IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

UNITED STATES Appellee v. MAJ (O-4) **STEPHEN L. NELSON** United States Army Appellant	**Brief on Behalf of Appellant** Docket No. ARMY 20250399 Tried at Fort Eustis, Virginia on 19 March, 9-10 June, and 4-8 August 2025 by a general court-martial convened by Commander, US Army Center for Initial Military Training, Lieutenant Colonel Pamela L. Jones, military judge, presiding

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

Assignments of Error[1]

I. WHETHER APPELLANT'S CONVICTION IS LEGALLY AND FACTUALLY INSUFFICIENT.

II. WHETHER APPELLANT'S CONVICTION IS FURTHER LEGALLY INSUFFICIENT, AND LACKED NOTICE, WHERE THE GOVERNMENT USED ARTICLE 133 TO CHARGE A FALSE STATEMENT OFFENSE BUT REMOVED ELEMENTS OF ARTICLE 107.

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[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.

III. WHETHER THE SPECIFICATION OF CHARGE III WAS DEFECTIVE, FAILED TO STATE AN OFFENSE, AND VIOLATED DUE PROCESS WHERE THE GOVERNMENT DELETED ELEMENTS FROM ANOTHER OFFENSE, EFFECTIVELY REDUCING ITS BURDEN OF PROOF.

IV. WHETHER THE MILITARY JUDGE ERRED BY ADMITTING PROS. EX. 2 OVER DEFENSE OBJECTION.

Statement of the Case

On 19 March, 9-10 June, and 4-8 August 2025 appellant was tried by a general court-martial (Officer Panel) at Fort Eustis, Virginia. Appellant was convicted, contrary to his pleas, of one specification of Conduct Unbecoming an Officer in violation of Article 133, UCMJ, 10 U.S.C. § 933. (R. at 1146). Appellant was acquitted of all other charges. (R. at 1146). The military judge sentenced appellant to be reprimanded and to forfeit $2,000 pay per month for two months. (R. at 1190). The Convening authority took no action on the findings or sentence. (Action).

Statement of Facts

Amidst the breakup of their marriage, appellant's wife, [redacted] accused him of various misconduct, including physical and sexual assault. *See* (Charge Sheet). Shortly before making these accusations, as appellant and [redacted] approached divorce, [redacted] demanded $6000 in monthly child support, payment of the loan on her SUV,

and other concessions – and promised that, if appellant did not acquiesce, she would ruin his military career. (R. at 766).

Unsurprisingly, appellant was acquitted of all of [redacted] direct accusations. (R. at 1146). The sole conviction was for a novel Article 133 specification relating to appellant's submission of a mental health petition though the state of Michigan. (R. at 1146). The wording of this novel specification is important to this appeal:

> THE SPECIFICATION (Conduct Unbecoming an Officer): In that Major Stephen L. Nelson, U.S. Army, did at or near Grand Rapids, Michigan, on or about September 2023, while a commissioned officer, wrongfully submit a false statement under penalty of perjury, to wit: "[redacted] stated she wants to kill herself" or words to that effect and "She was afraid she would harm [her children]" or words to that effect, which statement was false in that [redacted] did not state that she wanted to kill herself or that she was afraid she would harm her children, and that such conduct, under the circumstances, constituted conduct unbecoming an officer.

(Charge Sheet) (second set of brackets in original).

1. <u>The mental health petition</u>

The state of Michigan has a system of court-issued mental health orders under the supervision of probate judges. (R. at 499-500). If a family member or other third party has a concern about someone's mental health, they can work with a social worker to petition for a mental health order for evaluation and/or treatment. (R. at 499-502).

On 5 September 2023, appellant initiated a mental health petition for his wife, [redacted] (Pros. Ex. 2, R. at 774). Appellant met with a licensed practitioner, [redacted]

[redacted], for about 25 minutes to discuss his concerns with his wife's mental health. (R. at 774). Appellant did not personally fill out any paperwork – he just talked while [redacted] took notes. (R. at 774-75, 779). At the conclusion of the meeting, appellant was not given anything to sign. (R. at 775). Instead, the staff told appellant they would call him when the paperwork was completed and he could come pick it up at that time. (R. at 775).

Appellant later received that call and returned to pick up the paperwork. (R. at 777). The first time appellant saw the form or its contents was when he picked it up, after it had already been signed by the probate judge. (R. at 779). He was given two packets, one for his own records, and one which he was instructed to bring to the local police station so they could staff it and execute a mental health pick-up. (R. at 777). Appellant did so and the police picked [redacted] up at the house to take her for a mental health evaluation. (R. at 784-85). Later the same day, [redacted] was released and returned to the house. (R. at 787).

2. <u>Appellant's actions prior to seeking the petition</u>

Prior to filing the petition, appellant sought advice from a wide range of individuals – mostly members of his family and [redacted] family.

Most prominently, appellant contacted [redacted] parents about his concern for [redacted] mental health. (R. at 593, 659-62). Appellant communicated that he was intending to petition for a mental health evaluation. (R. at 594). This conversation

lasted "multiple hours." (R. at 599); *see also* (R. at 690, 701) (testimony this visit was "three hours" long). [redacted] father stated that he would support appellant if appellant thought the petition was necessary, though he did not want his own name associated with the petition. (R. at 594).

Appellant also consulted with his own parents for advice. (R. at 631, 688-89; 700-02, 767-68).

Appellant also spoke to [redacted] brother prior to filing the petition. (R. at 604-05, 644-65, 767). Two of [redacted] other brothers also had pre-knowledge of the planned mental health petition. (R. at 783).

Appellant also sought advice from a long-time friend, [redacted] about the mental health petition. (R. at 630). [redacted] testified that appellant's "heart was broken" about the situation. (R. at 630). Appellant was sad and was just trying to find the best way to handle things. (R. at 630-31). [redacted] gave appellant support and ended up driving with appellant to file the petition. (R. at 630). [redacted] testified that appellant seemed "100 percent genuine" and was not at all trying to manipulate the process. (R. at 631). Appellant had brought up his concerns in prior conversations and was genuinely seeking advice – and he took the friend's advice. (R. at 631-32). [redacted] had also observed "extreme and bizarre" text messages from [redacted] including on the day of the petition. (R. at 632).

Appellant did not file this petition impulsively or in secret. [redacted] appellant accurately summed up: "Every single one of the family members knew exactly what was happening . . . ." (R. at 790).

3. Mental health concerns

There was substantial and overwhelming evidence that [redacted] had struggled with mental health for quite some time. The evidence is too voluminous to comprehensively catalog, but a summary may provide helpful context.

While [redacted] was pregnant in 2021, she started using marijuana. (R. at 715). She continued to use marijuana after the birth and while breastfeeding, and experienced postpartum depression. (R. at 715); *see also* (R. at 374) ([redacted] testimony that she used marijuana recreationally from 2020-23). [redacted] time went on, [redacted] continued to struggle with depression and made several distressing comments about suicidal thoughts. (R. at 715-16). At one point, [redacted] came into one of the children's room, where appellant was sitting, placed the baby in appellant's lap, and went into the master bedroom. (R. at 718). Appellant was concerned with her demeanor so he secured the children and followed her. Appellant found her holding a loaded handgun and expressing that she was going to kill herself. (R. at 718). After preventing [redacted] from committing suicide, appellant had to hide the handgun. (R. at 718).

[redacted] was seeking mental health treatment at this time, but was having some difficulty finding effective therapy through Tricare. (R. at 718). At the beginning of 2022, [redacted] again expressed suicidal ideations and told appellant, over the phone, that she was leaving their daughter at home. (R. at 718). Appellant returned home to find their daughter in a car seat on the garage floor. (R. at 719). Appellant called a married couple for help and the wife watched the children while appellant and the husband went out looking for [redacted] eventually finding her. (R. at 719). Shortly thereafter, there was another similar incident. (R. at 720). Around this time, [redacted] began doing therapy via telehealth. (R. at 719-20).

[redacted] was using prescribed Paxil and Zoloft, while also nightly self-medicating with THC and alcohol to help her sleep. (R. at 721) *see also* (R. at 374). In June of 2023, [redacted] texted appellant that she hated the children and had spanked one of them 100 times – she hated being a mom and did not even want to see the children. (R. at 726).

Even up until the time of trial, long after her separation from appellant, [redacted] remained in mental health treatment. (R. at 840).

[redacted] told appellant in writing that she suffered from anxiety and depression. (R. at 365). [redacted] personally confirmed at trial that she had suffered from suicidal ideations. (R. at 366). [redacted] confirmed that it was harder to take care of her children because of her suicidal ideations – which she described as feeling like she

would rather not exist. (R. at 366). [redacted] confirmed that she had communicated to appellant both: (1) her suicidal ideations and (2) its impact on her parenting. (R. at 366). [redacted] told appellant, in writing, that she was "fucking struggling" and "about to off myself" and "nobody's fucking listening." (R. at 368). On another occasion, [redacted] told appellant, in writing, "I'll probably off myself by then" (the record is unclear [redacted] to when "then" is in this context). (R. at 370). In the summer of 2023, [redacted] told appellant she couldn't do it anymore – hated her kids and hated being a mom. (R. at 371). [redacted] confirmed that on another occasion (the timeline is unclear) she told appellant about suicidal ideations. (R. at 372).

[redacted] own mother testified that [redacted] had told her in the summer of 2023 that [redacted] "was contemplating offing herself." (R. at 655). [redacted] mother also testified to a text message conversation in August of 2023 that said [redacted] "needed help" and "needed to get some sleep." (R. at 657-58). [redacted] mother confirmed she had told appellant about [redacted] comment about "offing herself". (R. at 659).

4. <u>Character evidence and manipulation of evidence</u>

While many relevant communications were sent through text message, this information was not comprehensively available at trial. [redacted] had obtained appellant's phone and deleted their text message history. (R. at 765). [redacted] manipulation of evidence did not stop there. [redacted] provided certain curated messages to CID, but she refused to consent to a wider review or extraction of her

cellphone data. (R. at 764-67). But the defense demonstrated that the messages [redacted] did give to the government had been selectively edited, with important messages omitted. *See* (R. at 803-07, 820-21; Def. Ex. N, O, P).

Three witnesses, to include the two men she dated after appellant, testified to [redacted] poor character for truthfulness. (R. at 614, 641, 645).[2]

There was no evidence of character flaws on appellant's part. To the contrary, there was some rather glowing testimony about appellant's strong military character from his supervisor, [redacted], with the impressive title: "Branch Head for Modeling and Learning Technologies at NATO's Supreme Allied Commander Transformation". (R. at 620).[3]

5. Evidentiary presentation

Even though the paperwork in question had been filled out by [redacted], the government did not call [redacted] The government's only witness regarding the paperwork was [redacted] of the Behavioral Health Unit of the Grand Rapids, MI

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[2] Noting that appellate defense counsel understand that [redacted] falsely accused one of these men of misconduct similar to what she accused appellant of – and that man is currently suing [redacted] for defamation. Furthering the pattern of volatile relationships on [redacted] part, there was also significant indication that [redacted] relationship with her own family had been volatile, though, at times, she and her family seemed to downplay this history. *See, e.g.*, (R. at 364-65, 382-83, 417-18, 730, 766, 900).

[3] Under the "new" rules on good solider evidence, this was relevant to some, but not all, of the charges. As this appeal involves only an Article 133 offense, it is relevant to that offense.

Police Department. [redacted] role was to serve the mental health order. (R. at 504). [redacted] had no predicate knowledge of the situation and was not involved in the petition process – his only involvement was serving the documents. (R. at 504-05).

[redacted] testified that the underlying documents were initially filled out and "constructed" by the private company "Network 180." (R. at 507). To [redacted] knowledge, Network 180 "manage[d] a lot of companies". (R. at 507). The documents would then be sent to probate court, signed by a probate judge, and sent back to Network 180. (R. at 507). The police then receive the documents for service. (R. at 507).

The military judge initially sustained a hearsay objection to this document (Pros. Ex. 2), over the government's assertion that it was a business record under Mil. R. Evid. 803(6) (business record). (R. at 506). After the government attempted to lay some additional foundation, the military continued to sustain the defense objection to Pros. Ex. 2. (R. at 509-10). After two lengthy Article 39a sessions, the military judge ultimately admitted the document as a business record. (R. at 520-35).[4]

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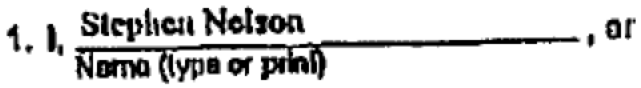
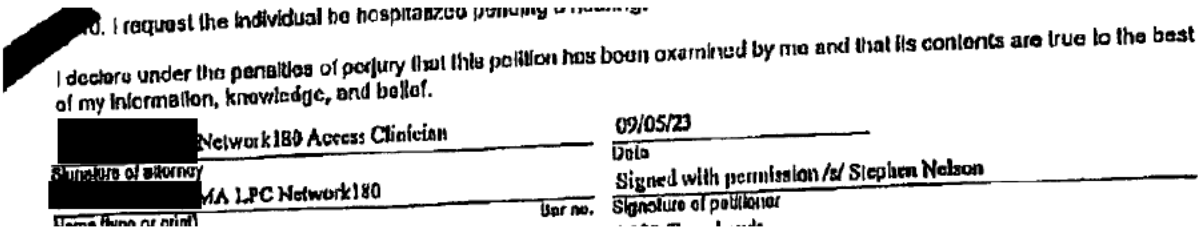
[4] Before calling [redacted] the government had tried to introduce this document through [redacted] testimony, because she was given a copy for her records. (R. at 312). The government bizarrely argued that [redacted] could authenticate these records under Mil. R. Evid. 803(6). (R. at 313-20).

6. *The contents of the mental health petition*

Given the nature of the charge, the specific contents of the petition are of importance. The form begins "I, Stephen Nelson":



(Pros. Ex. 2; R. at 779). But appellant did not actually write the form. (R. at 779). The first time appellant saw the form or its contents was when he picked it up, after it had already been signed by the probate judge. (R. at 779). The form also states "Signed with permission /s/ Stephen Nelson":



(Pros. Ex. 2; R. at 779-80). But appellant was never asked to provide permission to sign the form on his behalf. (R. 779-80). Rather, [redacted] had taken it upon himself to sign for appellant. (R. at 779-80). When processing the form, [redacted], who appears to view signature authorities quite casually, also typed his own name where an attorney was supposed to sign. (Pros. Ex. 2). [redacted] left blank the space for the attorney to put their bar number. (Pros. Ex. 2).

Based on appellant's lengthy oral recitation, [redacted] included three substantive sentences in the petition:

4. The conclusions stated above are based on
a. my personal observation of the person doing the following acts and saying the following things:

[redacted] stated she wants to kill herself. She has cut off all communication with her family, her husband's family.

b. the following conduct and statements that others have seen or heard and have told me about:

On 08/19/23-08/20/23 [redacted] reportedly called her parents Father and Mother asking that someone come take her 2 and 4-year-old children as she was afraid she would harm them.

by: Father [redacted]
Witness name Complete address Telephone no.

(Pros. Ex. 2).

Appellant had not made the specific statements in the form – but rather these were the [redacted] summaries of his much lengthier verbal comments. (R. at 780-81).

Appellant testified he had not intended [redacted] to list [redacted] parents in the paperwork but had instead provided their information for background and as a resource in case the providers had to involve additional family members, since they had asked to not be directly involved. (R. at 776). Appellant started to walk back towards the building, but then realized the judge had already signed the paperwork. (R. at 776). Appellant's friend, [redacted] confirmed this, that appellant had asked the social worker not to mention [redacted] parents in the report, but the social worker had done it anyway. (R. at 636). [redacted] testified that, when appellant read the report, "he was quite discouraged because they did not do what he had asked." (R. at 636). Appellant confirmed that he was surprised and irritated when he saw [redacted] father's name had been included in the paperwork. (R. at 777). He thought the paperwork

had been filled out "sloppily" by the staff. (R. at 777). Nevertheless, he believed the form to be truthful. (R. at 777-78).

Appellant testified that he had not lied on the court form, or to anybody, about trying to get mental health care for his wife. (R. at 711-12).

Additional facts are included as necessary below.

Argument

I. WHETHER APPELLANT'S CONVICTION IS LEGALLY AND FACTUALLY INSUFFICIENT.

Standard of Review

Issues of legal sufficiency are reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). Issues of factual sufficiency are reviewed as described in *United States v. Harvey,* 85 M.J. 127 (C.A.A.F. 2024).

Law and Analysis

The government failed to prove the charged statements were false. The evidence also failed to prove that appellant submitted the statement under penalty of perjury as charged.

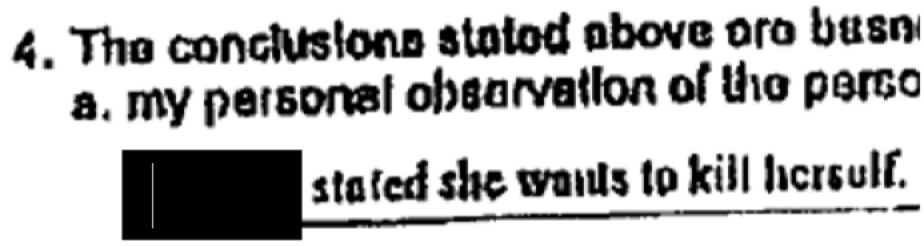
1. *Failure to prove falsity*

Most fundamentally, the evidence did not prove the statements were false. Indeed, it is at times difficult to even understand the government's theory of falsity. *See, e.g.*, (R. at 1069-73) (trial counsel closing statement about Article 133

offenses). In places trial counsel seemed to suggest that the falsity was including [redacted] father's name when [redacted] father requested his name not be included. *See* (R. at 1070) ("[redacted] father] never gave the accused permission to use his name on that petition."). This is true – and appellant clearly testified that he did not intend for [redacted] father to be listed; however, that did not make the petition false nor the charged conduct.

a. First charged statement

The first charged statement was: "'[redacted] stated she wants to kill herself' or words to that effect". (Charge sheet). No detail or context at all is provided by the petition:


4. The conclusions stated above are basn
a. my personal observation of the perso
[redacted] stated she wants to kill herself.

(Pros. Ex. 2). The petition does not list a date nor does it indicate to whom which this statement was made.

It is very difficult to understand the government's theory about how this statement was false given the record contains significant evidence that [redacted] had made statements to this effect multiple times.

[redacted] own mother testified that [redacted] had told her, in the summer of 2023, that [redacted] "was contemplating offing herself." (R. at 655). [redacted] mother confirmed

she had told appellant about [redacted] comment about "offing herself". (R. at 659). This evidence alone is enough to defeat the government's burden of proof.[5] Appellant testified that [redacted] mother had called him, concerned about the anticipated divorce, and expressed, *inter alia*, that [redacted] had voiced suicidal ideations. (R. at 762-63).

[redacted] herself, confirmed she had repeated suicidal ideations. (R. at 366, 368, 370-72). Additionally, [redacted] stated that it was harder to take care of her children because of her suicidal ideations – which she described as feeling like she would rather not exist. (R. at 366). [redacted] confirmed that she had communicated to appellant both: (1) her suicidal ideations and (2) its impact on her parenting. (R. at 366). [redacted] told appellant, in writing, that she was "fucking struggling" and "about to off myself" and "nobody's fucking listening." (R. at 368). On another occasion, [redacted] told appellant, in writing, "I'll probably off myself by then" (the

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[5] It is true that, at one stage of the trial, [redacted] mother told the government she had never communicated to appellant that [redacted] had made any suicidal or homicidal threats. (R. at 658). On the very next page, however, [redacted] mother confirmed she had told appellant about [redacted] comment about "offing herself". (R. at 659). A government paralegal also testified that, in pretrial interviews, [redacted] mother had confirmed that [redacted] had made the comment about offing herself. (R. at 681-82). [redacted] mother also stated in pretrial interviews that [redacted] had made a comment about checking herself into a facility. (R. at 681-82). [redacted] mother reported that [redacted] had made these comments in late August of 2023. (R. at 683). As these statements were admitted without objection, they constitute substantive evidence. *See* Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook [Benchbook], para. 7-11-1, n.2 (29 Feb. 2020)

record is unclear as to when "then" is in this context). (R. at 370). In the summer of 2023, [redacted] told appellant she couldn't do it anymore – hated her kids and hated being a mom. (R. at 371). [redacted] confirmed that on another occasion (the timeline is unclear) she again told appellant about suicidal ideations. (R. at 372). [redacted] acknowledged texting appellant that "it would be easier to not be alive . . . ." (R. at 372).

Appellant also testified about repeated suicidal ideations on [redacted] part, including her stating she was going to kill herself while holding a loaded gun. (R. at 715-19).

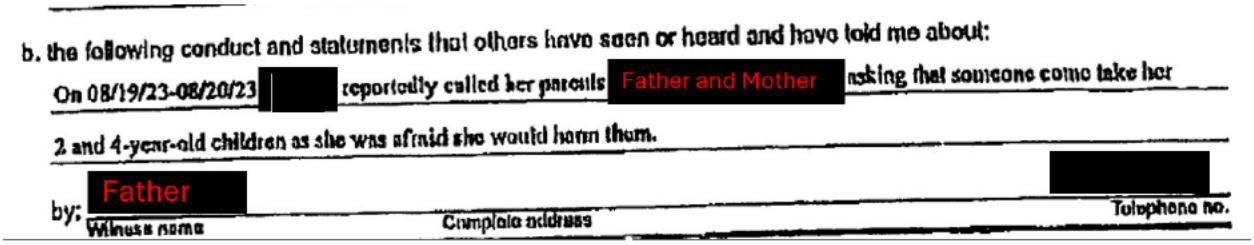
Given the lack of context in the petition, it is hard to know which of these many statements is being referred to – but the statement would be equally true with regard to any of them.

If the wording of a statement is ambiguous or contains multiple possible meanings, the Court of Appeals for the Armed Forces (CAAF) precedent demands "that doubts as to the meaning of allegedly false testimony should be resolved in favor of truthfulness." *United States v. Evans*, 37 M.J 468, 471 (C.A.A.F. 1993) (quoting *United States v. Purgess*, 13 USCMA 565, 568, 33 CMR 97, 100 (1963)). It is particularly hard to reconcile appellant's conviction with this longstanding precedent. The manner in which this statement was drafted – as a (very brief) summary typed by a third-party – emphasizes this precedent.

In furtherance of candor, appellant respectfully requests that the government concede the evidence is insufficient in regard to the statement "'[ ] stated she wants to kill herself' or words to that effect" given the huge volume of evidence, much of it from the government's own witnesses, that [ ] had made repeated statements to that effect. If the government maintains this portion of the specification is sufficient, appellant requests the government answer with specificity how the statement was proved to be false on this record.

b. Second charged statement

The second charged statement was that [ ] stated "'She was afraid she would harm [her children]' or words to that effect". (Charge sheet).


b. the following conduct and statements that others have seen or heard and have told me about:
On 08/19/23-08/20/23 [ ] reportedly called her parents Father and Mother asking that someone come take her 2 and 4-year-old children as she was afraid she would harm them.
by: Father [ ]
Witness name Complete address Telephone no.

(Pros. Ex. 2). This one-sentence statement is filtered through multiple levels of hearsay. [ ] wrote this as a summary of what appellant told [ ] about conversations with [ ] parents.

While this method of preparation makes it harder to pin down, especially when the government inexplicably failed to call [ ] himself, there was significant evidence to support the truth of the statement. Perhaps most pointedly, there was substantively admitted evidence that [ ] mother confirmed [ ] had made a

comment about checking herself into a facility, in late August of 2023. (R. at 681-83). [redacted] contemplated seeking of inpatient mental health treatment, which would obviously require help with the children matches quite well with the reference in the petition. And [redacted] mother placed this call in the exact timeframe as the call referenced in the petition.

This matches the pattern of other evidence showing that [redacted] had struggled with her parental responsibilities. [redacted] confirmed that it was harder to take care of her children because of her suicidal ideations – which she described as feeling like she would rather not exist. (R. at 366). [redacted] confirmed that she had communicated to appellant both: (1) her suicidal ideations and (2) its impact on her parenting. (R. at 366). [redacted] made suicidal ideations then drove away from home leaving her young child in an empty garage. (R. at 718-19). Over a period of six months, appellant had to spend 133 days away from his duty station to help [redacted] with mental health issues and take care of the children. (R. at 729). [redacted] acknowledged seeking help with the children from her family, and it was difficult to have two small children while geographically separated from their father. (R. at 275-76). [redacted] admitted to telling appellant "I fucking hate our kids," she "hate[d] being a mom," she didn't even want to see her kids, and spanked their toddler "at least a hundred times". (R. at 371).

Given that the specific statements were apparently filtered through [redacted] parents, it is not surprising that they would be hesitant to go against their daughter in Court, particularly in support of the man whom she was falsely claiming had sexually assaulted her. But the government evidence was a far cry from proving this never happened.[6]

The narrative that appellant would make up this lie is also deeply unsatisfying. If appellant was going to lie to try to discredit his wife, why would he choose a lie that would require her parents to confirm it? This would be highly illogical. It certainly does not fit with the government's theory that appellant was a "master strategist." (R. at 1124). This is particularly so in that appellant had worked so closely with [redacted] parents on the decision to file the mental health petition in the first place. (R. at 593-94, 599, 659-62, 690, 701). It would be totally illogical to work so closely with them and then make up a lie that they could contradict and that would undermine the petition.

2. Failure to prove that appellant submitted the statement under penalty of perjury

The government also chose that appellant's submission of the statement was "under penalty of perjury." (Charge sheet).

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[6] To be clear, the standard is not that appellant had to present evidence at trial of the underlying events. The government had to disprove them.

It is not 100% clear if the accusation is that the original statement to [redacted] at Network 180 was made under penalty of perjury, or the submission of the statement to the police department was done under penalty of perjury. In either case, the evidence does not support this.

"Perjury" means "[t]he act or an instance of a person's deliberately making material false or misleading statements under oath; esp., the willful utterance of untruthful testimony . . . ." *Black's Law Dictionary*, 1321 (10th ed. 2015).[7] Similarly 28 U.S.C. 1746 allows for documents to be signed under penalty of perjury. *See* (R. at 1151) (MJ statement that she used this standard to deny the defense R.C.M. 917 motion).

The record does not indicate that appellant was ever placed under oath, nor that he signed anything. There is some indication that he was supposed to sign Pros. Ex. 2 under an oath administered by an attorney. However, [redacted] took it upon himself to sign both for appellant, and for the attorney. (Pros. Ex. 2 at 2).

To the extent the government's theory was that appellant submitted the statement to the police department under penalty of perjury, that is equally unsupported by the record. Frankly, it is not even clear what that means. Perjury is a false statement made under oath.

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[7] The government recently submitted this definition to this Court.

Putting aside the fact that appellant was never under oath and never signed anything, it is also not clear what the "material" false statement was. As argued above, it is unclear whether any statement made on the petition was even false. But even if there was an error it is hard to see how it was "material." The thrust of the petition was that [redacted] had made self-injurious statements and exhibited dangerous behavior towards the children. Far from being materially false, both of these themes, are overwhelmingly supported by the record.

WHEREFORE, appellant respectfully requests this Honorable Court set aside the findings and the sentence.

II. WHETHER APPELLANT'S CONVICTION IS FURTHER LEGALLY INSUFFICIENT, AND LACKED NOTICE, WHERE THE GOVERNMENT USED ARTICLE 133 TO CHARGE A FALSE STATEMENT OFFENSE BUT REMOVED ELEMENTS OF ARTICLE 107.

Standard of Review

Adopted from Assignment of Error I with the following addition: When not objected to at trial, claims of a lack of fair notice are reviewed for plain error. *United States v. Rocha*, 84 M.J. 346, 349 (C.A.A.F. 2024) (citation omitted).

Law and Analysis

In the perfectly captioned case *United States v. Nelson*, the Navy Court recently examined the sufficiency of an Article 133 offense that alleged a false statement but omitted elements of Article 107 false official statement (the official

nature of the statement and the intent to deceive). 80 M.J. 748, 757 (N-M Ct. Crim. App. 2021). The Navy Court found the conviction legally insufficient – and found that that appellant lacked notice the charged conduct was subject to criminalization – where the government removed elements of Article 107 and did not clearly articulate what service custom or standard of conduct appellant violated:

> In sum, the Government charged the Article 133 offense brought under Charge III, Specification 2 without incorporating all the elements of false official statement under Article 107, and did not clearly articulate what service custom or standard of conduct Appellant violated without relying on Article 107 itself [of which Appellant was acquitted]. Moreover, the conduct charged in the Article 133 offense, minus the elements of officiality and intent to deceive, is not of a type that is obviously punishable. Therefore, we conclude that there is legally insufficient evidence that Appellant's conduct was unbecoming notwithstanding whether it amounted to a specific enumerated offense. We thus set aside the finding of guilty to this specification.

Id. at 758.

In this *United States v. Nelson*, just as in the above cited *United States v. Nelson*, the government charged a false statement type offense "without incorporating all the elements of false official statement under Article 107". *Id.* at 758. This case should reach the same conclusion as the Navy Court that, particularly without a clearly articulated service custom or standard of conduct appellant violated, appellant's conviction is legally insufficient and lacked notice.

WHEREFORE, appellant respectfully requests this Honorable Court set aside the findings and the sentence.

III. WHETHER THE SPECIFICATION OF CHARGE III WAS DEFECTIVE, FAILED TO STATE AN OFFENSE, AND VIOLATED DUE PROCESS WHERE THE GOVERNMENT DELETED ELEMENTS FROM ANOTHER OFFENSE, EFFECTIVELY REDUCING ITS BURDEN OF PROOF.

Standard of Review

Questions of law, to include whether a specification states an offense, is reviewed de novo. *United States v. Turner*, 79 M.J. 401, 404 (C.A.A.F. 2020) (citation omitted). However, the lens through which appellate courts evaluate the sufficiency of a specification differs depending on when counsel first raised the issue – with specifications subject to post-trial challenges viewed with increased liberality. *Id.* at 403-05.

Law

"The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132. For example, larceny is covered in Article 121, and if an element of that offense is lacking—for example, intent—there can be no larceny or larceny-type offense, either under Article 121 or, because of preemption, under Article 134. Article 134 cannot be used to create a new kind of larceny offense, one without the required intent, where Congress has already set

the minimum requirements for such an offense in Article 121." M.C.M. (2019) Part IV, para. 91.c.(5).

The CAAF stated the basis for the preemption doctrine in *United States v. McGuinness*, 35 M.J. 149, 152 (C.A.A.F. 1992). "The underlying basis for the preemption doctrine is Congress' and this Court's longstanding unwillingness to permit prosecutorial authorities 'to eliminate vital elements from common law crimes and offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134.'" *Id.* (quoting *United States v. Norris*, 2 U.S.C.M.A. 236, 239, 8 C.M.R. 36, 39 (1953)).

While the Article 134 preemption doctrine applies only to the general article, military courts have used similar language to prohibit using other articles to charge a residuum of elements from other specifically defined offenses. *See, e.g.*, *United States v. Curry*, 28 M.J. 419, 424 (C.M.A. 1989) (holding that Article 93 maltreatment "preempted" an Article 92 specification for disobedience of an order not to maltreat subordinates).

The Navy Court has held that using novel offenses to charge a residuum of elements from other offenses may "raise due process concerns where such a charging action 'delet[es] a vital element' and effectively reduces the Government's burden of proof." *United States v. Hoffmann*, No. 201400067, 2020 CCA LEXIS 198, at *10 (N-M Ct. Crim. App. 8 Jun. 2020) (quoting *United States*

v. Guardado, 77 M.J. 90 (C.A.A.F. 2017)) (alteration in original).

Analysis

Related to the above issue – this Court should consider whether the government's reduction of its burden of proof by deleting elements from Article 107 raised due process concerns and rendered the specification defective.

Congress and the CAAF have stated the basis for preemption is to ensure the government does not charge someone with an offense that has less elements than another offense under the UCMJ, thereby easing the government's burden in charging an accused with a crime. Under this principle, the government cannot charge an offense that has less elements than another offense, making it easier for the government to get a conviction, than if they charged the actual offense with more elements. *See McGuinness* at 152 (quoting *Norris* at 239).

That is exactly what the government did here. It deleted vital elements from Article 107, to include the official nature of the statement and the intent to deceive. The government should not be able to reduce its burden so fundamentally and still brand appellant as a criminal.

WHEREFORE, appellant respectfully requests this Honorable Court set aside the findings and the sentence.

IV. WHETHER THE MILITARY JUDGE ERRED BY ADMITTING PROS. EX. 2 OVER DEFENSE OBJECTION.

Standard of Review

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Greene-Watson*, 85 M.J. 340, 345 (C.A.A.F. 2025) (citing *United States v. Wilson*, 84 M.J. 383, 390 (C.A.A.F. 2024)). Military judges abuse their discretion (1) if the findings of fact upon which they predicate their ruling are not supported by the evidence of record; (2) if they use incorrect legal principles; or (3) if their application of the correct legal principles to the facts is clearly unreasonable. *Id.* An abuse of discretion also occurs when a military judge does not consider important facts. *United States v. Campos*, 85 M.J. 310, 314 (C.A.A.F. 2025) (citations omitted).

Law and Analysis

It is obvious the government came to trial without a well-considered plan to admit the mental health petition. (Pros. Ex. 2). The government's intent seemed to be to admit it as a business record through [redacted] simply on the basis that it had been served on her. (R. at 312-20). When this did not work, the government pivoted to the only other witness they had present, [redacted] *See* (R. at 506-35).

1. Hearsay

The form was clearly hearsay, but the military judge (eventually) admitted it under Mil. R. Evid. 803(6) (business record). This Court should consider whether a proper foundation was laid for this document. Nobody from the company (Network 180), who created the document, testified to authenticate it. There was no attestation clause, there was no business records certification or affidavit, and no records custodian testified. The only testimony was from [redacted] – who did not work for Network 180, was not involved, and had no knowledge of the contents of the document. (R. at 507). [redacted] only involvement was to serve the document. A process server is not a proper witness to authenticate a business record.

2. Confrontation Clause

Even if the document was a business record, the failure to call DD, the creator of the document, created a confrontation clause problem. The document was clearly testimonial as the only purpose of the form was for submission to a court. Indeed, the document was essentially an affidavit, albeit a very poorly executed one, the quintessential example of a testimonial document.

The necessity of [redacted] testimony was readily apparent by the way the trial played out as well. Trial counsel viciously cross-examined appellant about his statements to [redacted] and how [redacted] had interpreted them to result in the summary [redacted]

wrote. *See, e.g.*, (R. at 904-08). [redacted] missing testimony would have been critical on these points. In places, trial counsel seemed incredulous that [redacted], not appellant, had not actually filled out the form. *See, e.g.*, (R. at 907). Again, [redacted] testimony would have confirmed this for sure. [redacted] absence allowed trial counsel to suggest appellant was lying and gave the defense no way to counter this suggestion.

The government pointed to the wording on the form "signed with permission of" to argue that appellant had, in fact, given permission to [redacted] to sign the form. *See* (R. at 904). This is exactly the type of subject in which the testimony of [redacted] would have been critical. Similarly, trial counsel argued in closing appellant had given permission for [redacted] to sign the form. *S ee* (R. at 1129) ("It was signed with his permission."). But the defense did not have an opportunity to confront the person who could have denied this. In a case where the very issue of whether the alleged statements were said, or even true, it would be imperative to have the parties that said those statements provide their testimony for the factfinder to have any understanding at all. Without [redacted] testifying the causal leap is too great for the court to infer [redacted] "notes" properly captured the essence of what appellant was stating – especially when the statements are elements of the charged offense.

3. Prejudice

If this Court agrees on error, then prejudice is obvious as Pros. Ex. 2 was essential to the underlying factual basis for appellant's only conviction.

WHEREFORE, appellant respectfully requests this Honorable Court set aside the findings and the sentence.

Conclusion

WHEREFORE, appellant respectfully requests this Honorable Court set aside the findings and the sentence.

[redacted]

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Appendix (*Grostefon* Matters)

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the following matters:

1. WHETHER TRIAL COUNSEL COMMITTED PROSECTORIAL MISCONDUCT THAT WARRANTS RELIEF.

Standard of Review

Prosecutorial misconduct and improper argument are reviewed de novo and, in the absence of an objection, for plain error. *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (citation omitted).

Law

"Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014) (quotations omitted). Repeated violations of the Rules for Courts–Martial and/or Military Rules of Evidence can constitute prosecutorial misconduct. *Id*. This includes asking improper questions or eliciting improper testimony. *Id.* Similarly, improper argument can constitute prosecutorial misconduct. *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021).

Analysis

Large parts of trial counsel's examination were badgering and unprofessional. Trial counsel seemed to be under the impression that it was improper for a witness on cross examination to say anything other than "yes" or "no." *See, e.g.*, (R. at 864) (trial counsel: "The nature of cross examination is to elicit 'yes' or 'no' answers.").[8]

After badgering appellant for several pages about how Pros. Ex. 2 was or was not accurately filled out by [redacted] (questions that the presence of [redacted] would have been helpful to answer), trial counsel made the statement:

> Sir, it's quite clear to the panel you can't decide whether or not this is a truthful form. We understand.

(R. at 907).

Such statements are blatantly improper. The government's official representative should not be speaking for the panel ("it's quite clear to the panel"), associating himself with the panel ("*We* understand"), or making statements of fact during cross-examination at all.

This impropriety went to the heart of the matter on the only offense appellant was convicted of. Appellant was attempting to explain that the three

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[8] That said, trial counsel clearly did not believe this standard equally applied to defense cross examination. *See* (R. at 480, lines 9-13).

sentences that [redacted] had filled in were a summary of what appellant had said, at much greater length, orally. (R. at 904-08). Trial counsel repeatedly interrupted and asked appellant to answer only with yes or no. (R. at 904-08). After this back-and-forth, trial counsel made the above quoted comment. The comment was highly inflammatory, confused the issues, and invited the panel to conclude appellant was being deceptive.

Such inflammatory behavior by the government's official representative is particularly prejudicial given the weakness of the government's case generally. As outlined above, the government's case had substantial weaknesses.

The prejudice of trial counsel's ignoble cross examination is increased by comments trial counsel made at the end of rebuttal argument, suggesting that the panel should convict appellant precisely because of how he answered questions on cross examination:

> You all personally witnessed the way he treated the prosecution, the way he treated the orders of the military judge. And this was in an open courtroom, in front of a panel of field-grade officers, in front of members of the public. Major Nelson put on a master class of a man who absolutely loses it when a woman questions him or defies him. Imagine what it's like to be Major Nelson's wife behind closed doors.
>
> Major Nelson's behavior on the witness stand demonstrates to you that not only is he capable of committing each and every single crime alleged against Mrs. Nelson, but he is, in fact, guilty beyond a reasonable doubt. Thank you.

(R. at 1133). It is doubly prejudicial for trial counsel to blatantly commit prosecutorial misconduct in cross examination and then turn around and tell the panel they should convict because of the tenor of the cross examination.

WHEREFORE, appellant respectfully requests this Honorable Court set aside the findings and the sentence.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on January 23, 2026.

[redacted]

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