IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

UNITED STATES Appellee v. MAJ (O-4) **STEPHEN L. NELSON** United States Army Appellant	**Reply 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, U.S. 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

Argument

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

1. Specific Showing of a Deficiency in Proof

As a threshold matter regarding factual sufficiency, the government argues, without citation to authority, that appellant has not made a specific showing of a deficiency in proof sufficient to trigger further. (Gov. Br. at 12). The government seems to be placing this argument, largely *pro forma*, in every answer on factual sufficiency. The government's only elaboration is that appellant's arguments

"solely rely upon attacking the credibility of the Victim and the testimony of other witnesses." (Gov. Br. at 12).

It is not clear why the government feels an argument based on witness credibility cannot trigger factual sufficiency,[1] but it is also irrelevant because the government's factual predicate is simply not accurate. To the contrary, appellant's contention that the charged statements were true is largely *supported* by the testimony of the victim and government's witnesses. *See, e.g.*, (R. at 366, 368, 370-72) ([redacted] testimony confirming she had repeatedly displayed suicidal ideations); (R. at 655) ([redacted] mother's testimony that [redacted] had told her, in the summer of 2023, that [redacted] "was contemplating offing herself."); (R. at 371) ([redacted] testimony admitting to making obscenity laced statements about hating her children and physically harming her toddler); (R. at 681-83) (substantively admitted pretrial statement by [redacted] mother that, in late August of 2023, [redacted] had made a comment about checking herself into a facility).

2. *Failure to prove falsity*

Turning to the merits, the government brief does nothing to change the most overwhelming flaw in the evidence: the failure to prove the charged statements

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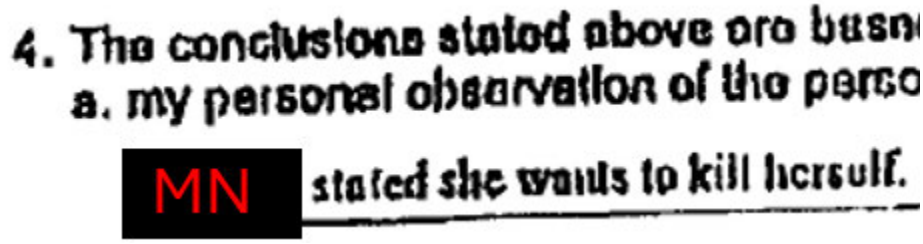
[1] For example, the Air Force Court recently found factual sufficiency review was triggered where an appellant "generally challenge[d] the believability of [the victim's] testimony." *United States v. Edwards*, No. ACM S32787, 2025 LX 136076, at *6 (A.F. Ct. Crim. App. 24 Apr. 2025).

were false.

a. First charged statement

The first charged statement was: "'[redacted] stated she wants to kill herself' or words to that effect". (Charge Sheet). The language from the petition was:


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

(Pros. Ex 2). As argued in appellant's original brief, the evidence failed to prove this statement was false and, to the contrary, overwhelmingly supported that it was true. (Appellant's Br. at 14-17). [redacted] personally, [redacted] mother, and Appellant all confirmed that [redacted] had made statements about killing herself. (R. at 366, 368, 370-72, 681-83, 715-19).

Given the overwhelming evidence that [redacted] had repeatedly made statements matching the petition, the government brief attempts to expand the charging language in order to save this fundamentally flawed allegation. First, the government argues that the evidence did not establish that, "at the time [appellant] submitted the petition the Victim was actively voicing suicidal ideations . . . ." (Gov. Br. at 13). But neither the charging language nor the underlying mental health petition contain these additional details. Appellant was not charged with falsely stating that [redacted] "was actively voicing suicidal ideations" on the day in

question.[2] The charged statement was much more generic and the government cannot retroactively change both the facts and the charging scheme on appeal.

Second, the government argues that "no other witness corroborated the necessity of the actions appellant took." (R. at 12-13). This argument is also incongruent with the charging language. Appellant was not charged with taking an unnecessary action. (Charge Sheet). He was charged with making a specific false statement ("[redacted] stated she wants to kill herself"). (Charge Sheet).[3]

Third, the government argues that "no other witness testified they had knowledge of the Victim making any such statements in August or September of 2023." (Gov. Br. at 13). Once again, this argument is not tailored to the scope of the charged conduct. Neither the charge sheet nor the mental health petition specified that the suicidal statements were made in August or September of 2023.[4]

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[2] That said, the evidence placed suicidal ideations by [redacted] quite close in time to the date of the petition. Appellant initiated the petition on 5 September 2023. (Pros. Ex. 2, R. at 774). [redacted] mother reported suicidal ideations in the summer of 2023 and statements by [redacted] about checking herself into inpatient treatment in late August of 2023 (R. at 655, 681-83). Appellant testified that [redacted] mother told appellant about suicidal ideations by [redacted] on 3 September 2023. (R. at 769-71).

[3] Once again, however, the factual premise is also questionable, as it is not particularly clear that appellant's actions were unnecessary or unjustified. It is true that the evaluation determined [redacted] did not require inpatient care, but the whole point of the evaluation is precautionary. Not every evaluation that results in release is an abuse of process. That standard would hinge the propriety of the petition entirely on the result.

[4] That said, as noted in footnote 2, considerable evidence placed some of [redacted] suicidal ideations in this timeframe.

Finally, the government argues in a footnote that: "While the Victim's mother testified the Victim made a comment in the summer of 2023 about 'offing herself,' the testimony did not establish this was a credible threat of harm." (Gov. Br. at n.6). The charging language does not hinge on whether [redacted] suicidal statements were credible. The relevant question is simply whether or not [redacted] made such statements. If she did, then appellant's statement ("[redacted] stated she wants to kill herself") was not false and the specification is legally and factually insufficient.[5]

In sum, none of the government's protestations are material to the charged conduct. The charging language alleges that the statement at issue "was false in that [redacted] did not state that she wanted to kill herself. . . ." (Charge Sheet). It does not allege that the statement "was false in that [redacted] was not actively voicing suicidal ideations at the time the petition was submitted"; "was false in that

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[5] While the question of whether [redacted] suicidal statements constituted "credible threat[s] of harm" is immaterial to this Court's ultimate determination, it is not entirely clear why the government represents that her suicidal threats were not credible. The government's only citation for this assertion is to a few words of [redacted] mother's testimony. (Gov. Br. at n. 6) (citing R. at 655, 658). It is unsurprising that [redacted] mother was supportive of her daughter in a prosecution where her child was claiming to be the victim of sexual assault. But relying on a partisan material figure to determine the credibility of suicidal ideations is not a sound practice. To the contrary, this is exactly why the mental health petition process exists: to allow for a professional evaluation of whether a credible safety threat exists.

submitting the petition was unnecessary"; "was false in that [redacted] did not state that she wanted to kill herself in August or September of 2023"; or "was false in that redacted statements that she wanted to kill herself did not establish a credible threat of harm." Rather than attempting to misdirect this Court's attention, it would be better if the government conceded the obvious: the evidence failed to prove this statement was false and, in fact, overwhelmingly supported that it was true.

The government also fails to grapple with the defense friendly standard applicable to determining whether a statement is false. As quoted in appellant's original brief, if the wording of a statement is ambiguous or contains multiple possible meanings, 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)). While the government does not substantively address this standard, it also does not dispute its applicability. The government's arguments, however, would require this Court not only to expand the charging language but to essentially apply the inverse of this controlling precedent.

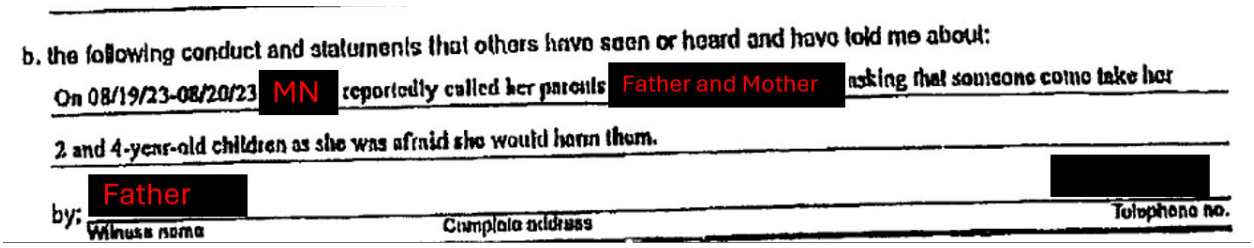
The undeniable fact on this record is that [redacted] vocalized suicidal ideations on a great many occasions, including close in time to the petition. This is not, as the government attempts to frame it, a credibility battle between appellant's testimony

and the government witnesses' testimony. Both sides confirmed that [redacted] had vocalized suicidal ideations.

This overwhelming conclusion dooms not only the charged statement ("[redacted] stated she wants to kill herself"), but the entire specification. The panel was asked to evaluate – in amalgamation – whether the two charged statements rose to the level of conduct unbecoming an officer and a gentleman. Eliminating even one of the charged statements as evidentially insufficient undermines the entire specification. That said, as discussed below, the evidence supporting the second charged statement is also insufficient.

b. Second charged statement

The second charged statement was that [redacted] stated "'She was afraid she would harm [her children]' or words to that effect". (Charge Sheet). The language from the petition was:


b. the following conduct and statements that others have seen or heard and have told me about:
On 08/19/23-08/20/23 MN 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). The government does not make a lot of substantive arguments about this statement in particular, so appellant largely rests on his original brief in this

regard.[6] As documented in appellant's original filing, there was a huge volume of evidence that [redacted] had struggled with mental health and with her parental responsibility. (Appellant's Br. at 6-8, 17-18). Perhaps most notably with respect to this charged statement, there was substantively admitted evidence that [redacted] mother confirmed [redacted] had made a statement about checking herself into a facility. (R. at 681-82). This was in late August of 2023. (R. at 683). This matches the substance of the statement charged quite closely.[7]

Additionally, the government neither acknowledges nor refutes appellant's arguments about the illogical narrative that one would have to accept to believe that appellant made up the second statement as a lie to discredit his wife. *See* (Appellant's Br. at 19). It would be highly irrational for a scheming husband to invent a story to discredit his wife that would require the cooperation of the wife's parents in the lie. This narrative is particularly illogical in that appellant worked very 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). Accepting the government's story would require the conclusion that appellant coordinated heavily with [redacted]

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[6] The government does argue in a caption that [redacted] "had not made threats against . . . the lives of her children. . . ." (Gov. Br. at 6). Echoing the incongruence of the government's arguments on about the first charged statement, this argument is not tailored to the charging language.

[7] To be clear, the standard is not that appellant had to present evidence at trial proving the truth of the charged statements. The government had to disprove them.

parents, then turned around and told a lie he knew they could and would refute. This simply makes no sense.

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

The government also charged that appellant's submission of the statement was "under penalty of perjury." (Charge Sheet). The evidence also failed to prove this portion of the specification.

a. Defining perjury

"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). 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). Appellant put forth these definitions in his original brief. (Appellant's Br. at 20). The government seems to agree with them as it neither disputes these definitions nor offers alternative definitions. [8]

b. What was appellant convicted of?

[8] Perjury is also a criminal offense in violation of 18 U.S.C. § 1623(a) requiring proof that: (i) the defendant made a declaration under oath before a court; (ii) such declaration was false; (iii) the defendant knew that the declaration was false; and (iv) the false declaration was material to the court's inquiry.

Appellant complained in his opening brief that it was "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." (Appellant's Br. at 20). "Fundamental due process requires that the accused know the . . . legal theory for which they . . . were . . . convicted." *United States v. Williams-Clark*, No. 20230185 (Army Ct. Crim. App. 23 Mar. 2026) (mem. op.), slip. op. at 1. The government brief compounds the confusion by arguing both theories in the alternative. (Gov. Br. at 15-16).

It is telling that not even the government knows what appellant was convicted of. In addition to illustrating the weakness of the case, this lack of clarity creates additional barriers to affirming appellant's conviction. *See id.* at 8 (noting that "the fact that the government itself has vacillated on its theory of the case" underpinned the ambiguity as to what appellant had been convicted of). Where not even the government knows what theory appellant was convicted under, this Court cannot know which of these theories the panel supposedly adopted.[9] If this Court finds that *either* of the government's two theories are invalid, the uncertainty as to the basis for appellant's conviction precludes affirming it. *See*

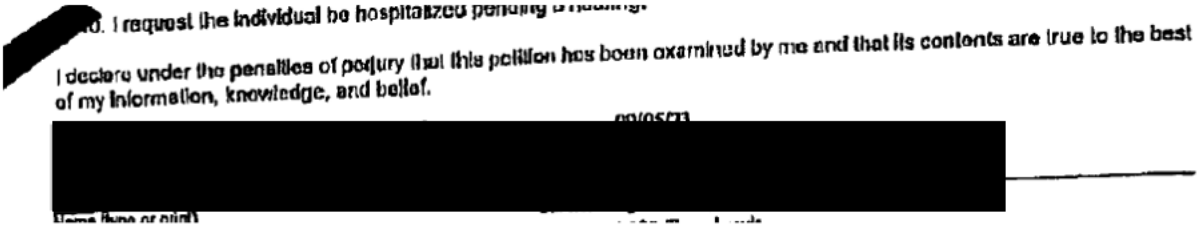
[9] Nor can appellant know what theory he was convicted of. *Id.* ("[I]f the government cannot consistently maintain the theory under which it seeks to convict appellant, we question how the appellant possibly could know.").

Yates v. United States, 354 U.S. 298, 312 (1957) (holding that a verdict must be "set aside in cases where the verdict is supportable on one [legal] ground, but not on another, and it is impossible to tell which ground the jury selected."). That said, this Court should find both the government's theories of perjury equally invalid.

c. Both the government's theories of perjury are invalid

The government's first theory is that the mental health petition "included an electronic signature from the appellant . . . ." (Gov. Br. at 15). This argument contradicts the government's concession at trial that appellant did not sign the mental health petition. (R. at 218) (Trial counsel: "the government concedes there is not a signature from Stephen Nelson [on Pros. Ex. 2.]"). This Court should not entertain the government's effort to un-concede this point on appeal. *See United States v. Schmidt*, 82 M.J. 68, 80 (C.A.A.F. 2022) (Maggs, J., concurring) ("to tell the military judge one thing . . . and then . . . assert something else on appeal . . . would go against the general prohibition against taking inconsistent litigation positions.") (citation omitted); *see also Lowery v. Stovall*, 92 F.3d 219, 223 (4th Cir. 1996) ("Judicial estoppel precludes a party from adopting a position that is inconsistent with a stance taken in prior litigation.") (quotation omitted).

This Court should also find this theory totally unsupported by the factual record. The "electronic signature" the government characterizes is the typed words: "Signed with permission /s/ Stephen Nelson":


[redacted]. I request the individual be hospitalized pending [illegible]

I declare under the penalties of perjury that this petition has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

[redacted]

(Pros. Ex. 2). The only testimony about how this form came to be filled out came from appellant, who testified that he 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). For that matter, appellant never even saw the form prior to [redacted] signing it without asking; 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). If the government thought this testimony was inaccurate it should have called [redacted] to refute it, but it did not do so.[10]

Appellant's testimony was corroborated by his friend, who testified that, when appellant read the form, appellant was surprised and discouraged because the contents were not what he had expected. (R. at 636). The idea that [redacted] would sign the form improperly is also corroborated by the way [redacted] improperly filled out the rest of the signature block, typing his own name in the block that was supposed to contain "Signature of attorney". (Pros. Ex. 2). [redacted] obviously had no problem taking it upon himself to sign for other people.

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[10] This Court may consider the absence of evidence in its factual sufficiency review.

Above and beyond the factual and estoppel hurdles to the government's arguments, accepting the government's theory of perjury would require legal conclusions for which the government cites no authority. First, this Court would have to conclude that 28 U.S.C. § 1746 could be satisfied via an electronic signature. *See Blount v. Stanley Eng'g Fastening*, 55 F.4th 504, 515 (6th Cir. 2022) ("The first affidavit was not a proper declaration under 28 U.S.C. § 1746 because it was unsworn and filed with Blount's electronic signature rather than his personal signature.") (citation omitted); *Cabardo v. Patacsil (In re Patacsil)*, Nos. 20-23457-A-7, 20-02167-A, 2023 Bankr. LEXIS 537, at *4 (Bankr. E.D. Cal. 28 Feb. 2023) ("As a rule, electronic signatures are not deemed sufficient execution under 28 U.S.C. § 1746.") (citations omitted). Second, this Court may have to simultaneously accept that 28 U.S.C. § 1746 could be satisfied by a proxy signing on behalf of the supposed declarant, another proposition for which appellant is aware of no authority.

The government's second theory is that "through his course of conduct, appellant adopted the statements, and with it, the representation his allegations were made under the penalty of perjury." (Gov. Br. at 15-16). The government asserts that by delivering the petition to law enforcement, appellant "held his statement out to have been made under oath" and, as such, it does not matter whether it was actually made under oath or not. By this government theory

"[w]hether [appellant] was sworn to an oath at the original making of the statements or not" is immaterial to the result. (Gov. Br. at 15-16). But that making "false or misleading statements *under oath*" is the very definition of perjury! Black's Law Dictionary, 1321 (10th ed. 2015) (emphasis added). Removing the oath requirement from perjury would be a radical legal development. It is quite remarkable to propose such significant jurisprudential leap in a three-sentence argument with no citations whatsoever to authority. (Gov. Br. at 15-16). This Court should reject this theory as readily as the first.

4. The government's factual presentation

Several aspects of the government's factual presentation more generally also warrant response. First, the government brief explicitly invokes allegations appellant was acquitted of. *See* (Gov. Br. at 3, n. 3). Though not fully developed, the government argues generally that this acquitted conduct is relevant to this Court's appellate review. *See* (Gov. Br. at 3, n. 3). It is true that conduct from one charge may be relevant to another for a permissible non-propensity purpose, but such arguments require the government to follow the procedures of Mil. R. Evid. 404(b). That was not done here and this Court should not consider the acquitted conduct for a 404(b)-type purpose absent compliance with that rule at trial. *See, e.g.*, *United States v. Bean*, No 2024029 (Army Ct. Crim. App. 19 Mar. 2026)

(mem. op.) at n.4 (declining to consider acquitted conduct as evidence of intent when the government did not present this Mil. R. Evid. 404(b) argument at trial).

The government also urges this Court to discount appellant's testimony because it "reflects a version of events the fact finder clearly found not credible." (Gov. Br. at 13). This conclusion does not flow logically from the panel's verdict. Appellant denied [redacted] sundry accusations against him and the panel acquitted him of all of them. (Statement of Trial Results). It is true, albeit hard to understand, that the panel convicted appellant of the sole specification before this Court, but that hardly means the panel found his testimony not credible writ large. In any event, as outlined above, the evidence from the government witnesses alone is more than sufficient to overturn appellant's conviction in this case.

Finally, the government's factual presentation is transparently selective and paints a deeply distorted picture of the evidence. The government glosses over or wholesale omits mention of [redacted] admitted history of substance abuse, admission of extreme statements about hating her kids and not wanting to be a mother, and admission of physically abusing their toddler. *See, e.g.*, (R. at 371, 374, 721). On the other side of the coin, the government also omits mention of appellant's extensive coordination and contemplation prior to seeking the petition, including seeking advice from a wide range of individuals – mostly members of his family and [redacted] family. (R. at 593-94, 599, 630-32, 659-62, 688-90, 700-02, 767-68,

790). Appellant told at least three of [redacted] brothers in advance (604-05, 644-65, 767, 783) and spent several hours speaking with [redacted] parents (R. at 59-4, 599, 659-62, 690, 701). [redacted] father even 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). A reader of the government brief would be left unaware of these and other important facts.

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.

The insufficiency of the evidence discussed in A.E. I is so overwhelming that it somewhat overshadows the remaining assignments of error. Nevertheless, the problems with the government's charging and evidence continue. With respect to A.E. II, the government concedes the premise that it removed elements from Article 107. (R. at 17-19). The government response focuses primarily on the notice issue, citing to several examples of UCMJ offenses involving dishonesty. (Gov. Br. at 17). But the government does not argue that the charged conduct met the elements of any of these offenses. As such, it is unclear how they could provide notice that the charged conduct – which is different than all these examples – is subject to criminal sanction. The government asserts that the "most persuasive" source of notice is the MCM's discussion section for Article 133,

which cites "making a false official statement" as an example of a qualifying offense. (Gov. Br. at 18). But this reinforces the very problem in this case – the fact that appellant's conduct did not constitute "making a false official statement." The government's removal of elements from this very offense (false official statement) is at the heart of the notice issue.

In *United States v. Nelson*, the Navy Court reversed where the government omitted elements of Article 107 false official statement from the charging language, but still argued (seemingly with some justification) that those elements were present. 80 M.J. 748, 757-58 (N-M Ct. Crim. App. 2021). This case goes beyond *Nelson* because the elements the government chose to omit are not present at all.

The problem here also goes beyond notice. As argued in appellant's opening brief, the government did not clearly articulate what service custom or standard of conduct appellant violated. The government does not address this argument with particularity and points to nothing in the trial record establishing a clearly articulated service custom or standard of conduct appellant violated.

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.

As with the preceding assignment of error, the government concedes the premise that it removed elements from Article 107, thereby reducing its burden of proof. The government's only real response is that the Article 134 preemption doctrine does not apply to Article 133. (Gov. Br. at 20). As this Court recently noted, "litigants occasionally try to unilaterally restyle their opponents' arguments in a manner that makes it (at least ostensibly) easier to understand." *United States v. Davis*, No. ARMY 20220272, 2025 LX 350899, at *19 (Army Ct. Crim. App. 8 Sep. 2025). But this technique is counterproductive "when they restyle with a strawman." *Id.* The government answer is a good example. Appellant's opening brief explicitly noted that "the Article 134 preemption doctrine applies only to the general article" – and did not ask this Court to expand the Article 134 preemption doctrine to Article 133. (Appellant's Br. at 24).

As the government makes no specific response to appellant's more nuanced arguments, appellant will largely rest on his original brief. Appellate defense counsel note for the Court's situational awareness that a similar issue is currently being litigated in the Air Force Court and may well be on a trajectory to CAAF. *United States v. Galvin*, Misc. Dkt. No. 2026-01 (A.F. Ct. Crim. App. 2026).

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

The government does not dispute that nobody from the company who

created the document (Network 180) testified, that there was no attestation clause, that there was no business records certification, and that no records custodian testified. (Gov. Br. at 23-25). The government nonetheless argues that a proper foundation for a business record was laid. (Gov. Br. at 23-25). Appellant rests on his original brief in this respect.

Regarding the confrontation clause issue, the government does not dispute the importance of [redacted] missing testimony and, to the contrary, tacitly acknowledges that [redacted] would have been the better witness. (Gov. Br. at 25-28). The government does not dispute that trial counsel's presentation aggressively posed questions that only [redacted] missing testimony could have answered and made arguments that only [redacted] could have confirmed or contradicted. *See, e.g.*, (R. at 904-08, 1129). Nor does the government dispute that the only purpose of the form was for submission to a court, though it argues this is not a persuasive factor. (Gov. Br. at 28). Certainly, the exhibit involved much "more than a routine and objective cataloging of unambiguous factual matters" – a factor the government quotes as important to the confrontation clause analysis. (Gov. Br. at 27) (quoting *United States v. Rankin*, 64 M.J. 348, 352 (C.A.A.F. 2007)). This Court should reject the conclusion that the exhibit was nontestimonial under these circumstances.

The government further argues that, even if the military judge erred in

admitting the exhibit, there was no prejudice because it could have been admitted under Mil. R. Evid. 801(d)(2) as an opposing party's statement. (Gov. Br. at 28-29). The government twice made this argument, unsuccessfully, at trial. *See* (R. at 317-20, 514). As successfully argued by the defense at trial, the government's Mil. R. Evid. 801(d)(2) arguments did not account for the fact that appellant's underlying statements were, at best, hearsay within hearsay. (R. at 319, 514, 526-27). While [redacted] supposedly drafted the document as a summary of what appellant said, it still constituted statements by [redacted] about appellant's underlying statements. (R. at 527). The fact that one level in a chain of hearsay is a statement of the accused does not resolve the hearsay problems with the preceding levels of hearsay. For example, witness A could not testify that witness B told him that witness C told him that the accused said X without a hearsay exception applicable to each level of hearsay. To the extent the government makes different arguments on appeal than it did at trial, which is by no means clear to appellate defense counsel, this Court should consider them waived. The parties made *lengthy* arguments on this exact issue at trial, and the Government should not be allowed to further modify its position at this late date. Additionally, the government relies heavily on defense evidence – in particular appellant's testimony – to support its argument in this regard. (Gov. Br. at 28-29). Appellant knows of no authority for the idea that defense evidence could be considered in such an analysis. Had the

government been unsuccessful in entering the exhibit into evidence, appellant would not have needed to testify about it. The government cannot turn around and say that if its own evidence was insufficient to lay the foundation, appellant's testimony, which was only necessitated by the erroneous prior admission, filled the foundational gaps left in the government evidence.

Conclusion

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

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on March 31, 2026.

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