**IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

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| UNITED STATES, | Appellee | **BRIEF ON BEHALF OF APPELLEE** |
| v. | | Docket No. ARMY 20240542 |
| Staff Sergeant (E-6)<br>**MANUEL A. ERB,**<br>United States Army, | Appellant | Tried at Fort Sill, Oklahoma, on 8 July, 7 October, 4–5 November, and 7–8 November 2024, before a general court-martial convened by Commander, U.S. Army Fires Center of Excellence and Fort Sill, Colonel Jacqueline Emanuel and Lieutenant Colonel Kenton E. Spiegler, military judges, presiding. |

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

**Assignment of Error I**[1] [2]

**[WHETHER] THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING THE MOTION FOR A MISTRIAL.**

**Assignment of Error II**

**[WHETHER] THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUSTAIN THE FINDINGS OF GUILTY FOR FALSE OFFICIAL**

[1] 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 that 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.

[2] In accordance with Rule 17.1(d) of this court's rules of appellate procedure, the government has restyled appellant's assignments of error.

**STATEMENT, SEXUAL ASSAULT OF A CHILD, AND SEXUAL ABUSE OF A CHILD.**

## Assignment of Error III

**[WHETHER] THE DEFENSE COUNSEL'S FAILURE TO INVESTIGATE DENIED APPELLANT THE EFFECTIVE ASSISTANCE OF COUNSEL.**

## Statement of the Case

On 7 November 2024, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of sexual assault of a child, two specifications of sexual abuse of a child, and one specification of false official statement in violation of Articles 120b and 107, Uniform Code of Military Justice, 10 U.S.C. §§ 920b, 907 [UCMJ].[3] (R. at 427; Statement of Trial Results [STR]). The military judge sentenced appellant to a reduction to the grade of E-1, eleven years' confinement, and a dishonorable discharge.[4] (R. at 472; STR). On 22 November 2024, the convening authority took no action. (Action). On 25 November 2024, the military judge entered judgment. (Judgment).

[3] Unless otherwise stated, all references to the UCMJ and Rules for Courts-Martial [R.C.M.] are to the versions in the Manual for Courts-Martial, United States (2019 ed.) [*MCM*] [with 2020 and 2021 amendments].

[4] Appellant was sentenced on Charge I to five years' confinement for Specification 1; two years for Specification 2; six years for Specification 3; and five years for Specification 4; confinement for Specifications 1–3 to run concurrently with each other but consecutively with the confinement for Specification 4. No confinement was adjudged for The Specification of Charge II. (R. at 472).

## Statement of Facts

### A. Appellant's family.

Appellant and [redacted] met on 8 March 2007; he was twenty years old, and she was fourteen. (R. at 237–38, 248). [redacted] remembered the specific date because it was her sister's sixteenth birthday. (R. at 237–38). Appellant and [redacted] had two daughters, [redacted] and [redacted]; appellant and [redacted] got married but later divorced. (R. at 237, 239). Appellant's current wife is [redacted]; appellant's daughters lived with him and [redacted] in Oklahoma. (R. at 241, 266, 275). [redacted] was twelve years old at the time appellant sexually assaulted and abused her. (R. at 241; STR). Following the initial allegations against appellant, [redacted] and [redacted] moved back to Colorado to live with [redacted] in December 2022. (R. at 280–81).

### B. Bedroom assault.

Late one night in 2022, before [redacted] thirteenth birthday, appellant came into [redacted] bedroom and laid down behind her on the bed. (R. at 282–83). Appellant unhooked [redacted] bra and stroked her breasts. (R. at 284). After some time, appellant "put his hands down the front of [her] pants." (R. at 284). He then began to rub his daughter's "woman area" in a circular motion inside of her underwear.[5] (R. at 285). At the same time, [redacted] heard appellant moaning in her

[5] When asked, [redacted] clarified that her "woman area" was the same as her "private parts." (R. at 285).

ear and stroking his "man part." (R. at 285–86). Appellant then penetrated her vulva with his fingers, moving them fast. (R. at 286). [redacted] "was extremely uncomfortable, and just really scared." (R. at 286). [redacted] jumped up out of the bed and backed away from appellant, who told her to lay back down, which she did. (R. at 286). Appellant left the room after his daughter fell asleep. (R. at 286).

**C. Couch assault.**

On a separate occasion, while [redacted] was twelve years old, appellant, [redacted] had a movie night on their couch. (R. at 287). [redacted] and [redacted] fell asleep, appellant then put [redacted] hand down his shorts, forcing her hand to stroke his genitals.[6] (R. at 287–88, 320). [redacted] tried to kick [redacted], who was lying next to her, to wake her up. (R. at 288–89). [redacted] described that "some liquid" got on her hand and that it had come from appellant's "man part." (R. at 289). Appellant then took [redacted] hand, wiped the liquid off with his shorts, and put her hand down. (R. at 289). [redacted] felt "very scared, and extremely uncomfortable, and [she] just wanted it to stop." (R. at 288). Appellant told [redacted] not to tell anybody about what had happened. (R. at 290).

[6] [redacted] described the area that appellant had forced her hand to touch as his "man part" and "wiener." (R. at 287, 289).

**D. Appellant's apology and [redacted] disclosures.**

The first person [redacted] told about appellant's abuse was her friend from school, [redacted] (R. at 322–323). [redacted] mother and grandmother also found out about what had happened. (R. at 324). Sometime after [redacted] thirteenth birthday in September 2022, she told [redacted] and [redacted] about appellant's abuse. (R. at 289–90). With [redacted] present, [redacted] and [redacted] confronted appellant about the offenses, who appeared "kind of shocked" but "looked very guilty." (R. at 290–91). Appellant acknowledged his actions were wrong, admitted he should not have done it, and apologized. (R. at 273, 291). Appellant told [redacted] "that he understood that [she] might never be able to forgive him." (R. at 309).

A few months later, [redacted] told her friend, [redacted]. (R. at 291). [redacted] then told her mother, [redacted] (R. at 201). [redacted] responded by first calling appellant to ask if [redacted] could stay the weekend at her home; once [redacted] was at her house, [redacted] contacted the Lawton Police Department (LPD), who then arrived and spoke with [redacted] (R. at 201–02). Both of appellant's daughters stayed with [redacted] for about a month. (R. at 202). Unsure if her mother knew about appellant's sexual abuse, [redacted] called and told her. (R. at 310). [redacted] and her sister then went to live with [redacted] in Colorado. (R. at 202).

**E. Appellant's statements to CID.**

On 12 April 2023, U.S. Army Criminal Investigation Division (CID) [redacted] interviewed appellant about the offenses. (R. at 401; Pros. Ex. 23). When asked about [redacted] age at the time he met her, appellant stated "she was sixteen." (Pros. Ex. 23). [redacted] also asked appellant, "Soon after you met [redacted] was when you had a kid together?" and appellant responded "yes." (Pros. Ex. 23). Prior to beginning the interview, [redacted] had informed appellant that he was suspected of sexual abuse of a child and properly advised him of his rights; appellant waived his rights. (Pros. Ex. 5).

**Assignment of Error I**

**[WHETHER] THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING THE MOTION FOR A MISTRIAL.**

**Additional Facts**

Prior to trial, pursuant to Military Rule of Evidence (M.R.E.) 404(b), the government provided notice of intent to introduce evidence of certain acts of the accused, including that he met [redacted] March 2007 when she was fourteen years old, that the two engaged in sexual intercourse when she was fourteen and fifteen years old, and that [redacted] became pregnant when she was fifteen years old. (App. Ex. VI-A). Defense moved to exclude the evidence and the military judge ruled that the evidence was inadmissible under M.R.E. 404(b) and 414. (App. Exs. V,

VI, VIII, IX, XI, XII). The military judge reasoned that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice to the trial process under both M.R.E. 404(b) and 414. (App. Exs. XI, XII).

During the government's opening statement, trial counsel stated "[redacted] recently turned 15 years-old" and [redacted] "was born just a couple of months after [redacted] turned 16." (R. at 146–47). Trial counsel also said,

> "birthdays are important in this case. Birthdays are important because, the evidence will show that [redacted] was 12, when the accused came into her bedroom . . . . Birthdays, are also important, because [appellant], lied to CID during the course of this investigation. He told CID . . . that he met [redacted] . . . when she was sixteen years old."

(R. at 147). After opening statements, the military judge, in an Article 39(a), said the reference to the timing of [redacted] birth "clearly makes a connection between sexual intercourse, since that's the cause of birth and her age, which is different from, just that [appellant and [redacted] met when she was 16." (R. at 156).

Defense then moved for a mistrial under R.C.M. 915 on the basis that "the government's opening . . . highlight[ed] the age at which sexual intercourse, allegedly began with [redacted]." (R. at 157). Defense also raised the concern that the government also told members of the panel that [redacted] was "that same age," therefore "[d]rawing that correlation between the two." (R. at 157). The trial defense counsel argued that the circumstances necessitated a mistrial but acknowledged the military judge's discretion in this matter. (R. at 158). The

military judge denied defense's motion for a mistrial under R.C.M. 915, finding it was not warranted based on government's opening statement; the government had no nefarious intent; this was only one sentence in opening; there was an option for a curative instruction; and defense had the ability to rebut or draw attention to a lack of any evidence presented during their opening and argument. (R. at 166–67).

The military judge provided a spillover instruction and cautioned the government to avoid "any other comments, correlations, inferences in argument, that further connect those" to the maximum degree possible. (R. at 234–35). The government took this warning seriously and made it known to the court that they had not only advised [redacted] previously about certain things she should avoid speaking about but requested another opportunity to remind her immediately preceding her testimony. (R. at 235). The military judge also gave instructions to the panel that "arguments of counsel are not evidence," rather, what counsel expect the evidence will show. (App. Ex. XXVIII; R. at 146, 397).

**Standard of Review and Law**

A military judge's determination on a mistrial will not be reversed absent clear evidence of abuse of discretion. *United States v. Rudometkin*, 82 M.J. 396, 400 (C.A.A.F. 2022) (citing *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003)). Abuse of discretion occurs when the military judge: (1) predicates a ruling on unsupported findings of fact; (2) uses incorrect legal principles; (3) applies the

correct legal principles to the facts in a clearly unreasonable manner; or (4) fails to consider important facts. *Rudometkin*, 82 M.J. at 401 (internal citations omitted).

Under R.C.M. 915, a "military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." R.C.M. 915(a). Declaring a mistrial is a "drastic remedy," appropriate in rare instances when no other remedies are sufficient. *United States v. Garces*, 32 M.J. 345, 349 (C.M.A. 1991). Military judges should use this power only "with great caution, under urgent circumstances, and for plain and obvious reasons." R.C.M. 915(a) discussion.

Appellate courts presume that panel members follow the military judge's instructions, absent evidence to the contrary. *United States v. Sewell*, 76 M.J. 14, 19 (C.A.A.F. 2017); *United States v. Jenkins*, 54 M.J. 12, 20 (C.A.A.F. 2000) (internal citations omitted). This presumption generally also applies to curative instructions, "even where the possibility of harm to the accused has been acute." *Garces*, 32 M.J. at 349 (additional citations omitted).

## Argument

### A. The government's opening statement was not grounds for a mistrial.

The military judge remained well within the range of reasonable decisions in denying the defense's mistrial motion. The military judge raised the issue of the

government's improper statement sua sponte. (R. at 156). He acted appropriately from the start to protect the record and the accused's right to a fair trial. He cited the correct legal principles,[7] including language from R.C.M. 915(a), and concluded that such a drastic remedy was not warranted. (R. at 163–68).

The government's transgression was isolated and limited. The military judge identified a single sentence from the government's opening statement as improper and inadmissible under M.R.E. 403; though finding the sexual inferences "very concerning," he emphasized that the trial counsel acted "in good faith" and with "no nefarious intent." (R. at 165). The court also stated that it "had determined that very same, factual scenario, was inadmissible under both, [R.C.M.] 404(b) and [R.C.M.] 414," in reference to the court's previous ruling related to the admissibility of [redacted] birth certificate for certain purposes as it related to proving Charge I. (R. at 165). While the government could have anticipated this issue ahead of time, the military judge made clear that he found no bad faith on their part, and the previous ruling denying admission of the evidence under those specific rules for specific purposes related to Charge I were given thorough analysis and due consideration. (R. at 165–66). In denying defense's motion for mistrial, the military judge acted reasonably and did not abuse his discretion.

The military judge explained that the government's presentation of facts

[7] Appellant conceded this point. (Appellant's Br. 13).

involving [redacted] age when she met appellant related directly to an element of the Specification of Charge II, making such evidence relevant and potentially admissible, subject to other rules. (R. at 164). Even the nature of their meeting and relationship, outside of sexual acts, was relevant both as res gestae and in establishing appellant's mens rea for the false official statement. (R. at 164). Government counsel clarified they did not intend to elicit any direct testimony that [redacted] and appellant had sexual relations while she was under the age of sixteen but rather had intended to offer [redacted] birth certificate as documentary evidence that appellant met [redacted] before she was sixteen years old. (R. at 159).

The military judge reasonably relied on the limited and non-evidentiary nature of the error; the fact that implied sexual relations with [redacted] did not implicate criminal acts under Colorado state law; and the availability of other remedies, including a curative instruction that "could be given now, . . . before findings, or both." (R. at 167). The government had to reference [redacted] age to prove The Specification of Charge II, making the objectionable statement only a slight deviation from the permissible and necessary method of proof. Ultimately, the military judge noted that "the power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons." (R. at 163). This case did not present such rare circumstances, and the military judge determined that a mistrial was not warranted under R.C.M. 915. (R. at 166).

**B. The military judge's remedies were sufficient to cure any prejudice.**

Imposing limitations on the government and providing opportunities for the defense, the military judge remedied the potential prejudice from the government's error. He admonished the government no further slips on this topic would be tolerated. (R. at 168, 234–35). He explicitly prohibited trial counsel from introducing related evidence, including [redacted] birth certificate or age, as well as any testimony about appellant and [redacted] sexual relationship before the latter was sixteen, without first litigating the matter in an Article 39(a), UCMJ, proceeding. (R. at 167–68, 230). Heeding the court's warnings, trial counsel raised the intent to offer potentially related evidence outside of the panel's presence, abiding closely to the military judge's rulings. (R. at 221, 232). By constraining the government's presentation and warning of severe repercussions for any further issues, the military judge ensured that the potential prejudice did not compound.

The military judge afforded defense multiple avenues to cure any misunderstanding by the panel. Trial defense counsel was provided significant discretion to draft any limiting instruction about the erroneous government statement and flexibility on when to present such instruction to the panel. (R. at 166–67). The military judge gave defense the option for a specific curative instruction regarding Colorado's age of consent law, clarifying the legality of appellant's sexual relationship with [redacted] while appellant was a civilian. (R. at

167). He also granted leeway to defense in its closing argument. (R. at 167).

Finally, with both parties' affirmative acquiescence, the military judge gave a robust spillover instruction prior to panel deliberation. Without focusing attention on the previous erroneous inference, the instruction stated, "You may not consider any evidence relating to Charge II as evidence of any specification in Charge I." (R. at 379–80; App. Ex. XXVIII, p. 5). The record did not provide any indication that the panel ignored the military judge's instructions or failed to follow the law; therefore, this court should presume that the members properly avoided spillover. The court's remedy, particularly the curative spillover instruction, was sufficient in this case to counter any prejudice from a single sentence in the government's opening and did not constitute an abuse of discretion.

## Assignment of Error II

**[WHETHER] THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUSTAIN THE FINDINGS OF GUILTY FOR FALSE OFFICIAL STATEMENT, SEXUAL ASSAULT OF A CHILD, AND SEXUAL ABUSE OF A CHILD.**

## Standard of Review and Law

### A. Legal Sufficiency.

Questions of legal sufficiency are reviewed de novo. *United States v. Csiti*, 85 M.J. 414, 419 (C.A.A.F. 2025) (additional citations omitted). The evidence supporting a conviction is legally sufficient "if any rational fact-finder . . . could

have found all essential elements of the offense beyond a reasonable doubt." *Id.* (alteration in original) (quoting *United States v. Mays*, 83 M.J. 277, 279 (C.A.A.F. 2019)). Legal sufficiency review requires courts to consider "the evidence in the light most favorable to the prosecution." *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017). Though reviewed de novo, this is a deferential standard: while considering legal sufficiency, the courts must "draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (internal citations omitted).

During its legal sufficiency review, the court considers all available facts within the record and is "not limited to [an] appellant's narrow view of the record." *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996). In analyzing legal sufficiency, our superior court "has long recognized that the government is free to meet its burden of proof with circumstantial evidence." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019). "[T]he ability to rely on circumstantial evidence is especially important in cases . . . where the offense is normally committed in private." *Id.* The "standard for legal sufficiency involves a very low threshold to sustain a conviction." *Id*.

**B. Factual Sufficiency.**

The court may consider whether the findings of guilty are correct in fact upon appellant's request only if appellant makes a specific showing of a deficiency

in proof. UCMJ art. 66(d)(1)(B),10 U.S.C. § 866(d)(1)(B) (2021); *United States v. Harvey*, 85 M.J. 127, 130 (C.A.A.F. 2024). Only if appellant has made such a showing—assertion of error and showing of deficiency—may the court weigh the evidence and determine controverted questions of fact. UCMJ art. 66(d)(1)(B); *Harvey*, 85 M.J. at 130.[8]

In weighing the evidence, the court affords "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence and . . . to findings of fact entered into the record by the military judge." UCMJ art. 66(d)(1)(B). "[T]he degree of deference will depend on the nature of the evidence at issue." *Harvey*, 85 M.J. at 130. "For example, a CCA [Court of Criminal Appeals] might determine that the appropriate deference required for a court-martial's assessment of the testimony of a fact witness, whose credibility was at issue, is high because the CCA judges could not see the witness testify." *Id*. at 131. When a CCA reviews a conviction, however, such deference does not create a presumption that an appellant is in fact guilty. *Id.* at 132.

[8] "Although it was long settled that the service courts applied a 'de novo' standard of review under the earlier versions of Article 66(d), UCMJ, . . . the proper label for the standard of review under the newly amended Article 66(d)(1)B), UCMJ, is more difficult to describe . . . Although this Court explained how the new standard should be construed and applied in *Harvey,* we declined to place a label on it, neither endorsing nor rejecting the continued use of the phrase 'de novo' to describe the standard of review." *United States v. Downum,* 86 M.J. 200, 205 (C.A.A.F. 2025) (internal citations omitted).

If the court is clearly convinced that the finding of guilt was against the weight of the evidence, the court may dismiss, set aside, or modify the finding, or affirm a lesser finding. UCMJ art. 66(d)(1)(B). This court must satisfy two requirements to be "clearly convinced:" (i) that the evidence, as the court has weighed it, does not prove the appellant's guilt beyond a reasonable doubt and (ii) that this decision is correct. *Harvey*, 85 M.J. at 132.

**C. False Official Statement.**

Article 107, UCMJ, as charged, requires the government to prove four elements: (1) that the accused made a certain official statement, (2) that the statement was false in certain particulars, (3) that the accused knew it to be false at the time of making it, and (4) that the statement was made with the intent to deceive. *MCM*, pt. IV, ¶ 41.b(1).

**D. Sexual Assault of a Child.**

Sexual assault of a child requires the government to prove two elements: (1) that the accused committed a sexual act upon a child, and (2) that at the time of the sexual act the child had attained the age of twelve years but had not attained the age of sixteen years. *MCM*, pt. IV, ¶ 62.b(2). A "sexual act" includes "the penetration, however slight, of the vulva . . . of another by any part of the body or any object, with an intent to . . . arouse or gratify the sexual desire of any person." UCMJ arts. 120(g)(1)(C), 120b(h)(1). A sexual act also includes "the intentional

touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to . . . arouse or gratify the sexual desire of any person." UCMJ art. 120b(h)(1).

**E. Sexual Abuse of a Child.**

Sexual abuse of a child requires the government to prove that the accused committed a lewd act upon a child, meaning "any person who has not attained the age of 16 years." UCMJ art. 120b(h)(4). A "lewd act" includes "any sexual contact with the child." UCMJ art. 120b(h)(5). And "sexual contact" includes "touching, or causing another person to touch, either directly or through the clothing, the vulva, penis, . . . [or] breast . . . of any person, with an intent to . . . arouse or gratify the sexual desire of any person." UCMJ arts. 120(g)(2), 120b(h)(1).

## Argument

**A. Appellant sexually assaulted [redacted] when he touched [redacted]s genitalia and penetrated her vulva with his finger (Specifications 1 and 3 of Charge I).**

[redacted] recounted, in detail, the assault when appellant came into her bedroom at night, laid down in her bed, and began rubbing her "woman area" in a circular motion inside of her underwear. (R. at 285). [redacted] described how appellant then put his fingers inside of her "woman part" and began moving his fingers fast while he was stroking himself and moaning in her ear. (R. at 285–86).

[redacted] testimony laid out all elements of Specifications 1 and 3 of Charge I. While recalling the traumatic and embarrassing ordeal, then 15-year-old [redacted]

used reasonable terms (e.g. "woman area" and "private parts") to reference her and her father's genitalia.[9] (R. at 285). The context also provides any necessary clarification as to the terms' meaning: appellant "put his hands down the front" of her pants, rubbed inside her underwear, and then penetrated her, pushing his fingers inside her "woman part." (R. at 284–86). Particularly with this testimonial context, appellant's contention that the described area could have been places like "her inner thigh" or "buttocks" defies reason. (Appellant's Br. 33).

Photographs of [redacted] bedroom show her bed in the corner—the location of the assault. (Pros. Ex. 17). The bed appears sufficiently large to fit a 12-year-old girl and appellant lying on their sides. (Pros. Ex. 17). While appellant contends that it "defied logic" to assert that appellant had enough room to fit on the bed with [redacted] and assault her, a reasonable factfinder considered all the evidence presented, including live testimony from [redacted] and photographs of the location of the abuse to find that appellant sexually assaulted [redacted] (Appellant's Br. 34; Pros. Ex. 17; R. at 284–86). They were able to assess the credibility of [redacted] testimony, appellant's testimony, and examine the photographs. Giving appropriate deference to the factfinder who saw and heard this testimony live and viewing the

[9] [redacted] use of the medically correct terms of "vulva" or "vagina" is not a requirement under the charged offense of sexual assault of a child under Article 120b, UCMJ.

facts in a light most favorable to the government, the evidence is legally and factually sufficient to prove appellant sexually assaulted [redacted]

[redacted] potential bias as appellant's current wife easily explains her inconsistent testimony regarding [redacted] disclosure to her about the assault and abuse she endured. Both [redacted] and [redacted] testimonies confirm that [redacted]. [redacted] was told appellant abused [redacted] sometime after [redacted] birthday in September 2022 but before Thanksgiving 2022. (R. at 272–73, 289–90). However, [redacted] testified that she first learned of the allegations on 11 December 2022 from law enforcement and denied that [redacted] ever told her that appellant had sexually assaulted her. (R. at 357–58). A factfinder could reasonably discredit her testimony based on perceived bias, in combination with multiple other accounts that corroborate one another, but factually diverge from [redacted] testimony.

Finally, the evidence of appellant's apology to [redacted] delivered in front of [redacted] and [redacted], along with [redacted] direct disclosure of this abuse to at least *five* people and later discovered by an additional three people (five of which testified at trial) substantiates the allegations many times over. (R. at 273, 291, 309). The evidence not only meets legal sufficiency when viewed in a light most favorable to the government, but the factfinder heard this testimony live and assessed and weighed the credibility for all of these witnesses in conjunction with the additional evidence presented at trial.

**B. Appellant sexually abused [redacted] in her bedroom and on the couch (Specifications 2 and 4 of Charge I).**

[redacted] testified that appellant came into her bedroom, laid down behind her in her bed, started rubbing her back, unclipped her bra, and "started to rub [her] breasts." (R. at 283–84). [redacted] had clear and distinct memories of this assault and relayed the events in detail. She was able to articulate the order of events from that evening, where she and appellant were positioned in relation to each other, where exactly appellant touched her, and other actions that appellant took before and after touching her breasts. There are no apparent memory issues or contradictions throughout her testimony. [redacted] also disclosed what had happened to several individuals initially, including [redacted] and [redacted] When confronted about his behavior, appellant apologized to [redacted] in the presence of [redacted] and [redacted]. (R. at 290–91). Appellant said that he knew what he did was wrong and understood if [redacted] did not forgive him. (R. at 291).

During a family movie night, after [redacted] and [redacted] had fallen asleep, appellant took [redacted] hand, put it down his shorts, and forced her to stroke his penis. (R. at 287). [redacted] testified clearly about the incident. (R. at 287–89, 320–29). She described the evening in detail—that it was late at night, that she was laying next to her sister and appellant, that appellant was behind her, that appellant had just been wearing shorts that night, and that she felt "very scared, and extremely uncomfortable, and [she] just wanted it to stop." (R. at 287–88). [redacted]

described that "some liquid got on my hand" from appellant's "man part," use of the medically correct term "penis" was not necessary to explain to a fact finder what appellant forced [redacted] hand to touch. (R. at 289). Her description of the area as appellant's "man part" and "wiener" was more than sufficient to understand that he forced her to touch his penis. (R. at 288–89).

Given the government's evidence presented via [redacted] and [redacted] testimony, and the factfinders' ability to see and these witnesses and hear their testimony in-person, they assessed the weight and credibility of this evidence. Giving appropriate deference to the factfinder and viewing the evidence in a light most favorable to the government, the evidence is not only legally sufficient but factually sufficient to prove that appellant sexually abused [redacted] by touching her breasts and forcing her hand to touch his penis.

**C. Appellant made a false official statement (The Specification of Charge II).**

Prior to appellant's 12 April 2023 CID interview, [redacted] gave appellant a proper rights warning; appellant acknowledged that he understood and voluntarily waived his rights. (Pros. Ex. 5). During the interview, appellant stated "[w]hen I met [redacted], she was sixteen." (Pros. Ex. 23). In actuality, [redacted] was fourteen years old when she and appellant met, so this official statement was false. In response to [redacted] question, "soon after you met her was when you had a kid together?" appellant affirmatively responded "yes." (Pros. Ex. 23).

[redacted] testified that she was fourteen years old when she met appellant. (R. at 237–38). Appellant himself admitted his statement's falsity, acknowledging in his sworn testimony that [redacted] was in fact fourteen years old when they met. (R. at 369). This fact is significant because of the circumstances—meeting at [redacted] older sister's sixteenth birthday—making it even more apparent that both [redacted] and appellant would remember when they met and how old [redacted] was at that time. [redacted] age at this event has never and will never change. Following the birth of their two daughters, appellant and [redacted] were married; it would be unreasonable to believe that appellant remained ignorant of, or forgot, her age after such an extended and intimate relationship. Therefore, when appellant made this false official statement to [redacted] he knew it to be false at the time it was made.

Appellant intended to deceive [redacted] with this false statement since representing [redacted] age to be older could appear to be less problematic in the context of [redacted] allegations. Appellant's clear answer, contrary to a fact he reasonably should and did know, showed his intent to deceive [redacted] with a response intended to deflect further scrutiny on this point. While appellant attempted to clarify through his testimony that he was giving his best estimate to [redacted] in the moment, and realized later that the answer he gave was incorrect, the factfinder was able to see and hear everything. (R. at 369). Appropriate deference should be given to the factfinder in this case who not only viewed the video of

appellant's CID interview but heard appellant's live testimony about forgetting his ex-wife's age at the time they met. (Pros. Ex. 23; R. at 369). Even under a theory that appellant had been mistaken or confused at the time he made the statement to [redacted], the assessment of the credibility of that theory is determined during trial by the factfinders that were present, heard the testimony, could adequately weigh the evidence, and make a determination. Thus, the evidence is legally and factually sufficient to find that appellant made a false official statement.

## Assignment of Error III

**[WHETHER] DEFENSE COUNSEL'S FAILURE TO INVESTIGATE DENIED APPELLANT THE EFFECTIVE ASSISTANCE OF COUNSEL.**

## Additional Facts

[redacted] was the account holder for [redacted] cell phone plan, therefore she had access to videos, text messages, and other digital media saved in the cloud storage system from [redacted] phone. (Def. App. Exs. A, B). Prior to trial, while scrolling through [redacted] cloud account, [redacted] discovered an 8 May 2022 FaceTime video of [redacted] and her friend watching pornography. (Def. App. Exs. A, B). [redacted] and appellant then attempted to provide defense counsel with this video and other similar material, claiming they showed that [redacted] had prior knowledge beyond her tender years regarding sexual matters, knowledge unattributable to appellant. (Def. App. Exs. A, B). They showed defense counsel

multiple videos and text messages between [redacted] and her friends that "contained inappropriate material." (Def. App. Exs. A, B).

Due to the sensitive nature of the material, defense counsel requested that appellant and [redacted] send this evidence to a digital dropbox. (Def. App. Exs. A, B). On 23 July 2024, [redacted] uploaded the FaceTime video from her Gmail account to the dropbox link defense counsel provided on "app.box.com." (Def. App. Exs. A, B). Defense counsel told [redacted] that they could not access the video. (Def. App. Exs. A, B). [redacted] attempted to re-send the FaceTime video approximately twenty times. (Def. App. Exs. A, B). However, these attempts were unsuccessful, and defense counsel were never able to access the video in the dropbox. (Def. App. Exs. A, B). [redacted] offered to upload the digital media to an external device for the defense counsel, but they declined. (Def. App. Exs. A, B).

According to appellant and [redacted], one of the trial defense counsel told them that "we'll be fine," or words to that effect, without seeking admission of the FaceTime video. (Def. App. Exs. A, B). Defense counsel did not offer this material as evidence. At the time this statement was made to appellant, defense counsel had already viewed the FaceTime video and read the text messages between [redacted] and her friends. (Def. App. Exs. A, B). Both counsel were aware of the contents contained within the videos and text messages at issue. (Def. App. Exs. A, B).

## Standard of Review and Law

Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Cuerto*, 82 M.J. 323, 327 (C.A.A.F. 2022) (citing *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011)). The Sixth Amendment recognizes the right to the effective assistance of counsel, and to establish that "ineffective assistance of counsel occurred, an appellant must prove both that the defense counsel's performance was deficient and that the deficiency caused prejudice." *Id.* at 327. (citing *United States v. Captain*, 75 M.J. 99, 103 (C.A.A.F. 2016)) (citing *Strickland v. Washington*, 466 U.S. 668, 698 (1984)).

Military appellate courts analyze ineffective assistance of counsel claims under the Supreme Court's two-prong *Strickland* framework. 466 U.S. 668. To establish such a claim, the appellant must show: (1) that counsel's representation fell below an objective standard of reasonableness, and was therefore deficient, and (2) the counsel's deficient performance prejudiced appellant. *Id.* at 687–88.

For the first prong, appellant must show specific defects in counsel's performance that were unreasonable under prevailing professional norms. *United States v. Scott,* 81 M.J. 79, 84 (C.A.A.F. 2021) (internal citations and quotation marks omitted). This court's "review of counsel's performance is highly deferential and is buttressed by a strong presumption that counsel provided adequate professional service." *Davis*, 60 M.J. at 473 (citing *United States v.*

*Garcia*, 59 M.J. 447 (C.A.A.F. 2004)); *see also Strickland*, 466 U.S. at 689 (recognizing "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"). Thus, appellant's burden to show deficient performance is especially heavy. *Davis*, 60 M.J. at 473 (internal citations omitted). The proper test for prejudice "is whether there is a reasonable probability that, but for counsel's error, there would have been a different result. *Id*.

## Argument

### A. Defense counsel's decision not to use the digital material was reasonable.

Appellant contends there was "no reasonable explanation" for defense counsel's failure to investigate the FaceTime video and other digital media. (Appellant's Br. 50–51). However, both defense counsel were present during the pretrial preparation with appellant and [redacted] and viewed the allegedly "inappropriate videos and text messages." (Def. App. Exs. A, B). Both counsel were fully aware of the contents of these digital materials and able to evaluate how it might potentially be relevant or helpful to appellant's defense. The assertion that they failed to investigate further is a misnomer—after [redacted] showed them the contents, they had no need to investigate that particular matter to a greater degree. On the information they had, the defense counsel could make an assessment and strategize accordingly with this evidence in mind.

Defense counsel's decision not to pursue admission of the FaceTime video

fell within the wide range of reasonable trial strategy. The victim used age-appropriate terms to reference genitalia and described the sexual acts clearly but simply.[10] (R. at 287–89). [redacted] was twelve years old when assaulted and fifteen years old when testifying at trial (R. at 282, 287); this age range is one where curiosity about, or knowledge of, sex is unsurprising if not commonplace. Trial counsel did not argue knowledge beyond tender years, rendering this rebuttal-type evidence irrelevant. The mere existence of material that could be relevant to a case does not necessarily indicate that the evidence is helpful to an accused, nor is it mandatory for defense counsel to utilize every item presented to them. Attacking or smearing the victim presents trial risk and could make the defense look less sympathetic. Offering such material could also potentially open doors unfavorable to the defense, given that [redacted] had made other, uncharged allegations. (Pretrial Allied Papers, Ex. 31(a)). Competent defense counsel considers these angles and exercises judgment when offering exhibits.

Appellant assumes that the military judge was likely to admit the material in question. There was a very tenuous connection between (1) [redacted] viewing

[10] Appellant argues defense should have introduced the video to tie [redacted] "knowledge of sexual matters, including the words for genitalia and ejaculation," to a source other than appellant's offenses. (Appellant's Br. 53). Yet [redacted] never used the words "genitalia" or "ejaculation," nor did the government argue that she learned any words or sexual knowledge from appellant. She described ejaculation with two simple statements, demonstrating very little sexualized knowledge: "some liquid got on my hand," from appellant's "man part." (R. at 289).

undefined pornography or receiving inappropriate messages and (2) appellant's theory of fabrication. It contained little probative value for the defense case. M.R.E. 412, a rule of exclusion, likely would have applied to this evidence implicating the child victim's sexual behavior[11] and/or predisposition.[12] It is uncertain at best that the military judge would have admitted this highly sensitive and potentially prejudicial material after conducting an M.R.E. 412(c)(2) hearing.

Appellant did not meet his burden to establish deficient performance, in part because the allegation of watching pornography and having access to other "inappropriate material" does not establish a sufficient link to [redacted] knowledge or testimony. These vague phrases do not establish relevance, much less deficient performance. The suggestion that difficulties in receiving the materials led to the defense counsel choosing not to present them is speculative and does not overcome the strong presumption of competency. Defense counsel made an informed and reasonable decision to not offer largely irrelevant and likely inadmissible material they had previously viewed, and appellant's hypotheses and vague complaints do not meet his heavy burden to establish deficient performance.

[11] "'Sexual behavior' includes any sexual behavior not encompassed by the alleged offense." M.R.E. 412(d).
[12] "The term 'sexual predisposition' refers to a victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but may have a sexual connotation for the fact finder." M.R.E. 412(d).

**B. Appellant failed to establish prejudice from defense counsel's decision.**

As detailed in Assignment of Error II, the government presented strong evidence establishing appellant's guilt beyond a reasonable doubt for Specifications 1–4 of Charge I. [redacted] gave clear and consistent testimony, describing in detail how appellant sexually abused and assaulted her. (R. at 280–334). Appellant's corroborated apology when confronted provided particularly robust evidence of guilt. The government presented additional testimony regarding the circumstances surrounding the incidents through [redacted], and [redacted] detailing appellant's and [redacted] general relationship and the victim's various outcries. [redacted] birth certificate was also admitted into evidence, establishing her age at the time the abuse took place, as well as a photograph of her bedroom where some of the offenses occurred. (Pros. Exs. 9, 17).

On the other hand, the FaceTime video and other alleged "inappropriate material" had limited relevance at best and was likely inadmissible. Without addressing the potential evidence's admissibility, appellant cannot establish prejudice. If offered, defense counsel would have attempted to answer a question that the government never posed or even implied[13]: Where did [redacted] gain

[13] Appellant cites the government's closing argument references to [redacted] age. (Appellant's Br. 52). None of these references, however, correlate her age with her sexual knowledge; most of them seek to prove her age, a necessary element for the Article 120b specifications, while the others focus on her vulnerability or the reasonableness of her thought processes and beliefs. (R. at 398–403, 413–14).

knowledge of sexual matters beyond her tender years? The victim's testimony, however, did not indicate any vocabulary or understanding about sex unexpected for twelve-year-old. Her purported interactions via FaceTime video and text messages with [redacted] did not make appellant's actions any more or less likely.

Speculation about the digital material's helpfulness in rebutting an unpresented argument is insufficient to show any negative effect. Appellant did not meet his burden to establish prejudice, failing to establish or even discuss admissibility. Trial defense counsel's informed choice should not be second-guessed simply because appellant received an unfavorable trial result. This court can resolve the ineffective assistance of counsel claim on either prong and the appellant's respective failures to meet his burden for each one.

**Conclusion**

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

[redacted]

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**CERTIFICATE OF SERVICE**

**UNITED STATES v. MANUEL A. ERB, ARMY 20240542**

I certify that a copy of the foregoing was sent via electronic submission to Mr. William Cassara at [redacted] and the Defense Appellate Division at [redacted] on the 19th day of May, 2026.

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