UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40810**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Derrick E. BRADDY	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 5 June 2025, counsel for Appellant submitted a Motion for Enlargement of Time (First), requesting an additional 60 days in which to file Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 9th day of June, 2025,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **15 August 2025**.

Appellant's counsel is advised that any subsequent motions for enlargement of time shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time.

FOR THE COURT

[redacted]

ROBERT DRIESSEN, Maj, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*,	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel 2
Master Sergeant (E-7) **DERRICK E. BRADDY,** United States Air Force, *Appellant*.	)	No. ACM 40810 5 June 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **15 August 2025**. This case was docketed with this Court on 17 April 2025. From the date of docketing to the present date, 49 days have elapsed. On the date requested, 120 days will have elapsed.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested first enlargement of time.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Maj, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 5 June 2025.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Maj, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **DERRICK E. BRADDY,** United States Air Force, *Appellant.*	)	No. ACM 40810
	)	6 June 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]
JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 6 June 2025.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*,	)	**NOTICE OF APPEARANCE OF COUNSEL**
v.	)	Before Panel 2
Master Sergeant (E-7) **DERRICK E. BRADDY,** United States Air Force, *Appellant*.	)	No. ACM 40810 1 July 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

To the Clerk of this Court and all parties of record, the undersigned hereby enters an appearance as the appellate counsel for the appellant in the above-captioned case, pursuant to Rule 12 of the Rules of Practice and Procedure of the United States Air Force Court of Criminal Appeals. I hereby certify that I am admitted to practice before this court.

Respectfully submitted,

[redacted]

SCOTT R. HOCKENBERRY, Esq.
Civilian Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 1 July 2025.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Maj, USAF
Appellate Defense Counsel
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40810**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Derrick E. BRADDY	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 30 Jun 2025, the Government filed a Motion for Leave to File a Motion for Remand and a Motion for Remand. The Government stated, "Appellant's record of trial includes a disc that contains a copy, rather than the original, of Appellate Exhibit XLVII," and the military judge had not authorized the inclusion of a copy rather than the original in the record. Although the Government did not concede the inclusion of a copy in place of the original disc constituted a substantial omission, it moved this court to "remand this record for correction should it find substituting a copy for an original appellate exhibit to be a substantial omission."

Appellant opposes the motion to remand. Appellant contends, *inter alia*, that the inclusion of a copy for Appellate Exhibit XLVII is not a substantial omission; that "Appellant waives any issues relating to its specific omission;" and that the delay involved in a remand would not be justified.

The court has considered the Government's motions, the Appellant's opposition, case law, the Rules for Courts-Martial, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 9th day of July, 2025,

ORDERED:

The Government's Motion for Leave to File Motion for Remand dated 30 June 2025 is **GRANTED**.

The Government's Motion for Remand dated 30 Jun 2025 is **DENIED**.

FOR THE COURT

[redacted]

SEAN J. SULLIVAN, Maj, USAF
Acting Clerk of Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	MOTION FOR LEAVE TO
Appellee,	)	FILE MOTION FOR REMAND
	)	AND MOTION FOR REMAND
v.	)	
	)	Before Panel No. 2
	)	
Master Sergeant (E-7)	)	No. ACM 40810
DERRICK E. BRADDY,	)	
United States Air Force	)	
Appellant	)	30 June 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23(d) of this Court's Rules of Practice and Procedure, the United States moves this Court for leave to file a motion to remand and within the same filing, to remand this record for correction should it find substituting a copy for an original appellate exhibit to be a substantial omission.

Appellant's record of trial includes a disc that contains a copy, rather than the original, of Appellate Exhibit XLVII. The copy was made directly from the original exhibit and contains the same material, but due to a misunderstanding by the legal office, the original exhibit was maintained at the base and not included in any record of trial.

Although a "substantial omission" renders a record of trial incomplete, an insubstantial omission does not "affect that record's characterization as complete." "United States v. Henry, 53 M.J. 108, 111 (C.A.A.F. 2000) (citations omitted). Each case is analyzed individually to decide whether an omission is substantial. United States v. Abrams, 50 M.J. 361, 363 (C.A.A.F. 1999).

R.C.M. 1112(a)(5) directs that the record of trial shall include "[e]xhibits, or if permitted by the military judge, copies [. . .] of any exhibits that were received in evidence and any appellate exhibits." A record of trial is complete if it complies with R.C.M. 1112(b). R.C.M. 1112(d)(2).

The military judge in Appellant's case did not authorize a copy of Appellate Exhibit XLVII to be included in the record of trial instead of the original. The United States does not concede that this would be a substantial omission that would affect the completeness of the record of trial because the copy was created directly from the original without alteration. But, should this Court disagree and find substitution of the original with a copy to render the record incomplete, the United States request this Court grant this motion, and return Appellant's case to the Chief Trial Judge, Air Force Trial Judiciary, for correction.

[redacted]
HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
[redacted]

[redacted]
FOR
MARY ELLEN PAYNE
Associate Chief
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 30 June 2025.

[redacted]

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*,	)	**APPELLANT'S OPPOSITION TO GOVERNMENT MOTION FOR REMAND**
v.	)	Before Panel 2
Master Sergeant (E-7) **DERRICK E. BRADDY,** United States Air Force, *Appellant*.	)	No. ACM 40810 1 July 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23 of this Court's Rules of Practice and Procedure, Appellant opposes the Government motion for remand.

On 30 June 2025, the Government filed a motion for remand with this Court because the record of trial ostensibly includes a copy of Appellate Exhibit XLVII instead of the original. Gov't Mot. for Remand, dated June 30, 2025, at 1. It is unclear from the Government's filing, or the record, how the Government knows that Appellate Exhibit XLVII is a copy instead of an original. In any event, the Government claims that this may be a "substantial omission"[1] rendering the record incomplete. *Id.* (citing *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000)).

Appellant does not believe, for Appellate Exhibit XLVII alone, that including a copy instead of the original is a substantial omission requiring remand. Appellant understands that this exhibit contains material the Government proposed admitting under Mil. R. Evid. 414. R. at 174-76. Ultimately, this material was never presented at trial and is largely irrelevant for this appeal. Moreover, even if it were a substantial omission, the Appellant waives any issues relating to its specific omission. Further, the Appellant has both a constitutional and statutory right to speedy

[1] Interestingly, the Government "does not concede that this would be a substantial omission."

appellate review. Civilian co-counsel has already completed a review of the record and has begun research for the opening brief. Remand will delay Appellant's ability to file the opening brief and will likely cause unjustified delay which will prejudice him.

WHEREFORE, Appellant respectfully requests that this Court deny the Government's motion for remand.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Maj, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 1 July 2025.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Maj, USAF
Appellate Defense Counsel
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40810**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Derrick E. BRADDY	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 29 July 2025, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials, requesting appellate counsel for both parties be allowed to examine: pages 38–77, 249–94, and 617–20 of the transcript and corresponding closed session audio recordings; Appellate Exhibits IX–XVI, XXIX, XLVII, LI, LII, and LVII; Prosecution Exhibit 2 for Identification; and Preliminary Hearing Officer (PHO) Report Exhibits 8–10, which were reviewed by trial counsel and trial defense counsel at Appellant's court-martial and sealed by the military judge. The Government consents to the motion.

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities . . . ." Rule for Courts-Martial 1113(b)(3)(B)(i), *Manual for Courts-Martial, United States* (2024 ed.).

The court finds Appellant has made a colorable showing that review of the identified sealed materials is reasonably necessary for a proper fulfillment of appellate counsel's responsibilities. This court's order permits counsel for both parties to examine the materials.

Accordingly, it is by the court on this 1st day of August 2025,

ORDERED:

Appellant's Consent Motion to Examine Sealed Materials dated 29 July 2025 is **GRANTED**.

Appellate defense counsel and appellate government counsel may examine **transcript pages 38–77, 249–94, and 617–20 and corresponding closed session audio recordings**; **Appellate Exhibits IX–XVI, XXIX, XLVII, LI, LII, and LVII**; **Prosecution Exhibit 2 for Identification**; and **Preliminary Hearing Officer (PHO) Report Exhibits 8–10**, subject to the following conditions:

To examine the sealed materials, counsel will coordinate with the court.

No counsel granted access to the materials may photocopy, photograph, reproduce, disclose, or make available the sealed content to any other individual without the court's prior written authorization.

FOR THE COURT

[redacted]

A AF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*,	)	**CONSENT MOTION TO EXAMINE SEALED MATERIALS**
v.	)	Before Panel 2
Master Sergeant (E-7) **DERRICK E. BRADDY,** United States Air Force, *Appellant*.	)	No. ACM 40810 29 July 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rules 3.1 and 23.3(f) of this Court's Rules of Practice and Procedure and Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i), the Appellant moves for both parties to examine the following sealed materials:

1) **Transcript Pages 38-77, 249-94, 617-20 and Accompanying Closed Session Audio**. These transcript pages and audio cover closed session hearings discussing Mil. R. Evid. 412 and 513 evidence. *See* Memorandum, Transcript/Appellate Exhibits Ordered Sealed by the Military Judge (Feb. 26, 2024) [hereinafter Memo) (available at page 1561 of the electronic record of trial). The parties and military judge were present at these hearings. *See, e.g.*, R. at 37.

2) **Appellate Exhibits IX-XVI, XXIX, LI, LII, LVII** – The exhibits were ordered sealed by the military judge. *See* Memo (showing all but App. Ex. XVI sealed); *see also* R. at 29 (sealing App. Ex. XVI). These exhibits pertain to Mil. R. Evid. 412 and 513 issues raised at trial, Exhibit Index, and were reviewed by the military judge and the parties. *See, e.g.*, R. at 26-29.

3) **Appellate Exhibit XLVII** – This exhibit is contraband. R. at 176. It was offered by the Government as part of its response to a defense motion to exclude Mil. R. Evid. 404(b)

and 414 evidence. R. at 175-76; *see* Appellate Exhibit XLVI. This exhibit was viewed by the military judge, R. at 176-77, and apparently the parties. *See* R. at 175-76; *see also* App. Ex. XLV (asking for the exclusion of the apparent 404(b) evidence).

4) **Prosecution Exhibit 2 for Identification (offered but not admitted)** – This exhibit was viewed by the military judge and the parties and was ordered sealed by the military judge. R. at 354-56, 361.

5) **PHO Exhibits 8-10** – These exhibits were considered by the preliminary hearing officer and ostensibly reviewed by the parties. It is not readily apparent from the record what these exhibits are or what they contain.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these matters is reasonably necessary to appellate counsels' responsibilities, undersigned counsel asserts that review of the referenced exhibits is necessary to conduct a complete review of the record of trial and be in a position to advocate competently on behalf of Appellant. The Appellant stands convicted of an offense related to the sealed materials admitted at trial. In order to fully present matters to this Court, the undersigned counsel requires access to sealed material.

Moreover, a review of the entire record of trial is necessary because this Court is empowered by Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, to grant relief based on a review and analysis of "the entire record." To determine whether the record of trial yields grounds for this Court to grant relief under Article 66, UCMJ, 10 U.S.C. § 866, appellate defense counsel must, therefore, examine "the entire record."

> Although Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error, that broad mandate does not reduce the importance of adequate representation. As we said in *United States v.*

Ortiz, 24 M.J. 323, 325 (C.M.A. 1987), independent review is not the same as competent appellate representation.

United States v. May, 47 M.J. 478, 481, (C.A.A.F. 1998). The sealed materials referenced above must be reviewed to ensure undersigned counsel provides "competent appellate representation." *Id*. Accordingly, examination of these exhibits is reasonably necessary since undersigned counsel cannot fulfill his duty of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing the complete record of trial.

Appellate Government Counsel have been consulted about this motion and consents to the relief sought by the Appellant.

WHEREFORE, Appellant respectfully requests that this Court grant this consent motion to view sealed materials.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Maj, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 29 July 2025.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Maj, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **DERRICK E. BRADDY** United States Air Force	)	No. ACM 40810
Appellant	)	5 August 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(1) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **14 September 2025**. The record of trial was docketed with this Court on 17 April 2025. From the date of docketing to the present date, 110 days have elapsed. On the date requested, 150 days will have elapsed.

On 20 December 2024, Appellant was tried by a general court-martial composed of a military judge alone at Scott Air Force Base, Illinois. R. at 1, 297. Appellant was found guilty, contrary to his pleas, of one charge and three specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b.[1] R. at 9, 300, 945. The military judge sentenced Appellant to be reduced to the grade of E-1, to be confined for a total of sixty months (with confinement for each specification running concurrently), and to

GRANTED
8 AUG 2025

[1] Appellant was found not guilty of one charge and one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920; one charge and one specification of sexual abuse of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b; and one charge and one specification of providing alcohol to a minor in violation of Article 134, UCMJ, 10 U.S.C. § 934. One charge and one specification of sexual abuse of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b was also withdrawn and dismissed without prejudice.

be dishonorably discharged. R. at 985. The convening authority took no action on the findings or the sentence. Convening Authority Decision on Action – *United States v. MSgt Derrick E. Braddy* (Jan. 9, 2025).

The trial transcript is 986 pages long. The electronic record of trial contains fifteen Prosecution Exhibits, eighteen Defense Exhibits, forty-three Appellate Exhibits, and one Court Exhibit. Appellant is currently confined.

Appellant was advised of his right to a timely appeal. Appellant has been provided an update of the status of counsel's progress on his case. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

Through no fault of Appellant, civilian appellate defense counsel (Mr. Scott Hockenberry) and undersigned counsel have been unable to complete their review of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise him regarding potential errors.

WHEREFORE, Appellant requests that this Court grant the requested enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

JOHN M. FREDERICKS, Capt, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 5 August 2025.

JOHN M. FREDERICKS, Capt, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **DERRICK E. BRADDY,** United States Air Force, *Appellant.*	)	No. ACM 40810
	)	6 August 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]
VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 6 August 2025.

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **DERRICK E. BRADDY** United States Air Force *Appellant*	)	No. ACM 40810 25 August 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Assignments of Error

I.

WHETHER THE EVIDENCE SUPPORTING SPECIFICATION 1 OF CHARGE I IS FACTUALLY INSUFFICIENT WHERE, INTER ALIA, THE VICTIM REPEATEDLY STATED IT MAY HAVE BEEN A DREAM, HAD PREVIOUSLY EXPIRIENECED A SIMILAR ASSAULT BY A DIFFERENT FAMILY MEMBER, AND DISCLAIMED SEEING APEPPELLANT DURING THE CHARGED EVENT.

II.

WHETHER THE EVIDENCE SUPPORTING SPECIFICATIONS 3 AND 4 OF CHARGE I IS FACTUALLY INSUFFICENT.

III.

WHETHER THE EVIDENCE SUPPORTING SPECIFICATION 3 OF CHARGE I IS LEGALLY AND FACTUALLY INSUFFICENT WHERE THE SPECIFICATION ALLEGED "INDECENT CONDUCT" BUT THE ACTUS REUS EXCLUSIVELY INVOLVED LANGUAGE.

Statement of the Case

On 21 October and from 16 through 20 December 2024, Appellant was tried by a general court-martial at Scott Air Force Base, Illinois. Trial Tr. at 1, 168, 301, 506, 793, 945. Contrary to his pleas, the military judge found Appellant guilty of one charge and three specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b.[1] Trial Tr. at 9, 297-300, 945. The military judge sentenced Appellant to be reduced to the grade of E-1, to be confined for a total of sixty months, and to be dishonorably discharged. Trial Tr. at 985. The convening authority deferred the reduction in grade until the entry of judgement and waived forfeitures for a period of six months for the benefit of Appellant's children but otherwise took no action on the findings or the sentence. eROT Vol. 1, *Convening Authority Decision on Action* (Jan. 9, 2025).

Statement of Facts

1. Background

Appellant's convictions arise from accusations made by his niece, EH, relating to two incidents that happened when she was around 12 years old. Trial Tr. at 401-21; 443-86. In the first incident, EH alleged she fell asleep on the couch, and awoke to perceive her arm outstretched with what she guessed to be Appellant's penis in her hand. Trial Tr. at 404-12, 461-474. EH testified she did not open her eyes or see Appellant, but thought it the perpetrator was Appellant because of rough skin on his hands and hearing heavy breathing. Trial Tr. at 409-10;

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[1] Appellant was found not guilty, consistent with his pleas, of one charge and one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920; one charge and one specification of sexual abuse of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b; and one charge and one specification of conduct of a nature to bring discredit upon the armed forces in violation of Article 134, UCMJ, 10 U.S.C. § 934. *Compare* Trial Tr. at 945 *with* Electronic Record of Trial (eROT) Vol. 1, *Entry of Judgment*, Dec. 20, 2024.

see also Trial Tr. at 461 (Q: "During the entirety of that incident, you kept your eyes shut?" A: "Yes."); Trial Tr. at 462 (Q: "[Y]ou never actually saw [Appellant], is that correct?" A: "Yes."). Three years prior, EH was the victim of a similar event, perpetrated by a male cousin. Trial Tr. at 474, 491-92.

In the second incident, EH testified Appellant had allowed her to drink soju and made the two charged inappropriate statements (Charge I, Specifications 3 and 4) during a game of "truth or dare."[2] Trial Tr. at 412-422, 443-61. Specifically, the statements were: daring EH to take her underwear off and then put her shorts back on and asking EH what type of pornography EH watched. Trial Tr. at 419-20. EH testified that she declined to perform the "dare" or answer the question and they continued to play "truth or dare."[3] Trial Tr. at 419-21.

2. Mil. R. Evid. 414 Testimony from SA

Pursuant to Mil. R. Evid 414, the government presented testimony from Appellant's stepsister, SA. Trial Tr. at 316-43. SA was about 10 years younger than Appellant. Trial Tr. at 317. SA testified to an incident, approximately 20 years prior to the charged events, in which she was sleeping on a couch in her father's house and woke up to find her arm outstretched, Appellant next to her, and Appellant's penis in her outstretched hand. Trial Tr. at 319-21.

3. EH's Disclosure Timeline

EH's initial disclosure to JC, Appellant's sister and EH's mother, was limited to the fact that Appellant had allowed her to drink alcohol. *See* Trial Tr. at 347-48, 373-74, 435-36, 439.

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[2] Prior to playing "truth or dare" with Appellant, EH was playing the "truth or dare" with her friends via a virtual reality headset. *See* Trial Tr. at 419, 451-53.

[3] EH also testified about a charged incident where Appellant was alleged to have touched her buttocks, but this specification resulted in an acquittal, seemingly on the basis of the lack of indication of sexual intent. *See, e.g.*, Trial Tr. at 441, 475.

EH did not disclose anything sexual during this disclosure. *Id.* Later in the day, JC reapproached EH and asked EH for more details – at which time EH disclosed the charged statements during the "truth or dare" game. Trial Tr. at 375-76, 437. When EH disclosed the "truth or dare" incident, JC testified she assumed Appellant must have done something else inappropriate to EH. Trial Tr. at 378.

EH disclosed the alleged couch-sexual-contact-incident via a typed note on an iPad dated 10 September 2022, which she showed to her stepmother, CH. Pros. Ex. 5; *see also* Trial Tr. at 429-30, 488-91.[4] The note stated that EH was unsure whether the event was a dream. Pros. Ex. 5 ("I don't know if it's a dream but he picked up my hand and put he's (sic) [eggplant emoji] in it and was putting it in and out of my hand but it felt like it was real like I felt it in my hand.").

On 7 November 2022, EH underwent a Child Forensic Interview. Trial Tr. at 442. EH acknowledged telling the Child Forensic Interviewer that she was not sure whether the couch/sleeping incident was a dream or not. Trial Tr. at 473-74. At trial, despite acknowledging these prior statements, EH testified she now thought it was not a dream. *Id.*

4. Crosstalk Between Family Members

After EH's initial disclosure to her mother about the "truth or dare" incident, but before the disclosure of the alleged couch-sexual-contact-incident, EH's mother, JC, messaged SA. Trial Tr. at 323-24. JC asked SA "if anything weird happened" when SA was younger. Trial Tr. at 323.

[4] EH later testified that she had told her stepmother about the alleged couch-sexual-contact-incident prior to writing the iPad note. However, it appears from context that, at most, EH's stepmother was aware of EH's disclosures to JC, which did not include the alleged couch-sexual-contact-incident, prior to EH writing the note. *Compare* Trial Tr. at 440-41, *with* Trial Tr. at 496-97.

SA told JC about the alleged couch-sexual-contact-incident between SA and Appellant from 20 years prior. Trial Tr. 319-23.

At the time of EH's initial disclosure to her mother, it was also known amongst the family – or at least known by JC – that Appellant had been investigated for allegations of sexual abuse against HB, Appellant's daughter. Trial Tr. at 375. After SA disclosed her accusation to JC, JC then shared SA's accusation with several family members. Trial Tr. at 380 (Q: "Now after speaking to [SA], you then proceeded to share that information with several family members, correct?" A: "Umm, yes."). Only *after* SA disclosed *her own* allegation against Appellant from twenty years ago, EH alleged that Appellant had done the exact same thing to her in 2022. Trial Tr. at 380-81. SA further testified that JC told her about EH's accusations. Trial Tr. at 324.

EH testified that she was initially not certain if Appellant had done anything wrong. Trial Tr. at 458. Rather, she had a "gut instinct" that something bad had happened to her. *Id.* EH confirmed that she had spoken to her cousin – the other charged victim HB – about what had happened to HB, though EH was somewhat unclear on the timeline of this discussion.[5] *Id.* EH later confirmed that she had spoken to HB, and HB supported and encouraged her to report Appellant. Trial Tr. at 484. EH also testified that it was her mother, JC, who had decided to "press charges" regarding EH's accusations. Trial Tr. at 484-85. EH further testified that she had spoken to another female cousin, identified as N, about at least some of her accusations against Appellant. Trial Tr. at 425.

[5] EH originally stated she was not aware if she had spoken to HB before or after the Child Forensic Interview. Trial Tr. at 458-59. Later, however, EH acknowledged that she was aware of HB's allegations at the time of the Child Forensic Interview. Trial Tr. at 460-61.

EH was also sitting in the courtroom and heard the other witness's testimony prior to her own. *See* Trial Tr. at 426-27. SA and JC both testified before EH, and EH heard them testify prior to her testimony.[6]

5. Appellant's Testimony, Prior Exculpatory Statements, and Positive Character Evidence

Appellant testified that he had not committed the charged sexual act or made the charged statements to EH. Trial Tr. at 680-720, 728-36, 738-65. Appellant acknowledged giving EH alcohol and playing "truth or dare" with her but clarified that he had not dared her to remove her pants and underwear. Trial Tr. at 695-710. On the contrary, Appellant testified that he had dared EH to put a pair of underwear on *over* her pants like a superhero. Trial Tr. at 707-08. He further denied asking EH about pornography during the "truth or dare" game. Trial Tr. at 710.

Appellant did acknowledge making a comment to EH about pornography on the of the alleged indecent statements, but explained it was not part of the game, but rather in response to EH teasing the boys present about the type of pornography they were watching because those boys had apparently been recently caught with pornography on their devices. Trial Tr. at 757-61. Appellant testified that these comments were consistent with other family discussions on the topic of pornography, primarily by JC, which had apparently followed catching several of the children with pornography. Trial Tr. at 759-60.

JC testified that she had confronted Appellant about the "truth or dare" game and, consistent with his testimony, Appellant "was completely transparent about allowing [EH] to consume alcohol," but Appellant did not admit to or confess making the charged inappropriate

[6] Appellate defense counsel's understanding is that EH was present in the gallery for the entirety of the proceedings, to include counsel's opening statements, closing arguments, and the testimony of other witnesses.

comments to EH. Trial Tr. at 379. Similarly, JC confronted Appellant in a subsequent conversation about EH's accusation of placing his penis in her hand and Appellant consistently denied it. Trial Tr. at 380-81.

The defense also presented evidence from three individuals who testified to a positive opinion of Appellant's relevant character traits: respect towards children, respect towards women, and truthfulness. Trial Tr. at 814-16; Def. Exs. I, J. The government did not rebut this evidence.

6. Expert Testimony

The defense presented testimony from an expert in forensic psychology. Trial Tr. at 825-73. The expert testified that children's memories are vulnerable to the environment around them, such as what they hear other people say, and emotional and social pressures. Trial Tr. at 831. The expert testified that a 12-year-old child can come to believe something is true, even if it did not actually happen. Trial Tr. at 832. While false memories cannot be scientifically distinguished from true memories, there are known risk factors for the creation of false memories. Trial Tr. at 832. The more risk factors that are present, the greater the risk of a false memory. Trial Tr. at 832. Turning to the facts of EH's accusations, the expert noted that multiple risk factors for suggestibility – or false memory – were present. Trial Tr. at 847. Risk factors included repetitive questioning, with six to seven people speaking to EH about her accusations prior to the forensic interview (Trial Tr. at 484-85, 849-50); confirmation bias and being questioned by multiple individuals (including JC and HB) who had their own reported histories of sexual abuse – a known risk factor (Trial Tr. at 850); the fact that EH previously had a similar experience where she was assaulted by her male cousin (Trial Tr. at 851); and negative serotyping – EH being exposed to multiple individuals independently saying negative things about Appellant (Trial Tr. at 851).

The expert further testified that it was concerning that EH had initially stated the charged assault may have been a dream, repeated that uncertainty in the forensic interview, and then, two years later at trial, stated she did not think it was a dream. Trial Tr. at 851-52. This progression raised the question of suggestibility and reinforced all the risk factors discussed previously. Trial Tr. at 852.

Argument

I.

WHETHER THE EVIDENCE SUPPORTING SPECIFICATION 1 OF CHARGE I IS FACTUALLY INSUFFICIENT WHERE, INTER ALIA, THE VICTIM REPEATEDLY STATED IT MAY HAVE BEEN A DREAM, HAD PREVIOUSLY EXPIRIENECED A SIMILAR ASSAULT BY A DIFFERENT FAMILY MEMBER, AND DISCLAIMED SEEING APEPPELLANT DURING THE CHARGED EVENT.

Standard of Review

Issues of legal and factual sufficiency are reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted); *see also United States v. Harvey,* 85 M.J. 127 (C.A.A.F. 2024) (discussing new factual sufficiency standard).

Law and Analysis

The current version of Article 66(d)(1)(B), UCMJ, states:

(B) FACTUAL SUFFICIENCY REVIEW.

(i) In an appeal of a finding of guilty under subsection (b), the [c]ourt may consider whether the finding is correct in fact upon a request of the accused if the accused makes a specific showing of a deficiency of proof.

(ii) After an accused has made such a showing, the [c]ourt may weigh the evidence and determine controverted questions of fact subject to—

(I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and

(II) appropriate deference to findings of fact entered into the record by the military judge.

(iii) If, as a result of the review conducted under clause (ii), the [c]ourt is clearly convinced that the finding of guilty was against the weight of the evidence, the [c]ourt may dismiss, set aside, or modify the finding, or affirm a lesser finding.

Article 66(d)(1)(B)(i), UCMJ, 10 U.S.C. § 866(d)(1)(B)(i), *Manual for Courts-Martial, United States* (2024 ed.) (2024 MCM)).

"[T]he requirement of 'appropriate deference' when a [Court of Criminal Appeals (CCA)] 'weigh[s] the evidence and determine[s] controverted questions of fact' . . . will depend on the nature of the evidence at issue." *Harvey*, 85 M.J. at 130. It is within this Court's discretion to determine what level of deference is appropriate. *Id.* at 131.

"[T]he quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is 'proof beyond a reasonable doubt,' the same as the quantum of proof necessary to find an accused guilty at trial." *Id.* For the Court of Criminal Appeals "to be 'clearly convinced that the finding of guilty was against the weight of the evidence,' two requirements must be met." *Id.* at 132. First, the Court of Criminal Appeals must decide that evidence, "*as the CCA has weighed it*, does not prove that the appellant is guilty beyond a reasonable doubt." *Id.* Second, the Court of Criminal Appeals "must be clearly convinced of the correctness of [their] decision." *Id.*

Appellant's conviction on this specification is drastically against the weight of the evidence, which failed to prove that the charged event occurred or, if it did, that Appellant was the one who committed it.

At the most basic level, the evidence raised the distinct possibility that the charged assault never occurred at all. In EH's initial disclosure via the typed iPad note, dated 10 September 2022, EH explicitly stated that she did not know whether it was a dream. Pros. Ex. 5. Approximately two months later, EH repeated to the Child Forensic Interviewer that she was not sure whether it was a dream or not. Trial Tr. at 473-74.

In addition to EH's explicit and repeated statements that the charged assault may have been a dream, this possibility was increased by other factors. EH had taken sleep aids prior to the charged events, which may have further clouded her perception.[7] EH also had been the victim of a similar assault by a different male family member, her cousin, in recent years. Trial Tr. at 474; *see also* Trial Tr. at 367. Dreams, of course, are a reflection of past experiences, and it would not be unreasonable if a victim of sexual abuse had dreams about similar themes.

EH never saw Appellant commit the charged act. Trial Tr. at 410, 461-62. Layered on top of the uncertainty as to whether the charged act had ever occurred, the evidence was woefully insufficient to identify Appellant as the supposed perpetrator. EH testified that she kept her eyes closed the whole time. Trial Tr. at 461-62. EH's only means of identification was from supposedly feeling his rough skin and hearing his breathing. Trial Tr. at 409. These are not reliable identifiers, particularly when added to the perception issues of being on sleep aid medication, actively

[7] While the government portrayed Appellant's provision of sleep aids to EH as sinister, other evidence established it was consistent with EH's routine. Trial Tr. at 406. In any event, it is reasonable to believe that the use of sleep aids could have impacted EH's ability to accurately perceive and recall during the charged events.

sleeping seconds before, and having a similar experience in recent years. EH's previous victimization in a similar manner by another family member is again relevant here, as this history of abuse between the family children raises the possibility that someone other than the accused may have committed the charged act. The record reflects that other individuals, including several of the male children, were in the house at the time (though not the perpetrator of the previous abuse). Trial Tr. at 471.

On top of these weaknesses in the evidence, there was considerable evidence that EH had been exposed to a great deal of negative information about Appellant that may well have tinted her perception and biases. Certainly, there was a great deal of crosstalk between the various family members on the specific subject at hand. Trial Tr. at 323, 375, 380-81, 424-25, 458, 484-85.

The timeline of EH's disclosure of the alleged couch-sexual-contact-incident is particularly notable. EH did not disclose anything about this incident in her initial disclosures to JC, even when prompted by JC for more information. Trial Tr. at 346-48, 436-40. After that initial disclosure, JC contacted SA, for the specific purpose of asking her if anything had happened to her. Trial Tr. at 323-24, 363, 377-80. During JC and SA's conversation, SA disclosed her own alleged couch-sexual-contact-incident which was nearly identical to the accusation EH would later make. *Compare* Trial Tr. at 320-23, *with* Trial Tr. at 404-12. JC then "proceeded to share [SA's alleged assault] with several family members . . . ." Trial Tr. at 380. It was not until *after* SA shared this information with JC mother, and then JC shared it around the family, that EH then alleged the exact same thing – explicitly saying that it may have been a dream.

In sum: (1) EH disclosed misconduct by Appellant to JC (the "truth or dare" accusations); (2) Based on EH's disclosures, JC contacted SA to ask whether anything had happened to SA when SA was younger; (3) SA replied that Appellant had placed his penis in SA's hand when SA

slept on the couch; (4) JC related this information to multiple other family members; and then (5) EH alleged that Appellant had done the exact same thing to her – placing his penis in her hand while she slept on the couch.

It is remarkably coincidental that JC would just so happen to initiate a conversation with SA, with the goal of gathering information against Appellant, and SA would then disclose that Appellant had done a nearly identical act to SA – prior to EH even making the accusation of Appellant doing the same precise thing to her. This timeline should give this Court great pause, particularly coupled with the crosstalk between family members and EH's uncertainty about whether her own nearly-identical accusation had been real or imagined.

The defense expert tied these themes together, testifying to her concerns. The defense expert testified that it was concerning that concerning that EH had initially stated the charged assault may have been a dream, repeated that uncertainty in the forensic interview, and then two years later at trial stated she did not think it was a dream. Trial Tr. at 851-52. The defense expert testified that the case had multiple risk factors for suggestibility or false memory: repetitive questioning, with six to seven people speaking to EH about her accusations prior to the forensic interview, to include the other charged victim (HB) (Trial Tr. at 848-50); confirmation bias and being questioned by multiple individuals (including JC and HB) who were themselves had a reported history of sexual abuse – a known risk factor (Trial Tr. at 850); the fact that EH had a similar experience (being assaulted by her male cousin) previously (Trial Tr. at 851); and negative serotyping, EH being exposed to multiple individuals independently saying negative things about Appellant (Trial Tr. at 851-52).

These weaknesses in the evidence are more than sufficient to render Appellant's conviction factually insufficient. The weight of the evidence certainly suggests that EH's memory

did not get better over time. EH's memory in the nearly three years between the alleged event and her testimony at court was subject to intense suggestibility due to her age, repetitive questioning, confirmation bias, and negative serotyping about Appellant. Layered on top of the weaknesses in the government's evidence, Appellant testified that the charged events did not occur. After the government attempted to impeach him, the defense put on character evidence supporting his relevant character traits and truthfulness. The government put on no evidence to rebut Appellant's positive character in these areas.

The government's strongest supporting evidence was probably the testimony of SA pursuant to Mil. R. Evid. 414; however, even that evidence is suspect. SA testified Appellant had previously molested her, including a very similar incident to the charged event. While Mil. R. Evid. 414 is a powerful evidentiary tool, the relevance of this evidence is reduced by the temporal gap – approximately 20 years. Additionally, the parallels between one of SA's accusations and EH's accusation are suspiciously similar, particularly as SA's report was so drastically delayed and there was evidence of crosstalk between the family members about Appellant's alleged abusive actions.

This Court's prior decision in *United States v. Barbary* also suggests that the evidence presented in the present case is factually insufficient. *United States v. Barbary*, 2017 CCA LEXIS 384 (A.F. Ct. Crim. App. May 31, 2017). In *Barbary*, this Court analyzed the factual sufficiency of a conviction under Article 120b, UCMJ. *Id.* at *28-31. There, the appellant challenged the factual sufficiency of his child sexual abuse convictions, arguing that the government's evidence was insufficient to establish guilt due to the victim's credibility and reporting timeline. *Id.* at *28-30. There, this Court found that the child-victim's forensic interview was made close in time to the abuse, the victim's forensic interview was consistent with the victim's testimony at court, the

victim's forensic interview was made prior to interference by the victim's mother, the victim's credibility was corroborated by multiple witnesses, that there was no motive to fabricate, and that the victim's timeline of abuse was corroborated by other evidence; therefore, the conviction was factually sufficient. *Id.* at *30-31.

Here, we have the opposite. EH's forensic interview was months after her initial disclosure, EH's forensic interview was inconsistent with her testimony in court (i.e., EH's memory got "better"), EH's forensic interview took place after several family members had already spoken to her negatively about the appellant, there was no character evidence put on for EH's truthfulness (but there was for Appellant), and the timeline of abuse is not corroborated by other evidence (i.e., EH was still allowed to, and in fact requested to, continue to spend time with Appellant).

There are at least two fair and rational hypotheses that the evidence failed to exclude. First, the charged event may never have occurred at all. EH herself repeatedly said it may have been a dream, and this possibility is increased by the fact that she was sleeping, on sleep aids, and had previously experienced a very similar assault. Second, the charged event may have occurred but been perpetrated by another individual. There was no reliable identification of Appellant; EH did not even see him. There were also other male family members in the house and there was a history of abuse of EH by male children relatives. On balance, this Court should find the evidence factually insufficient.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the finding of guilty as to Specification 1 of Charge I.

II.

WHETHER THE EVIDENCE SUPPORTING SPECIFICATIONS 3 AND 4 OF CHARGE I IS FACTUALLY INSUFFICENT.

Standard of Review

Adopted from A.E. I.

Law and Analysis

These convictions relate to Appellant's supposed words spoken to EH during a game of "truth or dare." Again, the evidence failed to exclude fair and rational hypotheses other than guilt. Appellant testified and explained both of the charged statements. Regarding the charged "dare" for EH "to take her pants and underwear off" – Appellant testified that what he actually said was that EH should put a pair of underwear over her pants like a superhero. Trial Tr. at 707-10. This is a perfectly plausible account in the context of a game of truth or dare and would clearly not constitute a lewd act. EH's testimony was actually very similar to Appellant's innocent explanation. *Compare* Trial Tr. at 419-20, 455, 488, *with* Trial Tr. at 707-10, 736, 755-57. The difference, of course, was that EH reported Appellant had said to take off the underwear she was wearing, then put it back on over her shorts. EH's perception could have resulted from a misunderstanding due to her alcohol consumption and EH's perception of Appellant was prejudiced because of her exposure to multiple other family members talking negatively about him.

Outside of EH's testimony, which was in many ways remarkably similar to Appellant's, nothing contradicted Appellant's denial and, as discussed above, the defense put on unrebutted character evidence of relevant positive character traits including truthfulness.

Regarding the second alleged statement, "asking what kind of pornography she watches," Appellant again provided an innocent explanation, acknowledged that he had made the statement,

but in a wholly different context – where EH was teasing one of the other children who had been caught watching pornography. Again, there was nothing inherently improbable in Appellant's story, and it is not even particularly incompatible with EH's testimony when potential issues in perception and recall are taken into account. *Compare* Trial Tr. at 420-21, 437, 454-55, *with* Trial Tr. at 710, 736, 757-60. It is perfectly plausible that EH could have confused these events in her mind, particularly given that she was drinking alcohol during the "truth or dare" game. And again, it is reasonable that EH's perception and recall may have been negatively influenced by her exposure to family members telling her Appellant was a child molester.

Additionally, the evidence supports a lack of memory on this specific occasion for EH. EH was consuming alcohol at the time and as a result of the alcohol, she reported being "dizzy" and did not remember changing clothes during the night. Trial Tr. at 453, 456-58. This evidence increases the chance of a mistake in perception or recall on EH's part that would explain the minor differences between her testimony and Appellant's innocent explanations.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings of guilty as to Specifications 3 and 4 of Charge I.

III.

WHETHER THE EVIDENCE SUPPORTING SPECIFICATION 3 OF CHARGE I IS LEGALLY AND FACTUALLY INSUFFICENT WHERE THE SPECIFICATION ALLEGED "INDECENT CONDUCT" BUT THE ACTUS REUS EXCLUSIVELY INVOLVED LANGUAGE.

Standard of Review

Adopted from A.E. I.

Law and Analysis

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (citation omitted). "[I]n resolving questions of legal sufficiency, [this Court is] bound to 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) (citations omitted). As a result, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." *United States v. King*, 78 M.J. 218, 221 (alteration in original) (citation omitted). "The [G]overnment is free to meet its burden of proof with circumstantial evidence." *Id.* (citations omitted). "The term reasonable doubt, however, does not mean that the evidence must be free from conflict." *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)), aff'd, 77 M.J. 289 (C.A.A.F. 2018). "This deferential standard impinges upon the factfinder's discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *United States v. Mendoza*, 85 M.J. 213, 217 (C.A.A.F. 2024) (internal quotation marks and citation omitted).

Article 120b makes it an offense for anyone to commit "a lewd act" upon a child. *See* 10 U.S.C. 920b (2018); *see also Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*) pt. IV, ¶ 62.a.(c). The phrase "lewd act" is statutorily defined, in part, as "intentionally communicating indecent *language* to a child by any means . . . ." or "any indecent *conduct*, intentionally done with or in the presence of a child . . . ." *Id.* at § 920b(h)(5)(C)-(D) (emphasis added).

Specification 3 of Charge I charged Appellant with indecent *conduct* for orally daring EH to remove her pants and underwear. eROT Vol. 1, *DD Form 458 – Charge Sheet* (Jan. 10, 2024) ("by engaging in *indecent conduct*, to wit: daring [EH] to take her pants and underwear off . . . ." (emphasis added)). Appellant's alleged misconduct, however, would constitute *language*, not *conduct*. *United States v. Green*, 68 M.J. 266, 269 (C.A.A.F. 2010) (defining the plain meaning of "language" for "indecent language" under Article 134, UCMJ, as "any organized means of conveying or communicating ideas, esp[ecially] by human speech, written characters, or sign language.") (citation modified); *see also United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010) (noting statutory terms should be given their ordinary and plain meaning). Because Specification 3 of Charge I is lacking sufficient proof of *conduct*, and thereby missing an essential element of the charged offense, it is legally and factually insufficient.

In *United States v. King*, the Court of Appeals for the Armed Forces (CAAF) addressed a similar issue, albeit under a prior version of Article 120. *United States v. King*, 71 M.J. 50 (C.A.A.F. 2012); *see* 10 U.S.C. § 920(k) (2006) (repealed 2011); *see also Manual for Courts-Martial, United States* (2008 ed.) (2008 *MCM*) pt. IV, ¶ 45.a.(k). There, the government charged King with indecent *conduct* by requesting his stepdaughter "to expose her breasts during a SKYPE internet conversation so that he could view them utilizing the web camera." *Id.* at 51. On appeal, King alleged the specification was legally insufficient because it charged indecent *conduct* but alleged only indecent *language*. *Id.* at 51, n.1.

Although the CAAF noted that under some of its precedent, "'language' can be, or be part of, 'conduct' in a particular case," it nevertheless set aside the conviction for indecent conduct. *Id.* at 52-53 (citing precedent under Article 133 and 134, UCMJ) (citations omitted); *contrast* 10 U.S.C. § 920(t)(11) (2006) (indecent liberty, covering communications), *with* 10 U.S.C.

§ 920(t)(12) (2006) (indecent conduct, omitting communications). Analyzing the issue under whether the specification stated an offense, the Court found that King's language was a substantial step towards the conduct of viewing, and opted to affirm a lesser included offense of attempted indecent conduct. *King*, 71 M.J. at 52-53.

Appellant's case is stronger than King's. Here, the statute at issue more clearly delineates indecent language from indecent conduct. *Compare* 10 U.S.C. § 920b(h)(5)(C) (2018), *with* 10 U.S.C. § 920b(h)(5)(D) (2018) (defining different types of "lewd acts" under 10 U.S.C. § 920b(c)); *see also* 2019 *MCM*, pt. IV, ¶ 62.e.(3)(c)-(d). Thus, interpreting "language" to include "conduct" would render an entire statutory provision superfluous. *See Advocate Healthcare Network v. Stapleton*, 581 U.S. 468, 478 (2017) ("the presumption [is] that each word Congress uses is there for a reason" and courts will "give effect, if possible, to every clause and word of a statute.") (internal citations and quotations omitted); *see also United States v. Mendoza*, 85 M.J. 213, 220 (C.A.A.F. 2024) (holding that when the statutory text creates multiple theories of liability, they must be given effect to avoid surplusage).

Moreover, unlike *King*, the legal sufficiency issue here must be resolved because no lesser included offense is available based on the charging language. *See United States v. Riley*, 50 M.J. 410, 415 (C.A.A.F. 1999) ("An appellate court may not affirm an included offense on 'a theory not presented to the' trier of fact.") (quoting *Chiarella v. United States*, 445 U.S. 222, 236 (1980)).[8] While the government may argue that the "dare" is conduct and the "truth" is language, as evidenced by their charging scheme, such a position would conflict with the express statutory

[8] While it is not fully developed in the *King* opinion, it seems the charging language in *King* was rather unique, allowing the specification to be saved through striking certain language – this dynamic is not present here.

scheme. *See Mendoza*, 85 M.J. 213; eROT Vol. 1, *DD Form 458 – Charge Sheet* (Jan. 10, 2024) (Specifications 3-4). Like *King*, a "dare" would be at most an *attempt* to engage in indecent conduct; the "dare" is language used to entice conduct, it is not conduct itself. Lastly, due to insufficient evidence being presented on indecent *conduct*, the specification is also factually insufficient.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings of guilty as to Specification 3 of Charge I.

Conclusion

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings of guilty and the sentence.

[redacted]

BRAD SIMON
Civilian Appellate Defense Counsel
[redacted]

[redacted]

JOHN M. FREDERICKS, Capt, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 25 August 2025.

JOHN M. FREDERICKS, Capt, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **DERRICK E. BRADDY** United States Air Force *Appellant.*	)	No. ACM 40810 17 September 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(5), the United States respectfully requests a 21-day enlargement of time to respond in the above captioned case. This is the United States' first request for an enlargement of time. This case was docketed with the Court on 17 April 2025. Appellant filed his brief with this Court on 24 August 2025. The United States' response in this case is currently due on 24 September 2025. As of the date of this filing, 153 days have elapsed since docketing. If this enlargement of time is granted, the United States' response will be due on 15 October 2025, and 181 days will have elapsed since docketing.

There is good cause for the enlargement of time in this case. The Air Force Appellate Operations Division (JAJG) is experiencing an increased workload. As of today, the division has 14 briefs pending before this Court and 5 briefs pending before the Court of Appeals for the Armed Forces. JAJG recently lost its deputy director, and the position has not yet been backfilled. JAJG has six active duty captains and majors and is engaging Reserve support, but two of its captains, Capt Wright and Capt Mumford, have been out of the office on temporary duty for two weeks representing clients in a holdover case from their past assignment.

GRANTED
18 SEP 2025

Undersigned counsel is currently counsel of record on this case, but intends to assign it to whichever of Capt Wright or Capt Mumford who can get to it first. However, they are both assigned to other cases that were filed earlier with this Court, United States v. Augustin and United States v. Talley, respectively. Since undersigned counsel is responsible for reviewing all court briefs and filings, and all other JAJG counsel are already assigned multiple briefs with earlier deadlines, no one has been able to begin work on this case. Further, no counsel is able to file a brief sooner than the requested deadline.

Appellant has raised three assignments of error in a 21-page brief. This request also allows for sufficient time for supervisory review and will ensure that the division can file the most thorough, helpful brief possible.

WHEREFORE, the United States respectfully requests this Honorable Court grant this motion for an enlargement of time.

[redacted]
MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, civilian defense counsel, and the Air Force Appellate Defense Division on 17 September 2025.

[redacted]

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Master Sergeant (E-7) **DERRICK E. BRADDY** United States Air Force *Appellant*	)	**APPELLANT'S GENERAL OPPOSITION TO UNITED STATES' MOTION FOR ENLARGMENT OF TIME** Before Panel No. 2 No. ACM 40810 18 September 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, Appellant hereby enters its general opposition to the United States' Motion for Enlargement of Time to file an Answer to Assignments of Error in this case.

WHEREFORE, Appellant respectfully requests that this Court deny the United States' enlargement motion.

Respectfully submitted,

[redacted]

JOHN M. FREDERICKS, Capt, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 18 September 2025.

[redacted]

JOHN M. FREDERICKS, Capt, USAF
Appellate Defense Counsel
[redacted]

15 October 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Master Sergeant (E-7) DERRICK E. BRADDY, USAF, *Appellant*.	)))))))))	ANSWER TO ASSIGNMENTS OF ERROR Panel 2 ACM 40810

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

ISSUES PRESENTED

I.

WHETHER THE EVIDENCE SUPPORTING SPECIFICATION 1 OF CHARGE I IS FACTUALLY INSUFFICIENT WHERE, INTER ALIA, THE VICTIM REPEATEDLY STATED IT MAY HAVE BEEN A DREAM, HAD PREVIOUSLY EXPERIENCED A SIMILAR ASSAULT BY A DIFFERENT FAMILY MEMBER, AND DISCLAIMED SEEING APPELLANT DURING THE CHARGED EVENT.

II.

WHETHER THE EVIDENCE SUPPORTING SPECIFICATIONS 3 AND 4 OF CHARGE I IS FACTUALLY INSUFFICENT.

III.

WHETHER THE EVIDENCE SUPPORTING SPECIFICATION 3 OF CHARGE I IS LEGALLY AND FACTUALLY INSUFFICENT WHERE THE SPECIFICATION ALLEGED "INDECENT CONDUCT" BUT THE ACTUS REUS EXCLUSIVELY INVOLVED LANGUAGE.

STATEMENT OF THE CASE

The United States generally accepts Appellant's Statement of the Case.

STATEMENT OF FACTS

- *Prior Incident in 2004 Involving SA, Appellant's 12-Year-Old Stepsister*

SA testified that her father was married to Appellant's mother, making Appellant her stepbrother. (R. at 317.) Appellant was 10 years older than SA. SA considered Appellant as her older brother who she looked up to and was proud of because he was "a great guy" and was "doing well in life." (R. at 324.) SA testified that when she was 12 years old, she would sometimes stay at her father's house, and Appellant would be there when he would be home on leave. (R. at 318.)

SA testified that one night when she was 12, approximately in 2004, she was sleeping on the living room couch in her father's house when she woke to find Appellant kneeling down beside her. (R. at 319-20, 329.) SA said her arm was stretched out and Appellant's penis was in her hand. SA said she knew it was Appellant because she recognized his face. (R. at 321.) SA said she pulled back her arm, rolled over, and tried to go back to sleep. However, SA said she "kept being woke up" by Appellant. (R. at 322.)

SA said she went to her room, but that Appellant was there sitting on her bed. (Id.) SA said she left her room and moved to other places in the house to avoid Appellant, but was eventually able to get into her room without Appellant being there, and lock her door. (R. at 322-23, 332.)

SA did not tell anyone about the incident until five years later, when she was 17. (R. at 323.) SA told the person who would eventually be the father of her child. SA said she did not tell anyone immediately about the incident out of fear, adding that she was afraid it would cause issues with the family. (R. at 341-42.)

Around September 2022, SA said she was contacted by JC, who wanted to know if anything weird had happened to SA when she was younger. (R. at 323.) At that time, SA had no idea about any allegations against Appellant involving EH, Appellant's niece.

- *Incidents Involving EH, Appellant's 12-Year-Old Niece*
    - *Testimony of JC, EH's Mother and Appellant's Sister*

In 2022, JC said she lived two-and-a-half hours away from Appellant, who was stationed at Scott Air Force Base. (R. at 344-45.) During that time, JC said she and Appellant would watch after each other's kids – JC had three children and Appellant had five. (R. at 345.) JC said they would send their kids to the other's house for weekends or for a week or two at a time during the summer. (R. at 346.)

One of JC's children, EH, had a close relationship with Appellant. JC said Appellant was the "funcle" – the fun uncle – who taught EH how to cook and who frequently played video games with EH. (R. at 346, 368.) JC expressed that Appellant showed a favoritism for EH over the other children, including Appellant's own daughter. (R. at 389.) JC said, "He seemed to be more concerned about [EH] and her feelings. Like he would teach her to cook, but not the other girl, [NB, Appellant's daughter]." (Id.)

However, in early 2022, JC testified that EH told her that she did not want to go to Appellant's house anymore and that EH "seemed a little reclused." (R. at 346.) Then, in August 2022, JC said that EH disclosed something that happened between her and Appellant in June 2022. (R. at 346-47, 374.) JC explained:

> [EH] told me that she didn't want me to mad at her, but [Appellant] got her drunk and asked her not to tell me. And I didn't ask like a whole lot of questions at that point, because I was just like, what -- what in the world. So, we went back home and I was like in my brain trying to process what she even told me. And then, a little bit

> later, I was talking to her and she was telling me about how, like, he breathalyzed her and they had played some, like, Truth or Dare.

(R. at 347-48.) JC said EH was 12 years old at the time of this incident. (R. at 362.)

JC testified that the initial conversation between her and EH that day was only about alcohol use. During cross-examination, Appellant's trial defense counsel asked JC about the initial conversation, stating, "But to be clear, [JC], during this conversation, [EH] did not say anything about any alleged sexual misconduct at that specific time, correct?" (R. at 374.) JC responded, "Correct. I don't think I gave her the opportunity to." (Id.)

JC agreed that later that evening EH told JC about sexual misconduct after JC reapproached EH and asked her for more details on the incident. (R. at 374-75.) JC agreed that EH did not initially want to provide additional details. (R. at 376.) However, JC eventually came to find out that one of the dares involved Appellant daring EH to "take her pants off or take her underwear off and put her shorts on . . . ." (R. at 362.)

JC texted Appellant and told him what EH had told her. Appellant responded that he had not told EH not to tell JC. (R. at 348, 375.) The text messages between JC and Appellant are at Prosecution Exhibit 1. Within those messages, Appellant made the following statements:

- "She did not get drunk though."
- "I am sorry. I should have told you. I made her take a breathalyzer and she never hit .08. I made sure she was ok."
- "I let her have a little, nothing major, and she played her game then went to bed as far as I know. She was asleep, I went to bed, she was up pretty early playing the game the next day . . . I asked if she was ok/hungover and she said she was good."

(Pros. Ex. 1.)

At some point after this exchange, JC confronted Appellant in person. Appellant admitted to JC that he gave EH alcohol, that he gave her a breathalyzer test to make sure she was

not drunk, and that the two did play Truth or Dare. (R. at 352.) JC said Appellant denied that anything sexual happened. (Id.) When asked what this denial was in reference to, JC said it was the Truth or Dare game and the dare by Appellant to EH to take off her pants or underwear. (R. at 362.)

After learning about the incident with EH, JC testified that she approached SA in early September 2022. (R. at 377.) However, JC said that she provided SA no specifics about what EH had told her. (R. at 363-64.) JC could not recall if SA told her about specifically about Appellant putting SA's hand on his penis, but did agree that SA told her about an incident between Appellant and SA when she was younger. (R. at 377.) After speaking with SA, EH agreed that she shared some of the information she heard from SA with several family members. (R. at 380.)

Later in 2022, after her conversation with SA, JC became aware of additional sexual misconduct involving Appellant and EH. (R. 380.) JC said that EH's stepmother, CH, found a note on EH's tablet. JC said the incident involved Appellant placing his penis in EH's hand while she was asleep on his couch. (Id.)

On cross-examination, Appellant's trial defense counsel asked JC if she was aware that EH had previously been sexually abused by a cousin. (R. at 367.) JC replied, "I don't know the details about that." When she was then asked, "But you know that something happened," JC responded, "Yes." (Id.)

- *Testimony of EH, Appellant's Niece*

At the time of her testimony at Appellant's trial, EH was 14 years old. (R. at 397.) At the time of the incidents, EH said she was 11 or 12 years old, adding that she turned 12 in May 2022. (R. at 403.) EH identified Appellant and said that he was her uncle. Prior to the

incidents, EH said it was "really cool having an uncle that would help me cook and play games with me," adding that it was a "good relationship." (R. at 398.)

However, things changed in the spring of 2022. On the day of the first incident, which EH said was either in February or April of 2022, EH said she and her brother were visiting at Appellant's house and spent the day waiting for her cousins (Appellant's children) to get out of school. (R. at 401.) Once they got home, the cousins rode bike and scooters for a while – what EH described as a normal day.

EH said that when she and her brother visited Appellant's house, she would sleep on the living room couch, and her brother would sleep in a room because her brother "would throw a baby fit if he – if he had to sleep on the couches." (R. at 403.)

That night, EH said she and Appellant were watching a movie in the living room when Appellant went to the kitchen multiple times. On one occasion, Appellant retrieved a Melatonin pill that he gave EH to take. Later, Appellant retrieved a Melatonin gummy from the kitchen, which he gave EH to take. Finally, Appellant retrieved NyQuil from the kitchen, which he also gave EH to take. (R. at 404-05.) EH said Appellant gave her these things so "I would go to bed." (R. at 406.) EH said that it was normal for Appellant to give her Melatonin or NyQuil when she visited his house. (Id.)

EH said she became drowsy and "really sleepy." EH said they finished the movie, and she went to bed on the couch. (R. at 407.) The next thing she remembered was waking up to Appellant standing over her with his penis in her hand. (R. at 408.) EH said, "I don't know if he was squatting or standing but moving back and forth . . . ." (Id.)

When asked how she knew it was her uncle (Appellant), EH replied as follows:

> This might come off mean but at the time, he like calcified. His hands were like calcified, like dry and he was doing his like usual

> breathing after he was like done playing the game or like during playing the game because he screams, or when he drinks.

(R. at 409.) EH continued that Appellant was breathing heavily and that it did not sound like anyone else who would have been in the house that night. (R. at 410.) EH also said that she was "trying not to hold my hand in the position that he would put it in," but that when her fingers would fall "he would fix my fingers." (Id.) EH further said Appellant's penis felt like a bone with skin in it. (R. at 463.)

EH said she did not look directly at her uncle because "I was scared, like, I was going to get in trouble and I didn't know what to do." (Id.) EH agreed that she kept her eyes shut throughout the entirety of the incident. (R. at 461.) EH also said she did not tell anyone because she did not think they would believe her. (R. at 412.)

EH agreed that the only other people in Appellant's house that night were Appellant's daughter (NB), Appellant's son (MB), and EH's brother (MH). (R. at 404.) EH's brother, MH, was 13 years old in 2022. (R. at 345.)[1] MB, Appellant's son, was approximately 10 years old in 2022. (R. at 771.)[2]

After this incident, EH testified that said she did not want to visit Appellant anymore and that she told Appellant this, though she would not tell Appellant the real reason why. EH testified that in her text messages to Appellant, she would tell Appellant she did not want to go up there, but would not blame it on anyone in particular. She explained that "the reason I said, it's not [Appellant], it's not [her cousins], it's not no one, is because I was scared to tell him why

[1] JC testified that MH was 15 years old at the time of Appellant's trial, which took place in December 2024.

[2] Appellant, during his testimony, stated that MH was 6 years old in 2018. (R. at 771.)

I didn't want to go up there." (R. at 413.) EH testified, "I just wasn't comfortable around him as much." (Id.)

A couple of months later, in late June 2022, EH recounted another incident with Appellant. She was at Appellant's house and had eaten lunch with Appellant and her cousin. After that, she was upstairs playing on her VR Oculus headset when Appellant came up with a glass filled with Soju, an alcoholic beverage. (R. at 414.) EH said she did not know what Soju was, but that the bottle had Korean or Japanese writing on it.

Appellant went back downstairs and EH said she slowly began drinking what Appellant had given her. (R. at 415.) Appellant came back upstairs and asked, "Would it be easier if you took a shot?" EH said the liquid tasted like rubbing alcohol, did not taste good, and that it burned. (Id.) EH said the shots made her feel "weird," adding that she had never been drunk so she did not know if she was drunk or not. However, EH said she felt dizzy and answered "no," when asked if she could have kept playing her VR headset at that point. (R. at 417.) EH estimated that Appellant gave her between six and 15 shots. (R. at 448.)

EH also said Appellant twice brought out a breathalyzer. (R. at 417.) EH said Appellant would say she was "good" after she used the breathalyzer. (R. at 418.) She said Appellant showed her the breathalyzer number after she used it the second time and that the number was .06. (R. at 419.)

Appellant then took the alcohol and glasses downstairs, but then came back up to play Truth or Dare, which EH said was Appellant's idea. EH said one of Appellant's dares to her was, "I dare you to take off your underwear but you can put your shorts back on when you're done taking them off." (R. at 422.) When EH refused, EH said that Appellant "sounded disappointed," adding, "I'm not sure if his face showed he was disappointed, but he sounded

disappointed." (R. at 421.) When EH later said "truth," Appellant asked, "What is the type of porn you watch?" (R. at 420.)

EH testified that she told her mom about the June incident because "I felt guilty, because I thought I did something wrong for agreeing to drink." (R. at 429.) On cross-examination, EH agreed that in her initial conversation with her mom in the field earlier in the day, she did not mention anything about the Truth or Dare game or Appellant's question about pornography. (R. at 437.) EH agreed that she told her mom those details during their second conversation later that night.

EH also agreed that one day in September 2022 she made a note in her stepmother's tablet about the incident from earlier in the year involving Appellant's penis in EH's hand. (R. at 439-40.) EH said, "I was trying to show my biological dad, because my biological mom knew and I thought it only felt right to tell my dad." (R. at 440.) EH agreed that prior to her writing her note on the tablet, her mother already knew about the penis incident. (R. at 441.)

The note, which is dated 10 September and is found at Prosecution Exhibit 5, states, in part, the following:

- "I took like 12 shots"
- "I couldn't move without falling over"
- "it was like 11pm to I think 1am"
- "he asked me if I wanted to play truth or dare and I said I guess and one of the dares was me to take my underwear off and and [sic] truth was what kind of porn [] I watch
- "I don't know if it's a dream but he picked up my hand and put he's [cucumber emoji] in it and was putting it in and out of my hand but it felt like it was real like I felt it in my hand"

(Pros. Ex. 5.) EH said that she showed her stepmother the note the same day she wrote it.

On cross-examination, Appellant's trial defense counsel asked EH, "Now thinking back to 2022, when you reported this incident, specifically the penis in the hand incident, you would agree with me that it's completely possible that this could've just been a vivid dream, correct?" (R. at 473.) EH answered, "No," and "this was not a dream." (Id.)

Appellant's counsel then asked, "But isn't it true that when you conducted your Child Forensic Interview, in November of 2022, you said that you weren't sure if it was a vivid dream or not?" (Id.) EH answered, "Yes, because me and him had I thought the perfect relationship other than those two incidents, three incidents if you count the one down at my house, the butt smacking. But I was hoping that it was a dream." EH continued, "It wasn't. I've never had a dream like that." (R at 474.)

- *Testimony of CH, EH's Stepmother*

CH testified that while on a family vacation, EH began acting "a little weird." (R. at 496.) When CH asked if she was okay, EH told her that she needed to talk to her, but without her dad around. CH explained that EH "said that something had happened, while she was at [Appellant's] house and she wouldn't tell me exactly what it was at first, but something sexual had happened . . . ." (R. at 497.) CH said EH was not comfortable telling her about the incident at first because EH was afraid of how her dad would react. CH said she messaged EH's mom, JC, who said that she already knew. (Id.)

CH denied prompting EH to write the note, denied telling EH what to write in the note, and said she had no knowledge of anyone telling EH what to say in the note. (R. at 498.) CH agreed that EH wrote the note on her own accord.

- *Testimony of HB,[3] Appellant's Daughter and EH's Cousin*

HB said she grew up with her mother and stepfather and said that she saw her father (Appellant) growing up a "few weekends, every couple of years." (R. at 508.) HB said before the allegations in this case, she and EH did not have a relationship and that, even now, they "[s]till don't really have one." (R. at 509.)

When asked if HB ever told specifics to EH about what Appellant had done to her, HB responded, "Very little," adding, "I told her that's there's been stuff, you know, that he's done to me in the past, but I didn't go into, like, huge details of what he has done." (Id.) She later added, "I do remember talking to [EH] about [Appellant] doing stuff to me, but I don't think I went into like details of things that he had done to me." (R. at 541.) HB said she and EH had their conversation in November or December of 2022. (R. at 509.)

- *Testimony of Appellant*

Appellant testified and denied sexually abusing or committing lewd acts against EH. (R. at 652, 686, 735.) Regarding the June 2022 incident, Appellant admitted that EH was staying with him at the time and that he allowed EH to drink alcohol, specifically Soju. (R. at 696.) However, Appellant claimed that it was EH's idea to try some Soju. (R. at 697.) He also claimed that he and JC, EH's mother, had spoken prior to this incident and had "agreed that the children could drink in limited amounts." (R. at 698.)

Appellant claimed that, in total, he provided EH with a half a cup of Soju and diluted it by putting Ginger Ale in it. (R. at 699-70.) Appellant admitted that he gave the alcohol to EH in shot glasses in limited amounts and that EH had a total of six shots. (R. at 700.) Appellant also

[3] At the time of her testimony at trial, HB had married and taken a new last name, HL. (R. at 507.)

admitted using a breathalyzer on EH two or three times, and further admitted that the highest point he observed was .06. (R. at 702.)

Appellant also admitted that he came up to EH's room, and said that he was checking on her before bedtime. (R. at 705.) Appellant said that EH was "bored," and he asked what she wanted to do. According to Appellant, EH said she wanted to play Cards Against Humanity," and that he told EH to see if NB (Appellant's daughter) wanted to play. (R. at 706.) When NB did not want to play, Appellant claimed he mentioned that game 20 Questions, which he explained to EH was "very similar to Truth or Dare, it's just the truth portions of it, if you will." (Id.) Appellant then claimed EH said, "Oh, Truth or Date, yeah we can play that," and that it was EH's idea to play the game. (R. at 706-07.)

Appellant denied daring EH to remove her pants and underwear and then put her pants back on without underwear. (R. at 707.) Appellant claimed the dare "had nothing to do with taking off underwear. It was [to] take a pair and put over the shorts." (R. at 708.) Appellant said EH was into cosplay, Fortnite, and anime and that he was "trying to be supportive of her hobbies." Appellant also denied asking EH about what type of pornography she liked to watch. (R. at 710.) Appellant said he first heard about the allegations when JC messaged him asking why he got EH drunk. (R. at 713-14.)

Appellant also denied the early 2022 couch incident involving EH. (R. at 718-19.) Appellant said he did not become aware of the allegation until January 2024. (R. at 720.)

Appellant also denied SA's allegation from 2004 that he placed her hand on his penis while she was asleep. (R. at 721.) Appellant said that one time he did talk to SA while she was laying on the couch, but that the conversation was about her breaking up with a boyfriend and there dysfunctional family. (R. at 721-22.) Appellant claimed nothing sexual happened.

On cross-examination, Appellant denied ever playing games with EH that involved sex or had sexual overtones or topics. (R. at 738.) However, Appellant then acknowledged that he had played Cards Against Humanity with EH, a game which Appellant agreed included topics such as ejaculation, penises, vaginas, and rape. (R. at 739-40.) When asked if Cards Against Humanity was a sexual game in any way, Appellant said, "I wouldn't think so, no." (R. at 739.) When asked, "So, a game that discusses ejaculate isn't a sexual game," Appellant responded, "Depends on the context, sir." (Id.)

Appellant also acknowledged that the only reason he and EH, his 12-year-old niece, did not play Cards Against Humanity that night was because his daughter, who was 14 at the time, did not want to play. (R. at 741.)

Appellant also agreed that in the spring of 2022, EH indicated that she did not want to come back to Appellant's house. (R. at 743.) Appellant stated, "she had her reservations about things." (R. at 744.)

Appellant also agreed that he gave melatonin to the children, including EH, but denied giving her NyQuil. (R. at 746.) Appellant also acknowledged that he increased the amount of melatonin he gave as they became accustomed to it. Appellant further agreed that EH "stayed downstairs a lot of nights." (R. at 747.)

Regarding the Soju, Appellant admitted to providing the alcohol to his 12-year-old niece and that he used "limited amounts" and tested EH with the breathalyzer to ensure she did not go above .08, which Appellant said was the "state legal limit for intoxication."[4] (R. at 752.) When

[4] During the trial, the military judge took judicial notice of a section of the Illinois State Code that said, "consumption by a person under 21 years of age under the direct supervision and approval of the parents or parenthood, or those persons standing in *local parentis* of such persons under 21 years of age in the privacy of a home is not prohibited by this act." (R. at 650.)

asked if his understanding was that a 12-year-old in Illinois could drink until they reached .08, Appellant replied, "Below .08, in your home, under supervision. That is the – the law." (Id.)

Though Appellant claimed that he and JC had agreed that they could provide alcohol to the children, Appellant acknowledged that he never told JC that he gave alcohol to EH on this night or that he gave her a breathalyzer test. (R at 753-54.)

Appellant on cross-examination maintained that he told EH to put her underwear over the clothes she was wearing. (R. at 755.) However, Appellant admitted that he did not specify that EH could get another pair of underwear other than the ones she was wearing to put over her clothes. (R. at 756. Appellant also admitted that he did not tell EH that she could leave the room to do the dare. (R. at 756.)

Regarding the issue of pornography, Appellant and the special trial counsel had the following exchange:

> STC: And, then, at some point, you asked her about pornography. Correct?
>
> Appellant: Umm, yes.
>
> STC: You asked [EH] what type of pornography she watched?
>
> Appellant: Not in that context, no.
>
> STC: Is there an appropriate context to ask your 12-year-old niece what type of pornography she watches?
>
> Appellant: Jokingly, sir.
>
> STC: Jokingly?
>
> Appellant: Yes, sir.
>
> STC: After you had given her shots of alcohol?
>
> Appellant: Umm, jokingly.

(R. at 758.) Appellant then attempted to clarify, stating that Appellant's son and EH's brother had been caught with pornography on their phones and that EH was "making fun of them for having some sort of weird porn . . . ." (Id.) So in response to this, Appellant testified that he told EH the following:

> So, my response was, you know, "Hey, well, what kind of weird porn do you watch," as a maybe don't throw stones. Wasn't a, "Hey, what kind of porn do you watch?" It was just a, you know, hey, don't throw stones, like, don't make fun of them whenever, you know, you do the same thing. There was nothing sexual or gratifying about that. It was just a, kind of a, like, that I do with all the kids, like, don't point fingers here.

(Id.) Appellant claimed this conversation was not a "truth" part of the Truth or Dare. (R. at 759.) Appellant said those types of conversations regarding what kind of pornography the kids were watching were not uncommon, adding that it "was a household thing around the kitchen table at the farm," and was "[c]ommon practice at the farm." (R. at 759-60.)

- *Testimony of Dr. SWJ, Defense Forensic Psychology Expert*

Dr. SWJ, the Defense Forensic Psychology expert, testified that a 12-year-old child could believe that something happened even though it did not. (R. at 832.) Dr. SWJ said there was no way to tell the difference between a true and false memory because the person genuinely believes it to be true. (Id.) Dr. SWJ talked about the subject of "suggestibility," and opined that EH speaking to multiple people about her allegations could create that risk. (R. at 850.) Dr. SWJ also opined that confirmation bias was present because of "the number of people that were asking questions of [EH], the frequency, and that their belief that something did occur." (Id.) Dr. SWJ also discussed other suggestibility risk factors she believed were present in this case, including EH reporting to individuals who had prior histories of sexual abuse, EH's prior sexual abuse experience, the negative stereotyping of Appellant, and that EH initially stated she was not

sure if what happened was a dream, but was now sure something occurred. (R. at 850-52.) When asked, "is the creation of a false memory a potential effect of somebody being exposed to risk factors for suggestibility," Dr. SWJ answered, "Yes." (R. at 852.)

On cross-examination, Dr. SWJ agreed that people tend to remember central details, or salient memories, of an experience. (R. at 853-54.) Dr. SWJ agreed that an example of a salient memory would be experiencing a sexual assault, and that, in general, salient memories are more strongly encoded. (R. at 854.)

Dr. SWJ also acknowledged that the most recent research on suggestibility focuses on children under the age of five and agreed that people who are most susceptible to suggestibility are those under the age of five. (R. at 854-55.) Dr. SWJ stated, "Children under five are at the highest – they are definitely at the highest risk of suggestibility, the younger child." (R. at 855.) As for a 12-year-old, Dr. SJW agreed that they form memories just as an adult would. Dr. SJW also agreed that she would expect a 12-year-old to be able to tell the difference between fantasy and reality. (R at 856.)

Regarding the issue of negative stereotyping, Dr. SWJ also agreed that if an alleged perpetrator was actually a role model for a child, this positive stereotype could actually decrease the risk of suggestibility. (R. at 857-58.)

As to risk factors overall, Dr. SWJ agreed that just because a risk factor was present did not mean that it had any actual effect. (R. at 858.) Dr. SWJ also agreed that the individual risk factors present in this case would not always have an effect.

Dr. SWJ also agreed that there were tests to see whether or not there had been any effects on a person's memory, including looking at the consistency of the memories, whether the memories were recalled *prior* to the risk factors, whether the child made a statement on their

own, whether the child made the statement in an environment where they were comfortable, and whether the child's statement was made using language akin to a child. (R. at 859-60.) When asked, "All of those would decrease your concern for suggestibility, correct," Dr. SWJ replied, "Yes." (R. at 860.)

- *Recall Testimony of JC, EH's Mother*

After the close of Appellant's case-in-chief, the Government recalled JC as a witness. (R. at 880.) JC denied ever discussing pornography with either her or Appellant's kids. (R. at 881.) JC also denied ever making an agreement with Appellant that EH was allowed to drink alcohol, and denied ever conducting any research with Appellant about the legal limit of alcohol intoxication in Illinois. (Id.)

Additional facts necessary to the disposition of this case are discussed in the specific issues below.

ARGUMENT

I.

APPELLANT'S CONVICTION FOR COMMITTING A LEWD ACT AGAINST HIS 12-YEAR-OLD NIECE BY CAUSING HER TO TOUCH HIS PENIS WITH HER HAND IS FACTUALLY SUFFICIENT.

Standard of Review and Law

The test of factual sufficiency is governed by the following amendment to Article 66(d)(1), UCMJ:

> (B) Factual sufficiency review
>
> > (i) [T]he Court may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.

> (ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—
>
> (I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
>
> (II) appropriate deference to findings of fact entered into the record by the military judge.
>
> (iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, Section 542(b), 134 Stat. 3611-12.

Thus, whereas the former Article 66(d)(1), UCMJ, required service courts to conduct a *de novo* review of factual sufficiency in every case, the amended Article 66(d)(1)(B)(i), UCMJ, eliminates that duty absent an appellant (1) asserting an assignment of error, and (2) showing a deficiency of proof. *See* United States v. Harvey, 85 M.J. 127, 130 (C.A.A.F. 2024).[5]

Though our superior Court has not yet addressed what constitutes a "specific showing of a deficiency of proof,"[6] the Navy-Marine Corps Court of Criminal Appeals (NMCCA) has held that "a general disagreement with a verdict falls short of a specific showing of a deficiency in proof, and thus will not trigger a full factual sufficiency analysis." United States v. Valencia, 85

[5] Appellant's brief, *citing* United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002), states that issues of factual sufficiency are reviewed *de novo*. However, our superior Court recently clarified that "it is no longer appropriate to describe the service courts' standard of review when performing factual sufficiency review simply as 'de novo,'" but instead "should cite and follow this Court's guidance in Harvey, 85 M.J. at 130-32, instead of the Court's prior guidance in Washington, 57 M.J. at 399." United States v. Downum, 2025 CAAF LEXIS 828, *13 (C.A.A.F. Sept. 30, 2025).

[6] *See* Harvey, 85 M.J. at 130.

M.J. 529, 535 (N-M. Ct. Crim. App. 2024).[7] Instead, "an appellant must identify a weakness in the evidence admitted at trial to support an element (or more than one element) and explain why, on balance, the evidence (or lack thereof) admitted at trial contradicts a guilty finding." Id.

The requirement of "appropriate deference" when a Court of Criminal Appeals weighs the evidence and determines controverted questions of fact "depend[s] on the nature of the evidence at issue." Harvey, 85 M.J. at 130. This Court has discretion to determine what level of deference is appropriate. Id. "[T]he quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is proof beyond a reasonable doubt, the same as the quantum of proof necessary to find an accused guilty at trial." Id. at 131. For this Court "to be clearly convinced that the finding of guilty was against the weight of the evidence, two requirements must be met." Id. at 132. First, this Court must decide that the evidence, as it weighs it, "does not prove that the appellant is guilty beyond a reasonable doubt." Id. Second, this Court "must be clearly convinced of the correctness of this decision." Id.

Charge I, Specification 1, in violation of Article 120b, UCMJ, alleges that Appellant, between on or about 1 February 2022 and on or about 30 June 2022, committed a lewd act upon EH, a child who had not attained the age of 16 years old, by causing EH to touch his penis with her hand, with an intent to gratify his sexual desires. (ROT, Vol. I, Charge Sheet.)

Analysis

The military judge at Appellant's court-martial correctly found Appellant guilty of committing a lewd act upon EH, Appellant's 12-year-old niece, by causing EH to touch

[7] Our superior Court has granted review of the NMCCA's decision on the following issue: Whether the lower court erred when it concluded Appellant's claim of factual insufficiency did not trigger a factual sufficiency review under Article 66, UCMJ. *See* United States v. Valencia., 2025 CAAF LEXIS 202, *1 (C.A.A.F. 14 March 2025).

Appellant's penis with her hand, and there is no credible basis in the record for this Court to disturb Appellant's just verdict and sentence. Here, the United States presented the military judge with ample evidence to convince him of Appellant's guilt beyond a reasonable doubt.

Under the new factual sufficiency standard, Appellant has failed to make a specific showing of a deficiency of proof. Yet even if he had, after making the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence.

The evidence overwhelmingly shows that Appellant committed this lewd act against his niece and that it was done to gratify his sexual desires. EH, now 14 years old at the time of Appellant's trial, testified that Appellant was visiting Appellant at his house with her brother and cousins. She stated that prior to going to bed Appellant gave her a Melatonin pill, a Melatonin gummy, and some NyQuil so that she would "go to bed." (R. at 404-06.) EH testified that the next thing she recalled was waking up to Appellant standing over her with his penis in her hand. (R. at 408.) Though EH never directly looked at Appellant, EH recalled what Appellant's penis felt like ("like a bone with like skin in it"), what his hands felt like ("like calcified, like dry"), and how Appellant was heavily breathing ("he was doing his like usual breathing after he was like done playing the game . . . or when he drinks"). (R. at 409-10.) She also recalled that Appellant would "fix my fingers" when they would fall from his penis and that he was moving his penis back and forth in his hands. (R at 408, 410.)

Further, the evidence shows that after this incident, EH began acting differently towards Appellant and no longer wanted to go to his house. Both JC and Appellant himself corroborated this point. JC, EH's mother, said EH told her in early 2022 that she did not want to go to Appellant's house anymore. (R. at 346, 413.) Appellant, during his testimony, also agreed with

this sentiment, stating that in the spring of 2022, EH indicated that she did not want to come back to Appellant's house. (R. at 743.) As Appellant put it, EH "had her reservations about things." (R. at 744.) Appellant also corroborated other parts of EH's testimony – namely that he regularly gave EH Melatonin to get her to go to sleep and that EH "stayed downstairs a lot of nights." (R. at 747.)

Moreover, the Government presented Mil. R. Evid. 414 evidence showing Appellant had committed a similar incident years earlier against his then 12-year-old stepsister SA. SA testified that one night while sleeping on a living room couch, she was awoken to find Appellant kneeling down beside her with his penis in her outstretched hand. (R. at 319-21.) This Mil. R. Evid. 414 testimony showed Appellant had a clear propensity or predisposition to commit his offense against EH. *See* United States v. Tanner, 63 M.J. 445, 449 (C.A.A.F. 2006) ("[Mil. R. Evid. 414] reflects a presumption that other acts of child molestation constitute relevant evidence of predisposition to commit the charged offense.").[8]

Despite this wealth of evidence, Appellant still claims error. Appellant first questions whether the event "occurred at all." (App. Br. 10.) Appellant points to EH's reference of a dream in both her iPad note and during her child forensic interview. (Id.)

However, Appellant fails to mention EH's trial testimony on this point. There, in response to a question from Appellant's trial defense counsel, EH said "this was not a dream." EH also explained why she said during her child forensic interview that she was not sure if it was a dream or not. EH explained that because she thought she and Appellant (her uncle) had a

[8] Appellant does not claim any error on the part of the military judge in denying Appellant's Mil. R. Evid. 414 motion in limine or admitting SA's testimony under Mil. R. Evid. 414 or. (*See* App. Ex. XL.)

"perfect relationship," she was "hoping that it was a dream." (R. at 473.) However, EH confirmed that "[i]t wasn't," and that she had "never had a dream like that." (R. at 474.)

Given her age at the time of the incident, it is perfectly reasonable for a 12-year-old to hope that what her favorite uncle – the "funcle" – had not done what he did to her and, as a coping mechanism, hope that it was all just a dream. However, what she hoped was a dream was, in fact, a real-life nightmare. In coming to the realization of what occurred, EH's testimony at Appellant's trial – which the military judge had the distinct opportunity of seeing first-hand – showed this incident was unfortunately not a dream, but a very real event that occurred literally at the hands of Appellant.

Notably, testimony from Appellant's own expert witness highlights why this was no dream. Dr. SWJ agreed that people tend to remember central details, or salient memories, of an experience, and further agreed that an example of a salient memory would be experiencing a sexual assault. (R. at 853-54.) Dr. SWJ also agreed that, in general, salient memories are more strongly encoded. (R. at 854.) This was no dream, but instead a very real lewd act committed by Appellant that EH, while initially hoping it was a dream, recalled in specific, and real, detail.

Appellant next claims that the Melatonin EH took "may have further clouded her perception." (App. Br. at 10.) However, Appellant cites to nothing from the record to support any indication that Melatonin would have impacted EH's ability to comprehend, or later recall, exactly what was happening to her when she awoke. Further, her specific memories of Appellant's breathing, the feel of Appellant's hands, and her description of his penis contradict any unsupported assertion that EH's perception was clouded in any fashion.

Next, Appellant argues that EH being a "victim of a similar assault by a different male family member" somehow resulted in her having a dream of her uncle sexually abusing her,

stating, "Dreams, of course, are a reflection of past experiences, and it would not be unreasonable if a victim of sexual abuse had dreams about similar themes." (Id., *citing* R. at 367, 474.) Again, however, Appellant points to no evidence supporting his assertion that a prior sexual assault victim is prone to having dreams of being sexually assaulted by a completely different person.

Moreover, while Appellant claims EH was the victim of a "*similar* assault," the specific details of this prior assault were not discussed in detail at all during Appellant's trial. (*See* R. at 367, 474.) When asked about EH being previously sexually abused by her cousin, JC testified, "I don't know the details on that." (R. at 367.) Then, when EH was asked, "Now, [EH], this wasn't the first time that something like this had happened to you, correct," and "More specifically, three years before this incident occurred, you had previously had this happen to you by your cousin [], correct," EH only responded "Yes" both times. (R. at 474.) In short, there is no evidence that EH's prior assault was "similar" at all, just as there is no evidence that EH being a prior victim of sexual assault somehow resulted in her having a dream of her uncle committing lewd acts upon her.

Next, Appellant claims someone else committed the acts against EH, stating, "the evidence was woefully insufficient to identify Appellant as the supposed perpetrator." (App. Br. at 10.) Appellant notes that EH never opened her eyes, and opines that her feeling Appellant's rough skin and hearing his breathing are "not reliable identifiers." (Id.) Appellant then highlights that "other individuals, including several of the male children, were in the house at the time." (App. Br. at 11.)

In fact, there were two male children in the house that night – Appellant's 10-year-old son and EH's 13-year-old brother. Thus, Appellant is now attempting to place the blame of his acts against EH on two minors, including his own son.

However, Appellant's claims do not pass muster. First, EH's testimony on why and how she believed the perpetrator was Appellant was very descriptive. EH explained how she knew Appellant's hands were calcified and that the hands that were touching her were calcified. EH also tied Appellant heavy breathing that night directly to other times when she had heard Appellant breathe in that fashion. (R. at 409-10.) In contrast, there is no evidence that either Appellant's son or EH's brother – again, aged 10 and 13 respectively – had calcified hands or heavily breathed in a fashion similar to Appellant. Nor was there any evidence that either of these children had a proclivity, unlike Appellant, for placing their penises in their family member's hand. Finally, the likelihood is also far greater than EH would have immediate recognized the difference, both in feel and in sound, between a 10 or 13-year-old versus a 43-year-old grown man.

Appellant next claims that EH "had been exposed to a great deal of negative information about Appellant that may well have tinted her perception and biases." (App. Br. at 11.) Appellant speaks to "crosstalk between the various family members" and questions the timing of EH's disclose of the couch incident. (Id. at 11-12.)

However, Appellant fails to discuss a glaring hole in his theory – namely that EH had no reason to fabricate her allegation against Appellant. As noted previously, EH, prior to this incident, saw Appellant as the fun uncle who taught her to cook and played video games with her. (R. at 398.) As EH put it, they had the "perfect relationship." (R. at 473.) He was a role model to her – there was simply no reason for her to make up allegations against him. Further,

even Appellant, while testifying, agreed that EH was an "honest kid," stating, "Yes, from what I saw – yes, I believe so." (R. at 743.)

Moreover, as shown in the messages between Appellant and EH, and as highlighted in EH's testimony, EH did not want to tell anyone about what happened to her in the aftermath of this Spring 2022 incident. But yet, EH's actions show something did happen. That spring, before the events in June involving the alcohol and Truth or Dare even happened, and well before any disclosures of either incident occurred, EH had already expressed to both JC and Appellant that she no longer wanted to go to Appellant's house. (R. at 413.) Further, as JC put it, EH became "a little reclused." (R. at 346.)

It is evident something happened between EH and Appellant that spring that caused EH to begin acting in this fashion. That something was Appellant's lewd act upon EH. And, again, these changes in EH's behavior all occurred before EH said anything to her mother and step-mother, and certainly before JC contacted SA about her past experience with Appellant.

Here, the evidence shows that EH was not a vindictive niece out to frame her favorite uncle for sexual misconduct. Instead, the evidence shows EH was living her own personal nightmare as she eventually came to terms that her favorite uncle had committed lewd acts against her.

Furthermore, there is no evidence that any of the family members mentioned by Appellant ever spoke to EH or somehow impacted or tainted EH's recollection of what occurred to her. Any insinuation that there was some coordination between EH and SA is unfounded and unsupported by the evidence. In fact, there is no evidence that they ever spoke or had any sort of relationship. Further, while JC and SA did speak, SA testified that she had no idea about any of the allegations involving EH when she spoke to JC. (R. at 323.)

Moreover, while JC did agree that SA told her about an incident between Appellant and SA when she was younger, JC could not recall if SA told her about specifically about Appellant putting SA's hand on his penis. (R. at 377.) Yet, even if SA did tell her the specific details about the incident, there is no evidence that JC ever passed any of what SA told her along to EH – just as there is no evidence that anyone spoke to EH about SA's allegations prior to EH making her disclosure.

Still, Appellant claims EH was exposed to "a great deal of negative information about Appellant" and cites the "great deal of crosstalk between the various family members." (App. Br. at 11, *citing* R. at 323, 375, 380-81, 424-25, 458, 484-85.) However, the majority of these citations to the record have nothing to do with EH or any alleged exposure to negative information about Appellant. Page 323 of the transcript is testimony from SA saying she spoke to JC. However, as noted above, there is no evidence that EH ever spoke to SA. Page 375 of the transcript is testimony from JC acknowledging that she was aware of HB's sexual assault allegations. Again, this has nothing to do with EH. Pages 380-31 of the transcript is testimony from JC saying that she shared information she learned from SA to her sister and to SA's father. As noted above, however, there is no evidence that JC ever passed any of what SA told her along to EH.

Pages 424-25 of the transcript is testimony from EH detailing how she told her cousin NB about waking up in different clothes on the morning after the "Truth or Dare" incident. However, EH testified that she "didn't tell [NB] about that night," but just about waking up in different clothes. (R. at 425.) There is no indication that anything "negative" about Appellant was discussed.

Finally, pages 458 and 484-85 of the transcript is EH testifying about her conversation with HB where EH and HB spoke about what happened to HB years earlier. (R. at 458.) However, HB testified that she only told EH that "there's been stuff, you know, that he's done to me in the past, but I didn't go into, like, huge details of what he has done." (R. at 509.) Notably, however, this conversation took place *after* EH had reported *both* incidents involving Appellant. HB testified that she and EH spoke in November or December of 2022, which was months after EH reported the "Truth or Dare" incident in August 2022 and months after she reported the couch incident in September 2022.

Put simply, there is no evidence that any supposed "negative information about Appellant" played any part in EH's reporting of the two incidents or in any way impacted her perception or recollection of those events.

To this point, it is worth noting that if EH and the family were truly out to get Appellant and fabricate a sexual assault allegation against him, EH's allegation could have been tailored more perfectly. Specifically, EH could have simply said that, similar to SA's testimony, she opened her eyes during the incident and directly saw Appellant. Instead, however, EH testified that she never opened her eyes and never saw Appellant. EH's admission of this fact, which Appellant now uses to attack her, only further highlights her credibility and the lack of any suggestibility or bias in her allegation.

Appellant next turns to his expert's testimony regarding supposed "risk factors for suggestibility or false memory." (App. Br. at 12.) However, Appellant fails to cite to Dr. SWJ's testimony where she agreed that children under the age of 5 were the highest risk of suggestibility and that 12-year-olds form memories just like adults do. (R. at 854-55.) Appellant

also fails to note Dr. SWJ's testimony where she agreed that a 12-year-old would be able to tell the difference between fantasy and reality. (R. at 856.)

Further, Appellant's fails to cite Dr. SWJ's admission that a child's positive stereotype of a person – for instance, if they were a role model – could actually decrease the risk of suggestibility. (R. at 857-58.) Here, the evidence shows EH held Appellant up as a role model prior to the incident and felt she had a "perfect relationship" with him. Thus, EH's risk of suggestibility was actually decreased, not increased.

Dr. SWJ also agreed that other factors would *decrease* the concern for suggestibility, including looking at the consistency of memories, looking to see if the memories were recalled *prior* to the risk factors, whether a child made a statement on their own, and whether they did so in a comfortable environment using language akin to a child. (R. at 859-60.) Here, EH met all of these factors. EH was consistent in her memory of what happened that spring night at Appellant's house. EH recalled her memories to her stepmother prior to any supposed "repetitive questioning," prior to being questioned by "multiple individuals," and prior to any alleged "negative stereotyping." EH also made her statement to her stepmother on her own accord, and did so in a comfortable environment (while on vacation) under no pressure or influence from her stepmother. Finally, EH used language akin to a child – most specifically in her use of an emoji in place of the word "penis." Considering these factors, Dr. SWJ's testimony shows a *decreased* concern for any suggestibility on the part of EH in this case, not an increase.

Appellant also noted that, at trial, he testified that "the charged events did not occur," and that "defense put on character evidence supporting his relevant character traits and truthfulness." (App. Br. at 13.) However, Appellant fails to address at least three separate claims that either JC, his sister, or Appellant's own testimony refuted. First, Appellant claimed that discussion about

pornography was commonplace within his family – even going so far as to say sexual conversations, including pornography, was a "household thing around the kitchen table at the farm." (R. at 759-60.) However, JC, Appellant's sister, vehemently denied ever discussing pornography in front of either her or Appellant's children. (R. at 881.)

Appellant also claimed that he and JC had previously discussed allowing their children to consume alcohol as long as they were supervised by a parent. (R. at 698.) JC, however, denied ever making such an agreement with Appellant. (R. at 881.) Appellant also claimed during his testimony that he had never played any games with EH involving sex or having sexual overtones or topics. (R. at 738.) However, as discussed above, Appellant was then forced to acknowledge that he had played Cards Against Humanity with EH, a game which Appellant agreed included topics such as ejaculation, penises, vaginas, and rape. (R. at 739-40.) As shown, Appellant's penchant for "truthfulness" was certainly at issue during his trial and shown to be lacking.

On the other hand, Appellant himself vouched for EH's credibility during his own testimony when he agreed that EH was agreed that EH was an "honest kid." (R. at 743.)

Finally, Appellant cites this Court's unpublished opinion in United States v. Barbary, 2017 CCA LEXIS 384 (A.F. Ct. Crim. App. May 31, 2017), which he claims "suggests that the evidence presented in the present case is factually insufficient." (App. Br. at 13.) The case does no such thing. In that case, which was reviewed under the prior Article 66(d), UCMJ, factual sufficiency standards, this Court denied an appellant's factual sufficiency claim and affirmed the Article 120b, UCMJ conviction.

Here, Appellant attempts to take the factual basis for this Court's factual sufficiency determination in Barbary, and invert those facts to try and match his rendition of the facts in this case. In particular, Appellant states that this Court in Barbary found that the child-victim's

forensic interview was made close in time to the abuse, was consistent with the victim's testimony at court, and was made prior to interference by the victim's mother. (App. Br. at 13-14.) Appellant further states that this Court in Barbary found that the victim's credibility was corroborated by multiple witnesses, that there was no motive to fabricate, and that the victim's timeline of abuse was corroborated by other evidence. (Id.) Appellant than claims his case is the opposite, arguing that EH's forensic interview was months after her initial disclosure, was inconsistent with her testimony in court, and took place after several family members had already spoken to her negatively about Appellant. (Id. at 14.) Appellant also argues that there was no character evidence put on for EH's truthfulness, and the timeline of abuse is not corroborated by other evidence. (Id.)

Appellant then claims this reverse engineering somehow equates to this Court "suggesting" in an unpublished decision from eight years ago that his conviction now is factually insufficient. Appellant's inverse logic approach to this Court's Barbary opinion is confusing, but also distorts the facts of this case. Appellant's attempt to employ inverse logic to this Court's Barbary opinion falls short for a variety of reasons and should be dismissed by this Court.

Notably, Appellant's discussion of this case focuses on EH's forensic interview and how it differed from the circumstances of the forensic interview at issue in Barbary. (See App. Br. at 14.) However, Appellant fails to note that the video of the forensic interview in Barbary was actually admitted as residual hearsay evidence in that trial and was heavily relied upon by the Government as direct evidence supporting the conviction. *See* Barbary, at *6-8. This explains why this Court spent time in his factual sufficiency analysis discussing that interview and whether the statements made in that video were reliable and free of influence. *See* Barbary, at *29-30.

Appellant's case is much different. While Appellant's trial defense counsel asked EH about statements she made during the forensic interview during cross-examination, the Government did not ask EH about the interview during direct examination. Further, while the Government did introduce a small snippet of the forensic interview where EH described Appellant penis as "feeling like a wrist with loose skin," the Government did so only in response to Appellant offering a separate clip from that interview. (R. at 803-05.) The trial counsel also did not mention the forensic interview during closing argument. (*See* R. at 887-904.)

In short, unlike in Barbary, the Government here did not rely on the child forensic interview as a central part of its case. (*See* R. at 805.) Considering the Government's non-use of this interview as evidence to establish Appellant's guilt in this case, Appellant's concern about the timing of the child forensic interview or whether family members spoke ill of Appellant prior to the interview are of little import to this Court's factual sufficiency analysis and are not comparable to significance of the forensic interview at play in Barbary.

Appellant next claims that there "was no character evidence put on for EH's truthfulness." (App. Br. at 14.) However, Appellant again seemingly forgets that he himself vouched for EH's credibility during his own testimony when he agreed that EH was agreed that EH was an "honest kid." (R. at 743.)

Finally, Appellant claims the "timeline of abuse is not corroborated by other evidence." (App. Br. at 14.) Again, however, Appellant fails to mention his own testimony when he noticed a marked difference in EH's interaction towards him in the spring of 2022 when he stated that EH "had her reservations about things." (R. at 744.) Appellant also fails to note JC's testimony that in early 2022 EH told her that she did not want to go to Appellant's house anymore. (R. at

346.) Both of these testimonies match the "timeline of abuse" that Appellant's lewd act occurred in spring of 2022 and that, as a result, EH no longer wanted to go to Appellant's house.

All told, considering all of these facts and circumstances, the Government provided the panel ample evidence of Appellant's guilt beyond a reasonable doubt. Here, Appellant has failed to make a specific showing of a deficiency of proof as to his sexual assault conviction. Yet even if he had, each of Appellant's attacks on EH's recollection, credibility, and supposed suggestibility were all raised by Appellant before the military judge at trial. Despite these arguments, the military judge – who had the distinct opportunity to witness first-hand the testimony of EH and all other witnesses – still found Appellant guilty of committing lewd acts against his niece. After giving the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence. Accordingly, Appellant's factual sufficiency claim must fail.

II.

APPELLANT'S CONVICTIONS FOR COMMITTING LEWD ACTS AGAINST HIS 12-YEAR-OLD NIECE BY ENGAGING IN INDECENT CONDUCT AND LANGUAGE WITH HER IS FACTUALLY SUFFICIENT.

Standard of Review and Law

The standard of review and law regarding factual sufficiency for this issue is the same as in Issue I above.

Charge I, Specification 3, in violation of Article 120b, UCMJ, alleges that Appellant, between on or about 1 June 2022 and on or about 30 June 2022, committed a lewd act upon EH, a child who had not attained the age of 16 years old, by engaging in indecent conduct, to wit: daring EH to take her pants and underwear off, intentionally done in the presence of EH, which conduct amounted to a form of immorality relating to sexual impurity which is grossly vulgar,

obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. (ROT, Vol. I, Charge Sheet.)

Charge I, Specification 4, in violation of Article 120b, UCMJ, alleges that Appellant, between on or about 1 June 2022 and on or about 30 June 2022, committed a lewd act upon EH, a child who had not attained the age of 16 years old, intentionally communicating indecent language to her, to wit: asking what kind of pornography she watches, with an intent to gratify his sexual desires. (Id.)

Analysis

The military judge at Appellant's court-martial correctly found Appellant guilty of committing lewd acts upon EH, Appellant's 12-year-old niece, by daring EH to take off her pants and underwear and by asking her what kind of pornography she watches, and there is no credible basis in the record for this Court to disturb Appellant's just verdict and sentence. Here, the United States presented the military judge with ample evidence to convince him of Appellant's guilt beyond a reasonable doubt.

Under the new factual sufficiency standard, Appellant has failed to make a specific showing of a deficiency of proof. Yet even if he had, after making the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the findings of guilty were against the weight of the evidence.

To start, both EH and Appellant testified that this entire incident began when Appellant offered his 12-year-old niece alcohol, provided her at least six shots of alcohol, and then tested her multiple times via a breathalyzer. (R at 414-18, 696-702.) Appellant also admitted that he and EH discussed playing the game Cards Against Humanity, which Appellant admitted included topics such as ejaculation, penises, vaginas, and rape. (R. at 738-40.) Thus, from the

outset, this evidence, all of which Appellant admitted to during his testimony, shows the entire setting between EH and Appellant that night – one that included alcohol, shots and sexual-related topics – was hugely inappropriate considering EH's age and Appellant's pseudo-parental status over EH.

The situation only grew worse that night as the evidence shows Appellant then engaged in a game of "Truth or Dare" with EH that included Appellant daring EH to take off her pants and underwear and then put her pants back on without her underwear. (R. at 422.) Notably, when EH refused to do Appellant's dare, EH testified that Appellant "sounded disappointed." (R. at 421.) Undeterred however, Appellant would then ask EH a "truth," by asking his 12-year-old niece what type of pornography she watched. (R. at 420.)

Appellant, however, finds fault in his conviction by claiming everything he did that night was innocuous and not done for a sexual purpose. (App. Br. at 15-16.) Appellant points to his testimony where he attempted to explain away his dare by claiming that "what he actually said was that EH should put a pair of underwear over her pants like a superhero." (App. Br. at 15, *citing* R. at 707-10.) But, on cross-examination, Appellant was forced to acknowledge that he never told his 12-year-old niece that she could either put on a different pair of underwear other than the ones she was wearing. (R. at 756.) Appellant was also forced to acknowledge that he never told EH she could leave the room when performing the dare. (Id.)

Even taking Appellant's rendition of his dare at face value, any dare made by a 43-year-old man involving a 12-year-old's underwear should immediately scream of inappropriateness. Still, Appellant could have easily clarified to EH what he meant. If he truly did not mean for her to take off the underwear she was wearing, Appellant could have simply told her that he meant for her to put on a different pair of underwear or that she could leave the room to do the dare. If

he truly meant for his dare to be "supportive of her hobbies," he could have clarified to EH that he meant for her to wear her underwear like a cosplay costume of her favorite superhero or Fortnite character.

Yet, Appellant made no such clarification because that is not what he wanted EH to do. He wanted EH – a 12-year-old – to interpret Appellant's dare exactly as he meant it. Appellant wanted her to take off her pants and take off her underwear, and then put the underwear she had been wearing on over her pants. Otherwise, Appellant would have attempted to clarify his dare when she expressed a clear disapproval of the dare. But no such attempt was made because this was an intentional attempt by Appellant to have EH take off the underwear she was wearing and, in doing so, expose her genitalia to him for his own sexual gratification.

Appellant's proclivity to engage in inappropriate sexual behavior with EH would continue just minutes later when he asked his 12-year-old niece what pornography she watched. Notably, Appellant does not deny asking EH about what kind of pornography she watched. (R. at 758-59.) In fact, Appellant openly admitted that he asked EH, "Hey, well, what kind of weird porn do you watch." (R. at 758.) However, both at trial and now in his brief to this Court, Appellant maintains that he was not asking about pornography in a sexual context, but instead was in the context "where EH was teasing one of the other children who had been caught watching pornography." (App. Br. at 15-16.)

Just as this argument was unpersuasive to the military judge at trial, it should meet the same result before this Court. Keeping in mind the context that Appellant had already provided EH with at least six shots and then dared his 12-year-old niece to do something involving her underwear, Appellant's pornography question had nothing to do with anything but Appellant's sexual desires.

To combat the indications of what asking a 12-year-old about pornography implies regarding intent, Appellant claimed at trial that talk about pornography was commonplace within his family – even going so far as to say sexual conversations, including pornography, was a "household thing around the kitchen table at the farm." (R. at 759-60.) However, JC, Appellant's sister, vehemently denied ever discussing pornography in front of either her or Appellant's children. (R. at 881.)

Importantly, as previously addressed in Issue I, this was not the only fabrication Appellant alleged during his testimony. Appellant also claimed that he and JC had previously discussed allowing their children to consume alcohol as long as they were supervised by a parent, which was denied by JC. (R. at 698, 881.) Appellant also claimed during his testimony that he had never played any games with EH involving sex or having sexual overtones or topics. (R. at 738.) However, as discussed above, Appellant was then forced to acknowledge that he had played Cards Against Humanity with EH, a game which Appellant agreed included topics such as ejaculation, penises, vaginas, and rape. (R. at 739-40.) While Appellant contends that "[o]utside of EH's testimony, . . . nothing contradicted Appellant's denial" or his "relevant positive character traits including truthfulness," the evidence shows multiple instances in which Appellant's testimony was contradicted by other witnesses and Appellant's own testimony.

Here, a 43-year-old man asked his 12-year-old niece what type of pornography she watches after having provided her with shots of alcohol and daring her to do something involving her underwear. Considering the multiple instances of his testimony that are refuted by the evidence, this Court should find Appellant's purported explanations of his actions during the Truth or Dare game that night unpersuasive and affirm his convictions.

Finally, Appellant attempts to discount EH's recollection of that night's events by repeatedly claiming that EH's perceptions and recollection of that night was impaired by alcohol. (App. Br. at 15-16.) But of course, Appellant, a 43-year-old, was the one who gave EH, his 12-year-old niece, repeated shots of alcohol in the first place. In any event, a review of EH's testimony shows that she recalls details of this night quite clearly. Moreover, Appellant admits in his brief that EH's testimony was "in many ways remarkably similar to Appellant's," which is an acknowledge by Appellant that he agreed with the accuracy of a majority of EH's testimony. (*See* App. Br. at 15.) Appellant here cannot say that EH's recollection of that night was skewed based on her alcohol use while, at the same time, acknowledge that a great deal of her testimony regarding that night was accurate (since it was "in many ways remarkably similar to Appellant's").

If EH's recollection of that night was truly skewed by alcohol use, one would expect Appellant to claim her *entire* recollection and perception of that night would be inaccurate. Yet Appellant, in his brief, picks and chooses only two pieces of EH's recollection to attack and claim was skewed based on alcohol – which just so happen to be the two incidents of lewd acts Appellant committed against her – while claiming that the rest of her testimony was "remarkably similar" to his own recollection of that night. In contrast to his claim, however, Appellant's concession that his and EH's testimony was "remarkably similar" provides this Court further proof that EH's recollection of that night was accurate and unencumbered by alcohol consumption.

Finally, Appellant claims EH's perception and recollection of this incident was "prejudiced because of her exposure to multiple family members talking negatively about him." (App. Br. at 15.) Appellant believes "it is reasonable that EH's perception and recall may have

been negatively influenced by her exposure to family members telling her Appellant was a child molester." (Id. at 16.)

Notably, Appellant fails to cite to any portion of the transcript when making either of these two claims and cites to no instance where a family member told Appellant was a "child molester." Appellant, in the fact section of his brief, does note that EH spoke with her cousin, HB, about that had happened to HB. (App. Br. at 5, *citing* R. at 458.) However, HB testified that she did not speak to EH at all until November or December of 2022, which was months *after* EH reported this incident to her mother in August 2022.[9] (R. at 510.) Moreover, HB testified that she did not go into "huge details" about what happened to her. (R. at 509.)

Appellant, also in the fact section of his brief, claims that EH spoke with another cousin, NB, "about at least some of her accusations against Appellant." (App. Br. at 5, *citing* R. at 425.) Appellant's statement is inaccurate. As noted in Issue I above, EH, during this portion of her testimony, was detailing how she told her cousin NB about waking up in different clothes on the morning after the "Truth or Dare" incident. However, EH testified that she "didn't tell [NB] about that night," but just about waking up in different clothes. (R. at 425.) Here, contrary to Appellant's assertions, nothing was discussed about any "accusations against Appellant." Furthermore, there is no indication that anything "negative" about Appellant was discussed either.

Here, as previously discussed in Issue I above, there is no evidence that any supposed "negative information about Appellant" played any part in EH's reporting of the two incidents or

[9] Appellant claims that the timeline for when EH and HB spoke was "somewhat unclear" based on EH's testimony. (*See* App. Br. at 5.) However, HB's testimony clarifies when the two first spoke. Appellant does not reference this portion of HB's testimony in his brief.

in any way impacted her perception or recollection of those events. Appellant's argument on this point should again be dismissed by this Court.

All told, considering all of these facts and circumstances, the Government provided the panel ample evidence of Appellant's guilt beyond a reasonable doubt. Here, Appellant has failed to make a specific showing of a deficiency of proof as to his sexual assault conviction. Yet even if he had, Appellant's purported explanations for his dare and his question about pornography, as well as his repeated attacks on EH's recollection and perception of that night, were all raised by Appellant before the military judge at trial. Despite these arguments, the military judge – who had the distinct opportunity to witness first-hand the testimony of EH and all other witnesses – still found Appellant guilty of committing lewd acts against his niece. After giving the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence. Accordingly, Appellant's factual sufficiency claim must fail.

III.

APPELLANT'S CONVICTION FOR COMMITTING A LEWD ACT AGAINST HIS 12-YEAR-OLD NIECE BY ENGAGING IN INDECENT CONDUCT IS LEGALLY AND FACTUALLY SUFFICIENT.

Standard of Review and Law

The standard of review and law regarding factual sufficiency for this issue is the same as in Issue I above.

This Court reviews issues of legal sufficiency de novo. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." United States v.

Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002). Applying this test, this Court draws every reasonable inference from the evidence in the record of trial in favor of the prosecution. United States v. McGinty, 38 M.J. 131, 132 (C.M.A. 1993).

Analysis

Appellant claims his conviction for Charge I, Specification 3 is both legally and factually insufficiency because he believes that him daring his 12-year-old niece to take her pants and underwear off constitutes "language," not "conduct." (App. Br. at 18.) Appellant argues that since his conviction is "lacking sufficient proof of conduct, and thereby missing an essential element of the charged offense, it is legally and factually insufficient." (Id.) Appellant is incorrect.

In making his claim, Appellant relies heavily on our superior Court's decision in United States v. King, 71 M.J. 50 (C.A.A.F. 2012). However, Appellant misunderstands that holding.

In King, our superior court reviewed whether a similar specification alleging an indecent act failed to state an offense.[10] There, an appellant was charged with asking his 14-year-old stepdaughter during a video internet chat to lift her shirt so that he could view her breasts. On appeal, the appellant alleged that the specification failed to state an offense because his request constituted indecent language, not indecent conduct. Id. at 52.

[10] At the time of King, no Article 120b, UCMJ, existed. Instead, the appellant in King was charged with committing an indecent act under a previous version of Article 120, UCMJ. The two elements of that offense were: (1) That the accused engaged in certain conduct; and (2) That the conduct was indecent conduct. *See* Manual for Courts-Martial, United States (MCM), pt. IV, para. 45.b.(11) (2008 ed.). The prior Article 120, UCMJ, defined indecent conduct, in part, as follows: "[T]hat form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." Id. at pt. IV, para. 45.a.(t).(12) (2008 ed.). This definition matches the current definition of "indecent conduct" in Article 120b, UCMJ. *See* MCM, at pt. IV, para. 62.h.(5).(D) (2019 ed.).

Our superior Court first noted that it had previously "held that 'language' can be, or be part of, 'conduct' in a particular case." King, 71 M.J at 52 (*citing* United States v. Brinson, 49 M.J. 360, 364-65 (C.A.A.F. 1998), United States v. Littlewood, 53 M.J. 349, 352, 353-54 (C.A.A.F. 2000), United States v. Lofton, 69 M.J. 386, 390 (C.A.A.F. 2011). The Court then conducted a legal sufficiency evaluation of "the specification and the facts," and held that "*at a minimum*, the facts support an attempted indecent act." 71 M.J. at 52 (emphasis added). The Court concluded that the appellant's request was an "overt act" that constituted "direct movement toward the commission" of an indecent act. Id.

Notably, our superior Court held, "But for his stepdaughter's refusal to lift her shirt, King would have 'view[ed]' his stepdaughter's breasts using the webcam." Id. The Court determined that the request amounted to at least attempted "conduct" and further determined that the appellant's request to his 14-year-old stepdaughter to lift her shirt so he could view her breasts met the definition of "indecent conduct." Id.

Though the Court concluded that "the evidence is legally sufficient to establish an attempted indecent act," the Court noted that "neither the granted issue nor the briefs in this case specifically address the legal sufficiency of the evidence to support the charged offense." Id. Rather than request briefs on whether the evidence was sufficient to establish the charged indecent act offense rather than the lesser included offense of attempted indecent act, the Court determined that it could affirm a finding of attempt because it did not change the sentencing landscape and because Congress had replaced that version of Article 120, UCMJ, before the Court issued its decision. Id. at 52-53.

Importantly, as this Court found in United States v. Capps, ACM 38160, 2013 CCA LEXIS 842 (A.F. Ct. Crim. App. Oct. 9, 2013), "King does not stand for the proposition that a

request to view a young teenager's breast via electronic means can *never* constitute a completed indecent act." Id. at *13. In Capps, an appellant was chatting with a 13-year-old who sent a picture of herself clad only in a bra from the waist up. Id. at *3. The appellant responded by asking the girl to take off her bra.

Like in King, the appellant in Capps claimed there was no completed indecent act. Using King as an example, this Court did "not find it necessary to hold that the appellant completed an indecent act," holding, "Consistent with our superior court's example, we affirm the lesser included offense of an attempted indecent act, which does not change the sentencing landscape." Id. at *13. This Court further determined that "the military judge would have adjudged the same sentence had she found him guilty of this lesser included offense." Id.

This case, even though charged under Article 120b, UCMJ, versus the prior version of Article 120, UCMJ, is remarkably similar to both King and Capps. In all three cases, the appellants were charged with what amounted to indecent conduct based on things they said. In King, the appellant asked his 14-year-old stepdaughter to take off her shirt so he could see her breasts. King, 71 M.J. at 52. In Capps, the appellant asked a 13-year-old to take off her bra. Capp, at *13. And here, Appellant asked his 12-year-old niece to take off her pants and underwear while playing Truth or Dare. Additionally, all three cases involved appellants asking the other person to engage in *conduct* – namely taking off a piece of clothing.

These holdings foreclose Appellant's instant claim that his misconduct was only "language" and not "conduct." Just like King and Capps, at a minimum Appellant's action in making the dare to his 12-year-old niece was an attempted lewd act via indecent conduct. Indeed, but for EH's refusal to take off her pants and underwear, she would have taken off her pants and underwear and Appellant would have viewed his 12-year-old niece's naked genitalia.

See King, 52 M.J. at 52. Like our superior Court in King and this Court in Capps, Appellant's request met the definition of "indecent conduct." Id.

However, as this Court held in Capps, our superior in Court in King did not foreclose the possibility that Appellant's acts constituted a completed lewd act by way of indecent conduct. In fact, that act was completed the moment Appellant communicated the dare to EH. This offense is similar to a solicitation offense in that it is "an instantaneous offense," which is complete when the communication is made. *See* United States v. Carroll, 43 M.J. 487, 489 (C.A.A.F. 1996). For it is the making of the request, under these circumstances, that is the indecent conduct. It is not required that the minor receiving the request actually comply in order for his request (the charged conduct) to be completed. *See* United States v. Higgins, 40 M.J. 67, 69 (C.M.A. 1994) (reaffirming that is not necessary that a solicitee agree to or act on the invitation to engage in criminal activity); *see also* United States v. Sutton, 68 M.J. 455, 459 (C.A.A.F. 2010) (holding that a charge of indecent liberties could have properly alleged an offense where an accused requested a minor to lift her shirt to show him her breasts in order to gratify his lust).

Here, the moment Appellant dared EH to take off her underwear – which would have resulted in EH engaging in *conduct*, not *language*, had she actually taken off her underwear – Appellant engaged in and completed his own act of indecent conduct.

Appellant, however, attempts to differentiate his case from King since the current Article 120b "more clearly delineates indecent language from indecent conduct," and because it defines language and conduct as "different types of 'lewd acts.'" (App. Br. at 19.) However, Appellant fails to mention that the previous version of Article 120, UCMJ, which was in place at the time of King and Capps, included indecent language and indecent conduct as different types of sexual misconduct. The previous statute had an offense of "Indecent liberty with a child," which could

"consist of communication of indecent language as long as the communication was made in the physical presence of the child," and "Indecent act," which involved engaging in indecent conduct. *See* MCM at pt. IV, para. 45.a.(j)-(k), para. 45.a.(t).(11)-(12) (2008 ed.).

Yet, despite indecent language being a part of a separate sexual offense (indecent liberties with a child) under the prior Article 120, UCMJ, both our superior Court in King and this Court Capps still found the language contained in each of those appellant's requests in each of those cases amounted to at least an attempted indecent act. Appellant's attempt to distance his situation from that in King is unpersuasive.

In all, when viewing the evidence in the light most favorable to the government, this Court should find that Appellant's request was "conduct" and that he completed his criminal act the moment he communicated his request to EH. Humphreys, 57 M.J. at 94. As to factual sufficiency, the evidence shows, consistent with both King and Capps that Appellant's request amounted to "conduct" and met the definition of "indecent conduct." Accordingly, this Court be should not be clearly convinced that the military judge's finding of guilty was against the weight of the evidence.

However, should this Court decide to follow the path of King and Capps, this Court can affirm the lesser included offense of an attempted lewd act via indecent conduct. While Appellant claims that there is "no lesser included offense available based on the changing language,"[11] his attempt to differentiate his case from the holding in King is unsupported. Appellant claims that "While it is not fully developed in the King opinion, it seems the charging language in King was rather unique, allowing the specification to be saved through striking certain language – this dynamic is not present here." (App. Br. at 19.)

[11] *See* App. Br. at 19.

However, the original charging language – i.e., the specification – is quoted in the King opinion and is not unique at all. *See* King, 71 M.J. at 51; *compare* to the model Indecent Act specification at MCM, pt. IV, para. 45.g.(11) (2008 ed.). Furthermore, CAAF never mentions anything about "striking" any language from the specification at play in King. Instead, our superior Court simply said it was affirming the "lesser included offense of attempted indecent act." King, 71 M.J. at 53. Appellant's claim that CAAF did anything other than simply affirm the lesser included attempt offense in King is incorrect.

Appellant fails to cite Capps at all, so he does not differentiate his case from this Court's holding in that case. Like King, this Court in Capps made no mention of having to strike language to "save" a specification or doing anything other than simply affirming the lesser included attempt offense.

Appellant does state, "Like King, a 'dare' would be at most an *attempt* to engage in indecent conduct; the 'dare' is language used to entice conduct, it is not conduct itself." (App. Br. at 20.) However, both King and Capps stand in contravention of Appellant's claim that his "dare" is not "conduct itself." Instead, each of those cases show that, at the very least, Appellant's conduct was an attempted lewd act by way of indecent conduct.

Moreover, just as in King and Capps, the sentencing landscape does not change should this Court affirm the lesser included attempt offense. Notably, the military judge sentenced Appellant to 60 months confinement for Specification 1, 36 months for Specification 4, and 36 months for this instant specification, Specification 3, and determined all three sentences would run concurrently. Thus, not only can this Court be sure the military judge would have adjudged

the same sentence had he found Appellant guilty of the lesser included offense,[12] but can also be confident that it would not have impacted Appellant's overall confinement sentence.

All told, this Court should deny Appellant's claim and affirm his conviction to Charge I, Specification 3. In the alternative, this Court can find that Appellant's conduct, at minimum, constituted an attempted lewd act by way of indecent conduct and affirm the lesser included offense of attempted lewd act as well as his affirmed sentence. *See* King, 71 M.J. at 53.

CONCLUSION

WHEREFORE, this Court should deny Appellant's claims and affirm the findings and sentence.

[redacted]

G. MATT OSBORN, Colonel, USAF
Appellate Government Counsel
[redacted]

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and Appellate
Operations Division
[redacted]

[12] *See* Capps, at *13.

MATTHEW D. TALCOTT, Colonel, USAF
Chief, Government Trial and Appellate Operations Division


CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 15 October 2025 via electronic filing.

G. MATT OSBORN, Colonel, USAF
Appellate Government Counsel


IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **DERRICK E. BRADDY** United States Air Force	)	No. ACM 40810
Appellant	)	22 October 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

I.

WHETHER THE EVIDENCE SUPPORTING SPECIFICATION 1 OF CHARGE I IS FACTUALLY INSUFFICIENT WHERE, INTER ALIA, THE VICTIM REPEATEDLY STATED IT MAY HAVE BEEN A DREAM, HAD PREVIOUSLY EXPERIENCED A SIMILAR ASSAULT BY A DIFFERENT FAMILY MEMBER, AND DISCLAIMED SEEING APPELLANT DURING THE CHARGED EVENT.

1. Specific Showing of a Deficiency in Proof

The Government contends, albeit without elaboration, that "Appellant has failed to make a specific showing of a deficiency of proof." Gov. Br. at 20, 32. In Appellate Defense Counsel's experience, the Government has been placing this line, seemingly *pro forma*, in every answer on factual sufficiency. It would be more helpful if the Government made a substantive argument. The lack of elaboration makes it hard to evaluate or respond to the Government's contention.

Appellant has argued that the evidence (1) "failed to prove that the charged event occurred" given that the named victim repeatedly stated it may have been a dream and (2) "failed to prove . . . that Appellant was the one who committed it" given that the named victim denied seeing Appellant – and stated she kept her eyes shut the entire time. Appellant's Br. at 10. These are specific and severe deficiencies in proof. Appellant also pointed out that this accusation did

not appear at all in EH's initial statements; it only arose after another family member made nearly identical accusations and that EH was exposed to a concerning array of suggestibility factors. *See* Appellant's Br. at 10-12. This Court should find this evidence more than sufficient to trigger factual sufficiency review and, for that matter, to find factual insufficiency.

2. It Could Have Been a Dream

The Government acknowledges that EH stated it could have been a dream in her initial disclosure and subsequent child forensic interview. Gov. Br. at 21. But, the Government protests, EH testified at trial it was not a dream. Gov. Br. at 21. It is true that EH drastically changed her story for trial, but that is a credibility issue in and of itself. EH's evolving story in no way eliminates the concern that she initially stated the charged event could have been a dream. EH maintained that stance for months, even when questioned in a controlled forensic setting.

The Government later cites the expert's testimony for the proposition that "a 12-year-old would be able to tell the difference between fantasy and reality." Gov. Br. at 27 (citing Trial Tr. at 856). But then why did EH describe this as a possible dream for months after it happened? There never has been a satisfactory explanation for why EH initially thought this could have been a dream but then realized, months after the initial disclosure (and only after exposure to significant risks of suggestibility / external influence), that it was not a dream.

While the Government vigorously attacks the defense arguments, notably absent from the answer is any cogent explanation for why EH maintained for months that she did not even know if this incident had actually happened. Nor does the Government offer any satisfactory explanation for the especially concerning fact that even in the controlled forensic interview, EH said this may have been a dream. This is a major problem that should give this Court great pause. The beyond a reasonable doubt standard is hard to reach when the only witness repeatedly endorses that the event may not have occurred at all.

3. The Core Facts are Flawed

The Government cites to various evidence corroborating collateral aspects of the charged facts, essentially arguing the strengths in the prosecution's case should outweigh the weaknesses. *See* Gov. Br. at 20-21, 31-32. Collateral corroboration is all good and well, but the problem here is that the core accusation itself has such major deficiencies. None of the collateral collaboration changes the fact that EH maintained for months she was unsure whether this incident had even happened. It does not change that EH never saw the alleged perpetrator. It does not change that the original accusations made no mention at all of the alleged lewd act touching. Nor that this alleged touching accusation was only levied after significant crosstalk between family members, which included the 404(b) accusation of *remarkably* similar character.

4. The Government Makes Improper Arguments

The Government blames Appellant for putting on a defense, arguing that "Appellant is now attempting to place the blame of his acts against EH on two minors, including his own son." Gov. Br. at 24. This is a blatantly improper argument. Government counsel cannot blame an accused servicemember for presenting a defense. Such arguments are improper at trial and are equally improper before this Court.

For example, in *United States v. Garcia*, the Army Court found constitutional error in government argument that (1) the Appellant's decision to call his young son as a witness was unkind to the son. ARMY 20130660, 2015 WL 4940266, at *7 (A. Ct. Crim. App. Aug. 18, 2015) (mem. op.). Here, as there, it is improper to blame Appellant for putting on a defense, regardless of whether it may paint another individual in a bad light.

The sad fact is that there was evidence of sexual molestation between the family children. Trial Tr. at 474, 491-92. This background – layered atop of EH's testimony that she never opened

her eyes or saw who was touching her – presents one of several reasonable hypotheses that excludes guilt: i.e., that Appellant was not the one who touched EH.

5. Crosstalk

The Government does not dispute that there was a large amount of crosstalk within the family about various accusations against Appellant. But the Government points out that the evidence did not indicate smoking gun type crosstalk, for example direct communication between the two accusers at the exact moment the accusations arose. Gov Br. at 24-27.

One could hardly expect that every conversation between the complex web of family and friends would be documented – or acknowledged – on the record. But the record is more than sufficient to demonstrate (1) that there was a great deal of crosstalk within the family and (2) EH's accusations changed *a lot* in its aftermath. Not only did EH's accusations greatly increase in severity, but they changed to match the exact accusation of another family member. Appellant's Br. at 4-5. By the time of trial, EH's accusation, which had originally not even mentioned the events of Specification 1 of Charge I, changed to be a near-precise mirror image of SA's accusations. EH's original accusation mentioned *nothing* of the most serious incident. Then SA made her penis/couch/hand accusation to EH's mom. Only then did EH make her own penis/couch/hand accusation. This should give this Court great pause. Reasonable doubt does not require a smoking gun.

6. Admissions Against Interests Hurt Credibility

The Government then argues that some of the very deficiencies in proof raised by the Defense actually *enhance* EH's credibility because, if she had been intentionally lying, her accusations would have been "tailored more perfectly." Gov. Br. at 27. The Government seems to be setting up a dichotomy in which EH was either wholly accurate or intentionally lying. But these are far from the only two options. But given the specific deficiencies in proof here,

intentional fabrication by EH was not the main defense theory. It would be more accurate to say that EH's various statements raised concerns about limitations in perception, memory, and suggestibility.

Additionally, EH was somewhat locked into these admissions by her closer-in-time statements. She could not change them wholesale at trial. Although, of course, she did "evolve" considerably in certain areas. As seen below, the Government applies a very different standard to Appellant's testimony.

II.

WHETHER THE EVIDENCE SUPPORTING SPECIFICATIONS 3 AND 4 OF CHARGE I IS FACTUALLY INSUFFICIENT.

1. Specific Showing of a Deficiency in Proof

The Government, as always, begins with a perfunctory accusation that "Appellant has failed to make a specific showing of a deficiency of proof." Gov. Br. at 33. Again, it is hard to respond in the absence of any explanation, but Appellant's contention that direct evidence presented an alternative theory to guilt is sufficient deficiency to trigger review.

2. General Inappropriateness Does Not Establish the Elements

Pointing to the provision of alcohol and playing of "Cards Against Humanity" – the Government argues the there was a milieu of inappropriateness surrounding the events in question. Gov. Br. at 34 (arguing "the entire setting between EH and Appellant that night – one that included alcohol, shots and sexual-related topics – was hugely inappropriate considering EH's age and Appellant's pseudo-parental status over EH."). There may be some truth to this, though the Government, both at trial and on appeal, seem oddly obsessed with the game "Cards

Against Humanity." Trial Tr. at 738-42, 898-99; Gov. Br. at 12, 13, 29, 33, 36.[1] But criminal convictions are not obtained or upheld based on general inappropriateness – they require proof beyond a reasonable doubt of specifically delineated elements.

Taking this argument even further, the Government suggests that, even if Appellant's version of events is to be believed, they were still inappropriate. Gov. Br. at 34 ("Even taking Appellant's rendition of his dare at face value, any dare made by a 43-year-old man involving a 12-year-old's underwear should immediately scream of inappropriateness."). Certainly, the Government cannot be suggesting this Court can or should affirm Appellant's conviction based on elements other than those charged because it finds the uncharged alternative version of events inappropriate. This would create a fatal variance or, at the very least, require the use of exceptions and substitutions that cannot be made on appeal. Even then, Appellant's version of events certainly would not meet the high threshold of indecency.

3. The Government Makes More Improper Arguments

The Government next makes a spillover argument between Specifications 3 and 4 of Charge I, arguing that "Appellant's proclivity to engage in inappropriate sexual behavior with EH would continue just minutes later when he asked his 12-year-old niece what pornography she watched." Gov. Br. at 35.

Neither on trial nor appeal is "proclivity to engage in inappropriate sexual behavior" an appropriate evidentiary consideration, absent a properly noticed and litigated motion under Mil. R. Evid. 414. That did not happen here and, of course, *could not have happened* because

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[1] The Government was so focused on "Cards Against Humanity" at trial that the military judge had to instruct the trial counsel to move on from this bizarre line of questioning. Trial Tr. at 742 ("SDC: Objection, Your Honor. Argumentative. Also 403 at this point. We spent more time talking about Cards Against Humanity than the charged misconduct. MJ: The objection is sustained. Move on.")

arguing Mil. R. Evid. 414 proclivity between charged offenses is directly prohibited by *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016).

4. Admissions Against Interests Hurt Credibility

Just pages after arguing that EH's supposed admission against interest bolstered her credibility, the Government attacks Appellant for making various admissions against interest. Gov. Br. at 33-35. The Government cannot ask this Court to use a different standard to evaluate witness testimony that it likes as opposed to witness testimony it does not like. By the Government's own argument pages before, EH's testimony was more credible because it was not "tailored more perfectly." Gov. Br. at 27. Applying the Government's own standard, Appellant's testimony was certainly not calculated to be maximally exculpatory. On the contrary, as highlighted throughout Government's brief, he admitted things that made him look flawed. A reasonable explanation for these admissions against interests is that he was telling the unvarnished truth rather than tailoring a more perfect lie.

5. Perception and Recall Issues Only Foster *Total* Inaccuracy

The Government then makes the difficult-to-follow argument that if EH's alcohol consumption impacted her memory, it would presumably have distorted the entirety of her memory. Gov. Br. at 27. In the Government's words: "If EH's recollection of that night was truly skewed by alcohol use, one would expect Appellant to claim her entire recollection and perception of that night would be inaccurate." Gov. Br. at 27. The Government cites nothing inside or outside the record for the proposition that alcohol either distorts memory completely or not at all.

To the extent this is an expert-like consideration, there is nothing in the record to support it. An expert did testify, but she did not say this. If counsel are making expert-like proffers at this point, this certainly does not match Appellate Defense Counsel's understanding of how alcohol impacts perception and memory. If this is simply an argument based on common knowledge, the

same holds true. Alcohol consumption could certainly impact the reliability of perception and recall of small details without completely distorting all the surrounding facts.

III.

WHETHER THE EVIDENCE SUPPORTING SPECIFICATION 3 OF CHARGE I IS LEGALLY AND FACTUALLY INSUFFICIENT WHERE THE SPECIFICATION ALLEGED "INDECENT CONDUCT" BUT THE ACTUS REUS EXCLUSIVELY INVOLVED LANGUAGE.

1. Since *King*, Article 120b, UCMJ, has Been Enacted

The Government's first argument is that the CAAF's decision in *United States v. King* is distinguishable, pointing out "At the time of *King*, no Article 120b, UCMJ, existed." Gov. Br. at 40, n.10 (citing 71 M.J. 50 (C.A.A.F. 2012). This is true and it significantly helps Appellant's argument. At the time of *King*, "Indecent Act" under Article 120 was a much broader offense and it did not expressly delineate between conduct and language. *See* 10 U.S.C. § 920(k) (2006) (repealed 2011); *see also* Manual for Courts-Martial, United States (2008 ed.) (2008 MCM) pt. IV, ¶ 45.a.(k).

2. Under Article 120b, Language and Conduct are Separately Delineated Theories of Liability – and Each Must be Given Separate Effect

The older version is contrasted with the statute here, which expressly provides differing theories of liability for "language" and "conduct." *See* 10 U.S.C. § 920b (2018); *see also* Manual for Courts-Martial, United States (2019 ed.) (2019 MCM) pt. IV, ¶ 62.a.(c). The statute here provides the two theories of liability: (1) "intentionally communicating indecent *language* to a child by any means . . . ." or (2) "indecent *conduct*, intentionally done with or in the presence of a child." *Id.* at § 920b(h)(5)(C)-(D) (emphasis added). Within the statute itself, the "language" and "conduct" theories of liability are delineated under separate sections:

> (5) Lewd act.-The term "lewd act" means-
>
> (A) any sexual contact with a child;
>
> (B) intentionally exposing one's genitalia, anus, buttocks, or female areola or nipple to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person;
>
> (C) intentionally communicating *indecent language* to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; or
>
> (D) any *indecent conduct*, intentionally done with or in the presence of a child, including via any communication technology, that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

10 U.S.C. § 920b(g)(5) (emphasis added).

Given that the statutory scheme specifically separates these options, controlling precedent and the rules of statutory interpretation require them to be given separate effect. *United States v. Mendoza*, 85 M.J. 213 (C.A.A.F. 2024) (separate theories of liability within a UCMJ Article must be given separate effect); *see also id.* at 218-21 (explaining the relevant rules of statutory interpretation). Here, as in *Mendoza*, allowing the Government to combine the theories of liability from Article 120b(g)(5)(C)-(D) would violate the surplusage cannon by needlessly applying "an interpretation that causes [a provision] to duplicate another provision." *Id.* at 218 (citing *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017) (internal quotation marks omitted).

"[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Id.* at 219 (quoting *Sager* at 158) (alteration in original, additional citations omitted). Here, the Government's argument would require this Court to render Article 120b(g)(5)(C) superfluous with Article 120b(g)(5)(D). This interpretation would directly violate the surplusage cannon at its strongest.

3. *King* and Pre-2012 Scheme

The Government itself clearly recognizes this dynamic. The problem for the Government is that the current scheme expressly delineates different theories of liability for conduct and language as explored above. The Government attempts to neutralize this problem by analogizing the current statutory scheme to the pre-2012 scheme from the time of *King* and *Capp*, contending that the old scheme similarly gave a separate option for charging language. Namely, "Indecent liberties with a child," which was an enumerated Article 134 offense at the time of *King* and *Capp*. *See* Gov. Br. at 43-44. The Government points out that, embedded in a definition under this old Article 134 provision, the 2008 MCM stated that language may constitute Indecent liberties. Gov. Br. at 43-44 (citing 2008 MCM at pt. IV, ¶ 45.a.(j)-(k), ¶ 45.a.(t)(11)-(12)).

This is hardly comparable to the current statutory scheme. The connection the Government is trying to draw from the pre-2012 UCMJ is *much* more attenuated than the connection in the current version. The Government is comparing a statutory UCMJ Article to an enumerated Article 134 offense – which does not appear in the statutory text at all. In the current version, by contrast, a single statutory UCMJ article gives two different theories of liability directly after each other. This is totally different.

Nevertheless, maybe the defense should have made a *Mendoza*-like argument in *King* and *Capp* based on the connection the Government is trying to draw. Perhaps the appellants in those cases could have argued that that this Article 134 provision contemplated "language" while the Article chosen by the Government contemplated only "conduct," and therefore they had to be given separate meaning and effect. Over a decade pre-*Mendoza*, however, it is unlikely that either the parties nor the Courts in those cases would have recognized this dynamic.

Additionally, it is unclear why the distinction needs to be made at all because the results *King* and *Capp* are perfectly consistent with Appellant's argument. In neither case did the courts

affirm the specifications as charged, instead affirming LIO's of attempted conduct. While this somewhat avoided the ultimate issue, it certainly indicates that the courts did not feel the original specifications should stand.

4. Government Request to Affirm an LIO of Attempt

The Government suggests that this Court might be able to affirm an LIO of attempted lewd act via indecent conduct. Gov. Br. at 42-44. This would not be a permissible resolution in the present case. The facts of *King* appear to have been quite unique in that the charging language made adjusting it to an LIO of attempt much easier. Specifically, in *King*, the original language of the specification alleged language with the goal of viewing ("so that he could view them" was expressly alleged in the specification). 71 M.J. at 51. This apparently allowed the CAAF to affirm the LIO without adding additional language. It is less clear from *Capp* how the court justified affirming an LIO. It is possible a similar dynamic was present, or it is possible it was just not an issue raised by the parties.

But a similar result is not possible here because there is no similar language in the specification. The Government points out that the CAAF in *King* did not strike language. Gov. Br. at 45. But that is exactly where the unique charging language in *King* came into play. It already included language about the attempt to view ("so that he could view them"), so changing the language was not required.

Here an attempt to do something not already alleged in the specification would require exceptions and substitutions. The specification reads:

> In that [Appellant did] commit a lewd act upon [EH], a child who had not attained the age of 16 years, by engaging in indecent conduct, to wit: daring [EH] to take her pants and underwear off, intentionally done in the presence of [EH], which conduct amounted to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to

sexual relations.

(Charge Sheet). The only LIO of attempt included within this charging scheme would be an *attempt to make the dare*. This modified inchoate specification would have the same problems as the original specification. The only way to fix this would be to add language, which cannot be done on appeal.

The Government further argues that affirming an LIO of attempt would not result in a reduction of sentence. Gov. Br. at 45-46. Appellant agrees in this regard. But Appellant does not see how the Court could properly affirm a legally sufficient attempt specification based on this charging scheme.

5. The "Light Most Favorable to the Prevailing Party" Standard of Review is Inapplicable to Questions of Statutory Interpretation

As a final note, the Government seems to cloud the standard of review, suggesting that the legal sufficiency standard requires this Court to consider the statutory interpretation question "in the light most favorable to the government" as the prevailing party at trial. Gov Br. at 44.

This framing confuses standard of review applied by this Court to questions of statutory interpretation with the standard of review applied to the evaluation of evidence. Questions of statutory interpretation are reviewed de novo, even when they implicate the ultimate issue of legal sufficiency. *See Mendoza*, 85 M.J. at 217-18 (distinguishing "the light most favorable to the prosecution" standard from a legal sufficiency standard based on a question of statutory interpretation); *see also United States v. Hiser*, 82 M.J. 60, 64 (C.A.A.F. 2022) (statutory interpretation questions reviewed de novo); *United States v. Jacobsen*, 77 M.J. 81, 84 (C.A.A.F. 2017) (statutory interpretation questions reviewed de novo).

To resolve this issue, this Court must decide the statutory interpretation issue one way or the other. If this Court agrees with Appellant that Article 120b(g)(5)(C)-(D) create separate theories of liability, Appellant's convictions are legally insufficient because of the charging scheme. No deference to the findings below is warranted on this question.

Conclusion

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings of guilty and the sentence.

[redacted]
BRAD SIMON
Civilian Appellate Defense Counsel
[redacted]

[redacted]
JOHN M. FREDERICKS, Capt, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 22 October 2025.

[redacted]
JOHN M. FREDERICKS, Capt, USAF
Appellate Defense Counsel
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40810**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL**
Derrick E. BRADDY	)	**CHANGE**
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 15th day of December, 2025,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 2 and referred to Panel 1 for appellate review.

This panel letter supersedes all previous panel assignments.

[redacted]

JACOB B. HOEFERKAMP, Capt, USAF
Chief Commissioner

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40810**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL**
Derrick E. BRADDY	)	**CHANGE**
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 31st day of March, 2026,

ORDERED:

That the record of trial in the above-styled matter is withdrawn from Panel 1 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

GRUEN, PATRICIA A., Colonel, Senior Appellate Military Judge
MENDELSON, JAMIE L., Lieutenant Colonel, Appellate Military Judge
KUBLER, JOSEPH J., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

JACOB B. HOEFERKAMP, Capt, USAF
Chief Commissioner