miss [redacted] described in great detail interactions appellant purportedly could not remember. (R. at 296–97). She recounted her experience cleaning her own blood off the floor. (R. at 299). Mrs. VG recalled appellant's comments on Miss [redacted] appearance and repeated assurances that he was trained to deal with adolescents. (Pros. Ex. 112 at 4:42–5:27, 15:05–16:04). 1SG LV also described the detrimental effects appellant's crimes had on the unit and their relationship with Saudi residents and leaders. (R. at 275–79). The government expert in trauma affiliated with child sexual abuse testified to potential long-term psychological and physiological effects that Miss [redacted] could experience. (R. at 347–48). The government's witnesses also testified to the psychological and social impact of appellant's crimes. (R. at 276–77, 314–20, 331). Thus, this factor weighs heavily in the government's favor.

By comparison, defense's case was weak relative to the government's case.

In his unsworn statement, appellant did not introduce any particular matters in extenuation or mitigation, except that he told Miss [redacted] to delete the texts, fearing potentially devastating effects on his life, and Miss [redacted] was only a few months away from the age of consent at the time appellant sexually assaulted her. (R. at 392–94, 411). Defense also offered four witnesses who generally portrayed him in a positive light as well as a Good Soldier Book, consisting of four family photos, information about his service, and Evaluation Reports from 2016–19.[10] (R. at 378, 382, 384, 389; Def. Ex. A). Thus, this factor weighs in the government's favor. *See Edwards*, 82 M.J. at 247.

With respect to materiality, this factor, on balance, weighs in favor of the government. If this court considers Mrs. [redacted] statement as an attack on defense, the military judge explicitly disregarded that interpretation. (R. at 368). Moreover, the information conveyed in both statements were already obvious from what was presented at trial. *Cf. United States v. Cunningham*, 83 M.J. 367, 372 (C.A.A.F. 2023).

With respect to quality, this court should consider that they each consisted of eight to ten sentences. (App. Ex. XXXVI, XXXVII). While their statements were

[10] The testimony defense elicited about appellant serving as a coach, squad leader, and drill sergeant was consistent with the government's aggravation argument that appellant was in the teaching business and trained to deal with adolescents. (R. at 404; Pros. Ex. 100).

emotional, there is "no indication in this record that the military judge allowed the emotional aspects of the presentation to affect him to a point that he departed from his duty to determine an appropriate sentence in a fair, objective, and unbiased manner." *Cunningham*, 83 M.J. at 372. Instead, it is more likely the nature and underlying circumstances of appellant's crimes that substantially influenced the adjudged sentence, not Mr. [redacted] or Mrs. [redacted] cursory statements.[11] *See Barker*, 77 M.J. at 384 ("[T]he age of the victimized children and the manner in which they were sexually assaulted, was particularly horrific. We are convinced it was that, rather than the heavily redacted and tenuously connected letters, that influenced the sentence.").

Accordingly, the facts of this case do not merit relief.

Assignment of Error IV

WHETHER THE JUDGE VIOLATED *UNITED STATES V. GOMEZ* WHEN HE LET [redacted] DISCUSS HER MENTAL HEALTH CONDITIONS AND THEN AN EXPERT TO PROVIDE AN OPINION BASED ON THAT INFORMATION WHILE PROHIBITING THE DEFENSE FROM SEEING THE ASSOCIATED RECORDS.

Additional Facts

Prior to trial, the government gave notice to defense of their intent to

[11] Notably, the government asked for a sentence of twenty-five years consecutive confinement, fifteen of which would be for the most serious offense. (R. at 402).

introduce Mil. R. Evid. 513-related evidence. Defense articulated its need for rebuttal evidence and opportunity to find inconsistent statements. (App. Ex. V, V-A) (sealed).

In October 2021, the military judge denied defense's motion for an in-camera review of and to compel Mil. R. Evid. 513 records in a closed motions hearing. (R. at 22; App. Ex. V, V-A, VI, XXVIII) (sealed). He reasoned in part that defense failed to meet its burden to demonstrate credible, specific evidence in support of its motion and there was no constitutional exception to Mil. R. Evid. 513. (App. Ex. XXVIII) (sealed).

During presentencing proceedings on 2 March 2022, Miss [redacted] testified she was diagnosed with [redacted] and experienced nightmares, which was a symptom of that [redacted] (R. at 310). Those nightmares included reliving a sexual assault. (R. at 310). Defense did not object. Subsequently, the government's expert in trauma affiliated with child sex abuse testified that while she could not predict the long-term effects on Miss [redacted] the symptoms of a [redacted] diagnosis could be aggravated. (R. at 347). On cross-examination, she testified that with intervention, it was also possible those symptoms could be eliminated. (R. at 350–51). She further agreed that marks of resilience were present in Miss [redacted] case. (R. at 351).

Standard of Review

When an appellant fails to object to the asserted error in the admission of

sentencing evidence, this court reviews for plain error. *United States v. Gomez*, 76 M.J. 76, 79 (C.A.A.F. 2017) (citing *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008)). Thus, appellant bears the burden of establishing: (1) there was error; (2) the error was clear or obvious; and (3) the error materially prejudiced a substantial right. *Id.* (citing *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014). The failure to establish any one of the prongs is fatal to a plain error claim. *Id.* (quoting *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006) (quotations omitted).

Law

A. Evidence in Aggravation.

The government may introduce evidence of aggravating circumstances pertaining to the medical impact an accused's offense has had on any person or entity who was the victim of the offense. *Gomez*, 76 M.J. at 79 (citing R.C.M. 1001(b)(4)). Those aggravating circumstances can include the effect of the process on a victim and encompass the harm inflicted on a victim's family. *Id.*

In *Gomez*, one of the victims testified in relevant part, "the trial process caused her stress; stress causes preeclampsia; she experienced preeclampsia during her pregnancy; and the preeclampsia caused her child to be born prematurely." 76 M.J. at 79. The Court in dicta asserted it appeared on its face her testimony was admissible. *Id.* But when viewed in a broader context, the testimony would be

inadmissible if she was providing the factfinder with (i) a diagnosis she reached on her own without possessing the necessary medical expertise to do so, (ii) expert testimony about her medical condition without the proper foundation laid for her qualifications to do so, or (iii) repeating hearsay statements her doctor made to them. *Gomez*, 76 M.J. at 79. Ultimately, the Court declined to pronounce error, clear or obvious, having found no prejudice. *Id.* at 80.

B. Prejudice.

To establish prejudice, appellant must demonstrate the testimony at issue "substantially influenced the adjudged sentence." *Id.* at 80 (citation omitted). Military courts evaluate prejudice from an erroneous evidentiary ruling by weighing (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.* (citation omitted).

Argument

A. No error.

The evidence in question was admissible when viewed in the context of the type of evidence that can be properly introduced in aggravation during the presentencing phase of a court-martial. Miss [redacted] told the military judge why she had not slept well since the incident: "I had nightmares. I was diagnosed with [redacted] and a symptom of that is . . . nightmares." (R. at 310). As in *Gomez*, this

testimony on its face appears to be proper aggravation evidence. R.C.M. 1001(b)(4).

When viewed in the context of the entire trial, Miss [redacted] testimony cannot be construed to have provided the factfinder with a diagnosis that she reached on her own. *Cf. Gomez*, 76 M.J. at 79. However, by referencing a diagnosis and then the symptoms arising therefrom, the latter reasonably could be considered to have raised *Gomez* concerns.

B. No clear or obvious error.

To the extent this court finds error, it was not clear or obvious. Even if her testimony could be construed as expert testimony about her medical condition or that she provided the factfinder with hearsay statements her doctor made to her, that testimony was "fleeting." *See Gomez*, 76 M.J. at 80. With such a cursory reference, there is an insufficient basis "to fault the military judge for taking no action even without an objection." *Gomez*, 76 M.J. at 81.

C. No Material Prejudice.

To the extent this court finds clear error, there was no material prejudice. Instead, all four factors weigh against a finding of prejudice.

As discussed earlier, the government presented a strong sentencing case in aggravation while defense's case was weak. *See* discussion *supra* AE III.C.

The third prong also weighs in favor of the government because the

evidence in question had little materiality during presentencing proceedings. In argument, the government did not mention anxiety or [redacted] when discussing victim impact, only Miss [redacted] resulting hair loss, loss of innocence, and broken family bond. (R. at 408-10). *Cf. Edwards*, 82 M.J. 248 (considering government counsel's reliance on improper evidence during closing argument). And while defense addressed [redacted] in their argument, they were able to argue that there were no records demonstrating she even had the diagnosis. (R. at 413).

Furthermore, the evidence in question was also low in quality as the brief references to [redacted] were not particularly aggravating. *See Gomez*, 76 M.J. at 80 (finding no prejudice). On the one hand, Miss [redacted] stated she experienced nightmares, a symptom of [redacted] (R. at 310). The government expert also testified appellant's crimes could potentially aggravate [redacted] symptoms. (R. at 347). But on the other hand, the government expert also testified these symptoms could also be improved or reduced with intervention. (R. at 347). On cross, defense further elicited that these symptoms could be eliminated and in Miss [redacted] case, characteristics that could make a child more resilient were present. (R. at 351). In short, the government expert could not predict the long-lasting effects in Miss [redacted] case. Thus, this fourth factor weighs in favor of the government.

Ultimately, appellant pled guilty to sexually assaulting a fifteen-year-old high school student, distributing alcohol to her, texting her lewd messages

thereafter, and obstructing justice by instructing her to delete those same lewd text messages while she was visiting her family in Saudi Arabia for the holidays. (R. at 280). While the government and defense requested twenty-five years and eighteen months confinement, respectively, the military judge adjudged forty-two months confinement. (R. at 402, 415). The sentencing decision does not indicate that the military judge was influenced by the testimony about [redacted] *See Gomez*, 76 M.J. at 80. Instead, the nature, circumstances, and consequences of appellant's crimes reasonably explain his sentence.

Assignment of Error V

WHETHER THE JUDGE ERRED BY ALLOWING HEARSAY EVIDENCE WHICH DID NOT MEET ANY ENUMERATED EXCEPTION.

Additional Facts

During her deposition, Nurse AQ testified she examined the victim and found two bruises below her knees, a minor bruise on her shoulder, and irregular vaginal bleeding. (App. Ex. XX, p. 106–108). She documented her observations with additional details on the Sexual Assault Nurse Examiner (SANE) exam report. (App. Ex. XX, p. 110–11, 113–14). The U.S. consulate administered Mrs. AQ's medical forensic exam training and it consisted of an initial two-hour online training and bi-annual refreshers. (App. Ex. XX, p. 102, 117–19).

During a motions hearing prior to trial, the government motioned to pre-

admit the report under the Mil. R. Evid. 803(6) business record exception. (R. at 86; App. Ex. XXIII; Pros. Ex. 35 for ID). Defense objected based on hearsay arguing no medical diagnosis or treatment exception, in part that Nurse AQ was not the first medical provider to see the victim and instead was conducting a forensic exam at the behest of law enforcement agents (i.e., for evidence gathering). (R. at 90–91; App. Ex. XX, p. 118–20). The government offered to amend its motion to admit only pages five and six of the report, which were the physical findings Nurse AQ observed. (R. at 93). The annotations included "greenish bruises" below the victim's knees and "bleeding from vaginal cavity." (Pros. Ex. 109). Defense further objected to these pages, arguing they were cumulative to Nurse AQ's testimony. (R. at 94).

The military judge overruled defense's objections and admitted those pages (redesignated as Prosecution Exhibit 109), finding the foundation for those observations and her documentation thereof were adequately laid during her deposition testimony. (Pros. Ex. 109; R. at 94–96). He explained, "There are no hearsay concerns, because . . . there are no statements of the alleged victim that are recorded herein; it is simply [Nurse AQ's] annotations of her observations and physical findings, as she testified to during her deposition testimony." (R. at 96).

Thereafter, during presentencing proceedings, Miss [redacted] testified she was examined once at the Johns Hopkins Emergency Room and then at the U.S.

Consulate where she met Nurse AQ. (R. at 304–06). She testified Nurse AQ took pictures of the bruises on her knees. (R. at 306).

Standard of Review

This Court reviews a decision to admit hearsay evidence for abuse of discretion. *United States v. Cucuzzella*, 66 M.J. 57, 59 (C.A.A.F. 2008).

Law

"Hearsay" is an out of court statement offered into evidence to prove the truth of the matter asserted. Mil. R. Evid. 801(c). Hearsay is not admissible unless the Military Rules of Evidence provide otherwise. Mil. R. Evid. 801–802. Military Rule of Evidence 803(4) excepts statements "made for—and is reasonably pertinent to—medical diagnosis or treatment; and describes medical history past or present symptoms or sensations; their inception; or their general cause." *See United States v. Sola*, ARMY 20210322, 2023 CCA LEIXS 237, *7 (Army Ct. Crim. App. 12 May 2023) (mem op.) (declining to permit statements from medical professionals about the patient's treatment and diagnosis into evidence under Mil. R. Evid. 803(4) in a case where the examining doctor did not testify).

Argument

A. Hearsay Exception.

The military judge committed error. The annotations are hearsay and the fact that Nurse AQ testified to the same does not address the rule itself.

Nevertheless, the annotations qualify as a hearsay exception under Mil. R. Evid. 803(1) present sense impression because Nurse AQ described a condition while or immediately after she perceived it (i.e., during the victim's examination). *See United States v. Brown,* __ M.J. __, 2018 CCA LEXIS 107, *28–21 (Army Ct. Crim. App. 28 Feb. 2018) (determining notes taken less than five minutes after observing what happened qualified as present sense impression). Thus, though the military judge relied upon the wrong legal principle, the outcome was correct.

B. No prejudice.

To the extent this court finds the annotations do not qualify for any hearsay exception, appellant suffered no prejudice. Miss [redacted] testimony during presentencing proceedings established the same: namely, that she bled and had bruising on the knees. (R. at 298, 306). Defense had an opportunity to cross-examine Nurse AQ on the issue and they did. (App. Ex. XX, p. 118–21). Moreover, bleeding was established via text message, the victim, and appellant. (R. at 237, 298; Pros. Ex. 18). Similarly, the bruises merely corroborated the victim and appellant's testimonies that he sexually assaulted her while she was kneeling on the bathroom floor. (R. at 237, 306). Thus, there is no prejudice.

Assignment of Error VI

WHETHER THE JUDGE ERRED IN ORDERING DEPOSITIONS WHEN HE MISTATED THE APPROPRIATE TEST AND MADE NO FINDINGS OF FACT OR CONCLUSIONS OF LAW.

Additional Facts

During the 1 December 2021 article 39(a) session, trial counsel requested the court order depositions for Ms. VG, Mrs. KeS, Miss KaS, and Nurse AQ if the military judge schedule the trial date after 14 December 2021. (R. at 57).

Defense objected, arguing in relevant part, the government had not met its burden to demonstrate "it's an exceptional circumstance, that the person is likely to be unavailable in the future." (R. at 57–58). The following colloquy then ensued:

> Military Judge [MJ]: They can conduct their depositions. . . . But if you're talking about the standard for its admissibility, you're right. Before they can admit it as substitute testimony for the in-person testimony, they have a burden they have to meet, a foundation they have to lay of unavailability. . . . What's your opposition to depositions being taken? You'd have about a week and a half to prepare for a deposition – that's nothing.
>
> Assistant Defense Counsel [ADC]: Yes, Your Honor. I think, for that one individual, as opposed to the other three, I think the government can easily stop their movement and keep them where they're at. Should the court rule that the deposition will take the place of in-court testimony, which we are certainly opposed to, we would ask to be able to depose those witnesses in due time, to give us enough time to get sort of --

MJ: A week and a half is plenty to prepare for a deposition.

ADC: Yes, Your Honor. We would still object, based on an inability to ---

MJ: I can't imagine a defense attorney not wanting an opportunity to get a witness under oath, subject to cross-examination. Again, I have not made a ruling as to whether they're going to be unavailable. It's like being able to have your 32.

ADC: Yes, Your Honor. *We're certainly not opposed to* ----[12]

MJ: The normal 32 investigation ---

ADC: I'm sorry, Your Honor, I apologize. My guess is the government wants to substitute a deposition for in-court testimony; that, of course, we would oppose.

MJ: That's litigation for another day. Agree?

ADC: Yes, Your Honor.

MJ: All they're asking for now is to take the depositions of these persons who are already traveling here. Any objection to that?

ADC: No, Your Honor.

MJ: Draft the order, and I'll sign it as soon as you send it to me.

Trial Counsel [TC]: Yes, Your Honor.

[12] Although not reflected in the written transcript, the audio recording reflects defense counsel asserting, "We're certainly not opposed to a deposition." (Audio (Open Session) Disc 1 of 2, filename: "1 Dec 22" at 37:45–37:51).

[. . .]

MJ: There's no error or harm in conducting the depositions. Again, I'm not ruling as to whether they are admissible. You will, obviously, need to lay the foundation, and establish that the witness is available, or it is admissible for some other reason. Agreed?

TC: Yes, Your Honor.

(R. at 58–60) (emphasis added). The military judge ordered oral depositions, citing no objection from defense. (App. Ex. XIII, p. 2; R. at 65). The witnesses were deposed on 6 and 10 December 2021. (App. Ex. XX; R. at 65). Nurse AQ testified she intended to appear to testify at trial on 28–28 January 2022. (R. at 117).

On 3 January 2022, the government notified the court of its intent to introduce the deposition testimonies and defense waived objection. (R. at 66–67). Thereafter, the military judge gave both parties an opportunity to review the deposition transcript and note objections, before ruling on those objections. (R. at 67–68, 70, 77–79, 134–35, 141–42; App. Ex. XX–XII, XXV). The parties also litigated the government's motion to pre-admit evidence utilized during the deposition testimony. (R. at 82–96; App. Ex. XXIII).

Ultimately, the parties agreed only to the admission of Ms. VG's redacted direct examination during presentencing proceedings. (R. at 356; Pros. Ex. 112).

Standard of Review

The military judge's decision to order the taking of depositions should be reviewed for an abuse of discretion.

Law

A military judge may order a deposition at the request of any party only if the requesting party demonstrates that, due to exceptional circumstances, it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at trial. UCMJ art. 49(a); R.C.M. 702(a)(1). "Exceptional circumstances" includes circumstances under which the deponent is likely to be unavailable to testify at the time of trial. R.C.M. 702(a)(2).

A request for an oral deposition may be approved without the consent of the opposing party. R.C.M. 702(a)(5). The parties may agree to the taking of a deposition without cost to the United States. R.C.M. 702(j)(1). The ordering of a deposition does not control the admissibility of the deposition at trial. R.C.M. 702(i)(1)(A).

Argument

Here, the military judge properly ordered depositions for Ms. VG, Mrs. KeS, Ms. KaS, and Nurse AQ. (App. Ex. XIII). First, the military judge reasonably interpreted defense counsel's statements in court as not objecting to the ordering of depositions. (App. Ex. XIII; R. at 60, 65). While defense initially used the

language of R.C.M. 702(a)(1)–(2), defense qualified their objection as pertaining to the government substituting the deposition for in-court testimony (i.e., its admissibility). (R. at 59). Defense agreed admission was a separate issue and then affirmatively waived objection to its ordering. (R. at 59–60). As the parties were in agreement, the military judge's order was in accord with R.C.M. 702(j)(1).

To the extent this court finds the military judge's interpretation of defense counsel's statements unreasonable, appellant suffered no prejudice. On the record, the military judge did not require the prosecution to demonstrate R.C.M. 702(a)(1) exceptional circumstances (i.e., unavailability) before ordering the deposition. Instead, he considered that (i) these prospective witnesses were already traveling to Fort Liberty, (ii) the deposition would afford defense with the opportunity to cross-examine witnesses under oath, (iii) its taking did not separately determine its admissibility, and (iv) one and half weeks was enough time for defense to prepare for the deposition. (R. at 58–60). Ultimately, the deposition afforded appellant an opportunity to cross-examine under oath, object to, and receive rulings on the testimonies of four essential government witnesses at least one month before trial. (R. at 66–68; App. Ex. XXI–XXII). Having received notice for their use as well as exhibits admitted therein and defense counsel's subsequent agreement to their admission, these depositions likely informed trial strategy, including appellant's decision to amend his pleas and forum selection without the protection of a plea

deal. (R. at 8, 66–68, 70, 141, 143, 181–82; App. Ex. XVI–XVI-A, XXXIII). Moreover, not only were their deposition testimonies admitted without defense's objection, but defense also conceded their unavailability for trial pursuant to M.R.E. 804(a)(6).[13] (R. at 77–78). As such, the government respectfully submits no remedy is appropriate.

Assignment of Error VII

WHETHER THE EVIDENCE FOR SPECIFICATION 3 OF CHARGE I WAS FACTUALLY AND LEGALLY SUFFICIENT WHEN THE LANGUAGE USED WAS NOT OVERTLY SEXUAL ESPECIALLY IN THE CONTEXT OF THE VICTIM'S OTHER MESSAGES/DAILY USE AND THE JUDGE DID NOT DISCUSS THE FIRST AMENDMENT AS REQUIRED BY *BYUNGGU-KIM*.

Standard of Review

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion and questions of law arising from the guilty plea de novo. *United States v. Byunggu Kim*, 83 M.J. 235, 238 (C.A.A.F 2023) (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)).

[13] On appeal, appellant contests its ordering but does not argue its admission was improper. (Appellant's Br. 61–62).

Law

A. Providence.

"A military judge abuses his or her discretion by 'fail[ing] to obtain from the accused an adequate factual basis to support the plea—an area in which [appellate courts] afford significant deference' or if his or her ruling is based on an erroneous view of the law." *Id*. (quoting *Inabinette*, 66 M.J. at 322). Military judges are given broad discretion on the question of whether to accept a guilty plea, and reviewing courts should only find error if "the record as a whole show[s] a substantial basis in law and fact for questioning the guilty plea." *Inabinette*, 66 M.J. at 322.

"Even if a guilty plea is later determined to be improvident, a reviewing court may grant relief only if it finds that the military judge's error in accepting the plea 'materially prejudice[d] the substantial rights of the accused.'" *United States v. Moratalla*, 82 M.J. 1, 4 (C.A.A.F. 2021) (citing UCMJ, art. 45(c)) (alteration in original).

B. First Amendment.

When a charge may implicate both criminal and constitutionally protected conduct, the guilty plea colloquy between the military judge and appellant must contain an appropriate discussion and acknowledgment of the critical distinction. *Byunggu Kim*, 83 M.J. at 238 (quotations omitted). There must be dialogue "in

which the military judge poses questions about the nature of the offense and [appellant] provides answers that describe his personal understanding of the criminality of his . . . conduct." *Id.* (quoting *United States v. O'Connor*, 58 M.J. 450, 453 (C.A.A.F. 2003)). Where such discussion does not occur, there is a substantial basis in law for questioning the plea, warranting reversal. *Id.* at 240.

C. UCMJ art. 120b.

Any person subject to this chapter who commits a lewd act upon a child is guilty of sexual abuse of a child. UCMJ, art. 120b.a(c), b(3). "Lewd act" means intentionally communicating indecent language to a child by any means, including via any communication technology, with an intent to arouse the sexual desire of any person. UCMJ art. 120b(h)(5)(C).

"Indecent language" is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. MCM, pt. IV ¶ 105c. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. *Id.* The language must violate community standards. *Id.* Whether a behavior is indecent is a matter of fact. *United States v. Negron*, 60 M.J. 136 (C.A.A.F. 2004); *see United States v. Dupont*, ARMY 20180481, 2019 CCA LEXIS 118, *7–8 (Army. Ct. Crim App. 14 Mar. 2019) (mem op.) (finding the charged language was indecent under the circumstances); *see also United States v. Meakin*, 78 M.J. 396,

402 (C.A.A.F. 2019) (considering indecent conduct under UCMJ art. 134)

Argument

In this case, the military judge did not abuse his discretion in accepting appellant's guilty plea to Specification 3 of Charge I. First, the evidence admitted at trial relevant to this specification included appellant's testimony and photos of the text messages he sent to Miss [redacted] (R. at 240–250; Pros. Ex. 18). Appellant admitted and the record reflects appellant intentionally sent Miss [redacted] lewd text messages such as, "I am sorry you are so sexy," "You are are [sic] sexy?", "When was the last time you had sex?", "You are so sexy baby," "You make me so horny sex baby." (R. at 240–250; Pros. Ex. 18). That the discussion did not culminate in a future sex act or specific sex act is not dispositive. (Appellant's Br. 65). *See United States v. Bondo*, ACM 38438, 2015 CCA LEXIS 89 (A.F. Ct. Crim. App. 18 Mar. 2015), *overruled in part on other grounds* (unpub.) (comments on appearance). Instead, appellant communicated his sexual attraction to her by commenting on her sex appeal and his own sexual arousal. This language by its very nature tends reasonably to corrupt the morals of a minor. Contrary to what he claims on appeal, appellant admitted he knew she was fifteen years old and he did so to incite his own lustful thoughts. (R. at 246–50; Def. App. Ex. A at 1, 3). Thus, there is no substantial basis in fact for questioning the plea.

Second, the record supports each essential element of the offense. Appellant

admitted he intentionally communicated indecent language to a child (fifteen-year-old Miss [redacted] by communication technology (text message), with an intent to arouse or gratify his own sexual desire. He and Miss [redacted] had exchanged phone numbers the night before so that he was certain with whom he was texting. (R. at 239, 242–43; Pros. Ex. 18). Cautioned against by two other adults—Mrs. RW and Mrs. VG—appellant's phone number exchange with a minor clearly violated community standards. (R. at 207, 239). The language tended reasonably to incite lustful or libidinous thought (i.e., appellant's own). (R. at 246). Viewing the evidence in the light most favorable to the prosecution, a reasonable inference can be drawn that appellant committed a lewd act.

Moreover, the military judge did not and was not required to advise appellant of the distinction between criminal and constitutionally protected conduct in this case. Appellant's conduct and language went "beyond the confines of [his] home." *Meakin*, 78 M.J. at 402 (declining to extend the zone of privacy to obscene materials transmitted outside from inside the home). He intentionally texted Miss [redacted] these messages with the intent to arouse his own sexual desire. (R. at 240–50). And he sent her these messages after he sexually assaulted her. (R. at 240, 244).

The language of Miss [redacted] other messages is less probative than that thirty-nine-year-old appellant knew she was a fifteen-year-old high school student. (R. at

247–50). *See United States v. Hartwig*, 39 M.J. 125, 130 (C.M.A. 1994) (affirming a conviction under UCMJ art. 133, where the accused wrote a letter containing indecent language to a fourteen-year-old schoolgirl); *United States v. French*, 31 M.J. 57, 60-61 (C.M.A. 1990) (affirming conviction under UCMJ art. 134, where accused asked his fifteen-year-old stepdaughter if he could get in bed with her). In light of the circumstances in which appellant communicated these texts, they do not "occupy a constitutional gray area under the First Amendment." *United States v. Henderson*, 83 M.J. 735, 752 (Army Ct. Crim. App. 2023) (citing *United States v. Lindor*, 83 M.J. 678 (Army Ct. Crim. App. 2023)). Instead, appellant's language was clearly indecent and thus, not constitutionally protected. Accordingly, there is no substantial basis in law for questioning the plea.[14]

[14] To the extent this court finds there is a substantial basis in law for questioning the plea, appellant suffered no material prejudice. UCMJ art. 45. Appellant's sentence for Specification 3 of Charge I (twelve months) runs concurrent with Specification 1 of Charge I (forty-two months), Specification 2 of Charge II (24 months), Specification 4 of Charge I (eighteen months), and Specification 5 of Charge I (eighteen months). (STR). Thus, even if this court were to reassess appellant's sentence, his aggregate sentence would remain the same.

Conclusion

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

[redacted]

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Chief, Government Appellate Division

CERTIFICATE OF SERVICE, U.S v. GOINS (20220088)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on the _[redacted] day of August, 2024.

[redacted]

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