UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32776**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Hannes MARSCHALEK	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 6 May 2024, counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 days to submit 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 8th day of May, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **3 August 2024**.

Each request will be considered on its merits. 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. Counsel is not required to re-address item (1) in each subsequent motion for enlargement of time.

FOR THE COURT

[redacted]

FLEMING E. KEEFE, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5), **HANNES MARSCHALEK,** United States Air Force, *Appellant.*	)	No. ACM S32776
	)	6 May 2024

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 Assignments of Error. Appellant requests an enlargement for a period of 60 days, which will end on **3 August 2024**. The record of trial was docketed with this Court on 5 April 2024. From the date of docketing to the present date, 31 days have elapsed. On the date requested, 120 days will have elapsed.

Undersigned counsel is on leave beginning this Friday, 10 May 2024, until 28 May 2024. She will be out of the country from 11 to 24 May 2024 and unable to work on Appellant's, or any other case, during this time. Monday, 27 May 2024, is Memorial Day. Since Appellant's request for an enlargement of time must be filed by 28 May 2024 in accordance with A.F. CT. CRIM. APP. R. 23.3(m)(1), undersigned counsel is filing this request well in advance to avoid any issues or the risk of having to file out of time.

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

Respectfully submitted,

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4770
samantha.castanien.1@us.af.mil

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 Air Force Government Trial and Appellate Operations Division on 6 May 2024.

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

7 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) HANNES MARSCHALEK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32776 Panel No. 1

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]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

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 7 May 2024.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

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. 1
Staff Sergeant (E-5) **HANNES MARSCHALEK,** United States Air Force, *Appellant.*	)	No. ACM S32776
	)	23 July 2024

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

Pursuant to Rule 23.3(m)(3) 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 **2 September 2024**. The record of trial was docketed with this Court on 5 April 2024. From the date of docketing to the present date, 109 days have elapsed. On the date requested, 150 days will have elapsed.

On 24 October 2023, at a special court-martial convened at Royal Air Force Lakenheath, United Kingdom, a military judge, consistent with Appellant's pleas, found him guilty by exceptions and substitutions of one charge and one specification of indecent conduct in violation of Article 134, Uniform Code of Military Justice (UCMJ). R. at 1, 6-8, 14, 74. Pursuant to a plea agreement, one charge and two specifications of indecent exposure in violation of Article 120c, UCMJ, were withdrawn and dismissed with prejudice. R. at 6-7, 59, 73, 197. On 25 October 2023, the military judge sentenced Appellant to be reduced to the grade of E-1, to be confined for two months, and to be discharged from the service with a bad conduct discharge. R. at 197. The convening authority took no action on the findings or sentenced and denied the Appellant's request for deferment of both his reduction in rank and automatic forfeitures; however, the convening

authority did waive all automatic forfeitures for a period of six months, or release from confinement, or expiration of service, whichever was soonest, for the benefit of Appellant's spouse and child. Record of Trial (ROT), Vol. 1, *Corrected Convening Authority Decision on Action* – United States v. Staff Sergeant Hannes Marschalek, dated 19 January 2024.

The trial transcript is 198 pages long and the record of trial is comprised of two volumes containing nine Prosecution Exhibits, twelve Defense Exhibits, one Court Exhibit, and three Appellate Exhibits. Appellant is not currently confined.

Appellant was advised of his right to a timely appeal. Appellant was provided a status update on undersigned counsel's progress on his case and advised of the request for an 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, undersigned counsel has been unable complete her 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 respectfully requests that this Honorable Court grant the requested enlargement of time for good cause shown.

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4770
samantha.castanien.1@us.af.mil

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 Air Force Government Trial and Appellate Operations Division on 23 July 2024.

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

23 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) HANNES MARSCHALEK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32776 Panel No. 1

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]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

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 23 July 2024.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **HANNES MARSCHALEK,** United States Air Force, *Appellant.*	)	No. ACM S32776
	)	19 August 2024

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

Pursuant to Rule 23.3(m)(3) 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 **2 October 2024**. The record of trial was docketed with this Court on 5 April 2024. From the date of docketing to the present date, 136 days have elapsed. On the date requested, 180 days will have elapsed.

On 24 October 2023, at a special court-martial convened at Royal Air Force Lakenheath, United Kingdom, a military judge, consistent with Appellant's pleas, found him guilty by exceptions and substitutions of one charge and one specification of indecent conduct in violation of Article 134, Uniform Code of Military Justice (UCMJ). R. at 1, 6-8, 14, 74. Pursuant to a plea agreement, one charge and two specifications of indecent exposure in violation of Article 120c, UCMJ, were withdrawn and dismissed with prejudice. R. at 6-7, 59, 73, 197. On 25 October 2023, the military judge sentenced Appellant to be reduced to the grade of E-1, to be confined for two months, and to be discharged from the service with a bad conduct discharge. R. at 197. The convening authority took no action on the findings or sentenced and denied the Appellant's request for deferment of both his reduction in rank and automatic forfeitures; however, the convening

authority did waive all automatic forfeitures for a period of six months, or release from confinement, or expiration of service, whichever was soonest, for the benefit of Appellant's spouse and child. Record of Trial (ROT), Vol. 1, *Corrected Convening Authority Decision on Action* – United States v. Staff Sergeant Hannes Marschalek, dated 19 January 2024.

The trial transcript is 198 pages long and the record of trial is comprised of two volumes containing nine Prosecution Exhibits, twelve Defense Exhibits, one Court Exhibit, and three Appellate Exhibits. Appellant is not currently confined.

Appellant was advised of his right to a timely appeal. Appellant was provided a status update on undersigned counsel's progress on his case and advised of the request for an 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, undersigned counsel has been unable complete her 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 respectfully requests that this Honorable Court grant the requested enlargement of time for good cause shown.

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4770
samantha.castanien.1@us.af.mil

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 Air Force Government Trial and Appellate Operations Division on 19 August 2024.

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

20 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) HANNES MARSCHALEK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32776 Panel No. 1

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]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 20 August 2024.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **HANNES MARSCHALEK,** United States Air Force, *Appellant.*	)	No. ACM S32776
	)	19 September 2024

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

Pursuant to Rule 23.3(m)(3) and (6) 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 **1 November 2024**. The record of trial was docketed with this Court on 5 April 2024. From the date of docketing to the present date, 167 days have elapsed. On the date requested, 210 days will have elapsed.

On 24 October 2023, at a special court-martial convened at Royal Air Force Lakenheath, United Kingdom, a military judge, consistent with Appellant's pleas, found him guilty by exceptions and substitutions of one charge and one specification of indecent conduct in violation of Article 134, Uniform Code of Military Justice (UCMJ). R. at 1, 6-8, 14, 74. Pursuant to a plea agreement, one charge and two specifications of indecent exposure in violation of Article 120c, UCMJ, were withdrawn and dismissed with prejudice. R. at 6-7, 59, 73, 197. On 25 October 2023, the military judge sentenced Appellant to be reduced to the grade of E-1, to be confined for two months, and to be discharged from the service with a bad conduct discharge. R. at 197. The convening authority took no action on the findings or sentenced and denied the Appellant's request for deferment of both his reduction in rank and automatic forfeitures; however, the convening

authority did waive all automatic forfeitures for a period of six months, or release from confinement, or expiration of service, whichever was soonest, for the benefit of Appellant's spouse and child. Record of Trial (ROT), Vol. 1, *Corrected Convening Authority Decision on Action* – United States v. Staff Sergeant Hannes Marschalek, dated 19 January 2024.

The trial transcript is 198 pages long and the record of trial is comprised of two volumes containing nine Prosecution Exhibits, twelve Defense Exhibits, one Court Exhibit, and three Appellate Exhibits. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel also provides the following information. Appellate defense counsel is currently assigned 34 cases; 21 cases are pending before this Court (15 cases are pending AOEs); 12 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF); and one case is pending a petition to the United States Supreme Court. Ten cases have priority over the present case:

1. *United States v. Folts*, No. ACM 40322 – On 26 August 2024, this Court issued an opinion in this appellant's case. Undersigned counsel is working with a civilian appellate defense counsel on next steps, including drafting a petition and supplement to the CAAF.

2. *United States v. Leipart*, No. 23-0163/AF – The CAAF issued a decision in this case on 1 August 2024. Undersigned counsel anticipates filing a petition of certiorari to the United States Supreme Court within 90 days, barring any extensions.

3. *United States v. Giles*, No. ACM 40482 – This AOE was submitted on 5 September 2024. Upon receipt of the Government's Answer Brief, undersigned counsel will assess whether a Reply Brief is warranted and then draft any such Reply.

4. *United States v. Casillas*, No. 24-0089/AF – Undersigned counsel filed the Reply Brief on 16 September 2024. Undersigned counsel anticipates oral argument for this case will be later this year, which will likely impact her ability to review Appellant's case.

5. *United States v. Singleton*, No. ACM 40535 (EOT 8) – The trial transcript is 1,738 pages long and the record of trial is comprised of twelve volumes containing six Prosecution Exhibits, 17 Defense Exhibits, one Court Exhibit, and 89 Appellate Exhibits. This appellant is not currently confined. Undersigned counsel has not yet completed her review of the record of trial.

6. *United States v. Kim*, No. ACM 24007 – The record of trial for this direct appeal is five volumes consisting of five Prosecution Exhibits, three Defense Exhibits, 27 Appellate Exhibits, and one court exhibit. The transcript is 421 pages. This appellant is not currently confined. Undersigned counsel has not yet completed her review of this appellant's record.

7. *United States v. Hunt*, No. ACM 40563 – The record of trial is three volumes consisting of six Prosecution Exhibits, two Defense Exhibits, and 18 Appellate Exhibits. The transcript is 423 pages. This appellant is not currently confined. Undersigned counsel has not yet completed her review of this appellant's record.

8. *United States v. Gray*, No. ACM 40648 – The record of trial for this direct appeal is four volumes consisting of seven Prosecution Exhibits, nine Defense Exhibits, and 20 Appellate Exhibits. The transcript is 399 pages. This appellant is not currently confined. Undersigned counsel has not yet completed her review of this appellant's record.

9. *United States v. Thomas*, No. ACM 22083 - The record of trial is four volumes consisting of 14 Prosecution Exhibits, five Defense Exhibits, and 33 Appellate Exhibits. The verbatim transcript is 528 pages. This appellant is not currently confined. Undersigned counsel has not yet completed her review of the record of trial.

10. *United States v. Marin Perez*, No. ACM S32771 - The trial transcript is 108 pages long and the record of trial is an electronic ROT, which is one volume of 381 pages. There are four Prosecution Exhibits, fourteen Defense Exhibits, four Appellate Exhibits, and one Court Exhibit. This appellant is not currently confined. Undersigned counsel has not yet completed her review of the record of trial.

Additionally, undersigned counsel took on eleven cases from departing military appellate defense counsel. Three of these cases are now pending petitions and supplements to the CAAF; their timing may impact Appellant's case. The remaining cases are awaiting a decision from this Court and the CAAF. Depending on timing and next steps, these other cases may be prioritized over Appellant's case.

Appellant was advised of his right to a timely appeal. Appellant was provided a status update on undersigned counsel's progress on his case and advised of the request for an 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, undersigned counsel has been unable complete her 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 respectfully requests that this Honorable Court grant the requested enlargement of time for good cause shown.

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4770
samantha.castanien.1@us.af.mil

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 Air Force Government Trial and Appellate Operations Division on 19 September 2024.

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

23 September 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) HANNES MARSCHALEK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32776 Panel No. 1

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]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 23 September 2024.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **HANNES MARSCHALEK,** United States Air Force, *Appellant.*	)	No. ACM S32776
	)	21 October 2024

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

Pursuant to Rule 23.3(m)(3) and (6) 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 **1 December 2024**. The record of trial was docketed with this Court on 5 April 2024. From the date of docketing to the present date, 199 days have elapsed. On the date requested, 240 days will have elapsed.

On 24 October 2023, at a special court-martial convened at Royal Air Force Lakenheath, United Kingdom, a military judge, consistent with Appellant's pleas, found him guilty by exceptions and substitutions of one charge and one specification of indecent conduct in violation of Article 134, Uniform Code of Military Justice (UCMJ). R. at 1, 6-8, 14, 74. Pursuant to a plea agreement, one charge and two specifications of indecent exposure in violation of Article 120c, UCMJ, were withdrawn and dismissed with prejudice. R. at 6-7, 59, 73, 197. On 25 October 2023, the military judge sentenced Appellant to be reduced to the grade of E-1, to be confined for two months, and to be discharged from the service with a bad conduct discharge. R. at 197. The convening authority took no action on the findings or sentenced and denied the Appellant's request for deferment of both his reduction in rank and automatic forfeitures; however, the convening authority did waive all automatic forfeitures for a period of six months, or release from

confinement, or expiration of service, whichever was soonest, for the benefit of Appellant's spouse and child. Record of Trial (ROT), Vol. 1, *Corrected Convening Authority Decision on Action* – United States v. Staff Sergeant Hannes Marschalek, dated 19 January 2024.

The trial transcript is 198 pages long and the record of trial is comprised of two volumes containing nine Prosecution Exhibits, twelve Defense Exhibits, one Court Exhibit, and three Appellate Exhibits. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel also provides the following information. Appellate defense counsel is currently assigned 37 cases; 20 cases are pending before this Court (15 cases are pending AOEs); 15 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF); and two cases are pending petitions to the United States Supreme Court. Eleven cases have priority over the present case:

1. *United States v. Johnson*, No. 24-0004/SF – On 24 September 2024, the CAAF specified two issues in this case for briefing. Undersigned counsel inherited this case from an appellate defense counsel who changed duty assignments. This appellant's brief, which counsel is currently drafting, is due on 24 October 2024.

2. *United States v. Wood*, USCA Dkt. No. 25-0005/AF – Undersigned counsel is drafting what is anticipated to be a three-issue supplement to the petition for grant of review to the CAAF, due 29 October 2024.

3. *United States v. Casillas*, No. 24-0089/AF – Undersigned counsel filed the Reply Brief on 16 September 2024. Oral argument is expected to occur in December, although it has yet to be formally scheduled.

4. *United States v. Folts*, No. ACM 40322 – On 26 August 2024, this Court issued an opinion in this appellant's case. As this Court denied the motion for reconsideration, undersigned

counsel is now working with civilian appellate defense counsel on drafting the petition and supplement to the CAAF, due in early December.

5. *United States v. Leipart*, No. 24A288 – The CAAF issued a decision in this case on 1 August 2024. Undersigned counsel will file a petition of certiorari to the United States Supreme Court by 29 December 2024.

6. *United States v. Wells*, No. 23-0219/AF - The CAAF issued a decision in this case on 24 September 2024. Undersigned counsel anticipates filing a petition of certiorari to the United States Supreme Court by 23 December 2024, barring any extensions.

7. *United States v. Singleton*, No. ACM 40535 – The trial transcript is 1,738 pages long and the record of trial is comprised of twelve volumes containing six Prosecution Exhibits, 17 Defense Exhibits, one Court Exhibit, and 89 Appellate Exhibits. This appellant is not currently confined. Undersigned counsel has not yet completed her review of this appellant's record.

8. *United States v. Gray*, No. ACM 40648 – The record of trial for this direct appeal is four volumes consisting of seven Prosecution Exhibits, nine Defense Exhibits, and 20 Appellate Exhibits. The transcript is 399 pages. This appellant is not currently confined. Counsel has not yet completed her review of this appellant's record.

9. *United States v. Kim*, No. ACM 24007 – The record of trial for this direct appeal is five volumes consisting of five Prosecution Exhibits, three Defense Exhibits, 27 Appellate Exhibits, and one court exhibit. The transcript is 421 pages. This appellant is not currently confined. Counsel has not yet completed her review of this appellant's record.

10. *United States v. Thomas*, No. ACM 22083 - The record of trial is four volumes consisting of 14 Prosecution Exhibits, five Defense Exhibits, and 33 Appellate Exhibits. The

verbatim transcript is 528 pages. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

11. *United States v. Marin Perez*, No. ACM S32771 - The trial transcript is 108 pages long and the record of trial is an electronic ROT, which is one volume of 381 pages. There are four Prosecution Exhibits, fourteen Defense Exhibits, four Appellate Exhibits, and one Court Exhibit. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

Appellant was advised of his right to a timely appeal. Appellant was provided a status update on undersigned counsel's progress on his case and advised of the request for an 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, undersigned counsel has been unable complete her 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 respectfully requests that this Court grant the requested enlargement of time for good cause shown.

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
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samantha.castanien.1@us.af.mil

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 Air Force Government Trial and Appellate Operations Division on 21 October 2024.

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

22 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) HANNES MARSCHALEK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32776 Panel No. 1

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]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 22 October 2024.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (SIXTH)**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5)	)	
HANNES MARSCHALEK,	)	No. ACM S32776
United States Air Force,	)	
Appellant.	)	18 November 2024

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

Pursuant to Rule 23.3(m)(3) and (6) 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 **31 December 2024**. The record of trial was docketed with this Court on 5 April 2024. From the date of docketing to the present date, 227 days have elapsed. On the date requested, 270 days will have elapsed.[1]

On 24 October 2023, at a special court-martial convened at Royal Air Force Lakenheath, United Kingdom, a military judge, consistent with Appellant's pleas, found him guilty by exceptions and substitutions of one charge and one specification of indecent conduct in violation of Article 134, Uniform Code of Military Justice (UCMJ). R. at 1, 6-8, 14, 74. Pursuant to a plea agreement, one charge and two specifications of indecent exposure in violation of Article 120c, UCMJ, were withdrawn and dismissed with prejudice. R. at 6-7, 59, 73, 197. On 25 October 2023, the military judge sentenced Appellant to be reduced to the grade of E-1, to be confined for two months, and to be discharged from the service with a bad conduct discharge. R. at 197. The convening authority took no action on the findings or sentenced and denied the Appellant's request

[1] This request for an enlargement of time is being filed well in advance to avoid any issues while undersigned counsel is out of the office on leave from 22-29 November 2024.

for deferment of both his reduction in rank and automatic forfeitures; however, the convening authority did waive all automatic forfeitures for a period of six months, or release from confinement, or expiration of service, whichever was soonest, for the benefit of Appellant's spouse and child. Record of Trial (ROT), Vol. 1, *Corrected Convening Authority Decision on Action* – United States v. Staff Sergeant Hannes Marschalek, dated 19 January 2024.

The trial transcript is 198 pages long and the record of trial is comprised of two volumes containing nine Prosecution Exhibits, twelve Defense Exhibits, one Court Exhibit, and three Appellate Exhibits. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel also provides the following information. Appellate defense counsel is currently assigned 37 cases; 20 cases are pending before this Court (15 cases are pending AOEs); 15 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF); and two cases are pending petitions to the United States Supreme Court. Ten cases have priority over the present case:

1. *United States v. Casillas*, No. 24-0089/AF – On 29 October 2024, the CAAF ordered additional briefing in this case. Briefs are currently due 9 December 2024.

2. *United States v. Leipart*, No. 24A288 – The CAAF issued a decision in this case on 1 August 2024. Undersigned counsel will file a petition of certiorari to the United States Supreme Court by 29 December 2024.

3. *United States v. Johnson*, No. 24-0004/SF – Undersigned counsel filed this two-issue Grant Brief on 4 November 2024. Any reply brief will be due after the Government files its answer in December.

4. *United States v. Wells*, No. 23-0219/AF – The CAAF issued a decision in this case on 24 September 2024. Undersigned counsel anticipates filing a petition of certiorari to the United States Supreme Court by 23 December 2024, barring any extensions.

5. *United States v. Folts*, No. ACM 40322 – On 26 August 2024, this Court issued an opinion in this appellant's case. As this Court denied the motion for reconsideration, undersigned counsel is now working with civilian appellate defense counsel on drafting the petition and supplement to the CAAF, due in early December.

6. *United States v. Singleton*, No. ACM 40535 – Undersigned counsel anticipates withdrawing from this case to allow a more available appellate defense counsel to take over. The new counsel has already made an appearance, and withdrawal is pending client consultation and turnover.

7. *United States v. Gray*, No. ACM 40648 – Undersigned counsel has filed her withdrawal in this case, which is pending this Court's action.

8. *United States v. Kim*, No. ACM 24007 – The record of trial for this direct appeal is five volumes consisting of five Prosecution Exhibits, three Defense Exhibits, 27 Appellate Exhibits, and one court exhibit. The transcript is 421 pages. This appellant is not currently confined. Counsel has not yet completed her review of this appellant's record.

9. *United States v. Thomas*, No. ACM 22083 – The record of trial is four volumes consisting of 14 Prosecution Exhibits, five Defense Exhibits, and 33 Appellate Exhibits. The verbatim transcript is 528 pages. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

10. *United States v. Marin Perez*, No. ACM S32771 – The trial transcript is 108 pages long and the record of trial is an electronic ROT, which is one volume of 381 pages. There are

four Prosecution Exhibits, fourteen Defense Exhibits, four Appellate Exhibits, and one Court Exhibit. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

Appellant was advised of his right to a timely appeal. Appellant was provided a status update on undersigned counsel's progress on his case and advised of the request for an 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, undersigned counsel has been unable complete her 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 respectfully requests that this Court grant the requested enlargement of time for good cause shown.

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4770
samantha.castanien.1@us.af.mil

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 Air Force Government Trial and Appellate Operations Division on 18 November 2024.

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

20 November 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) HANNES MARSCHALEK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32776 Panel No. 1

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]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 20 November 2024.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (SEVENTH)**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5)	)	
HANNES MARSCHALEK,	)	No. ACM S32776
United States Air Force,	)	
Appellant.	)	9 December 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **30 January 2025**. The record of trial was docketed with this Court on 5 April 2024. From the date of docketing to the present date, 248 days have elapsed.[1] On the date requested, 300 days will have elapsed.

On 24 October 2023, at a special court-martial convened at Royal Air Force Lakenheath, United Kingdom, a military judge, consistent with Appellant's pleas, found him guilty by exceptions and substitutions of one charge and one specification of indecent conduct in violation of Article 134, Uniform Code of Military Justice (UCMJ). R. at 1, 6-8, 14, 74. Pursuant to a plea agreement, one charge and two specifications of indecent exposure in violation of Article 120c, UCMJ, were withdrawn and dismissed with prejudice. R. at 6-7, 59, 73, 197. On 25 October 2023, the military judge sentenced Appellant to be reduced to the grade of E-1, to be confined for two months, and to be discharged from the service with a bad conduct discharge. R. at 197. The

[1] This request for an enlargement of time is being filed well in advance to avoid any issues while undersigned counsel are out of the office or otherwise unavailable due to (1) being off orders or (2) being on leave from 13-21 December 2024 and over the federal holiday. Early submission also mitigates any problems that could arise when the Court is closed on 25 and 26 December 2024.

convening authority took no action on the findings or sentenced and denied the Appellant's request for deferment of both his reduction in rank and automatic forfeitures; however, the convening authority did waive all automatic forfeitures for a period of six months, or release from confinement, or expiration of service, whichever was soonest, for the benefit of Appellant's spouse and child. Record of Trial (ROT), Vol. 1, *Corrected Convening Authority Decision on Action* – United States v. Staff Sergeant Hannes Marschalek, dated 19 January 2024.

The trial transcript is 198 pages long and the record of trial is comprised of two volumes containing nine Prosecution Exhibits, twelve Defense Exhibits, one Court Exhibit, and three Appellate Exhibits. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel provide the following information. Lieutenant Colonel Anthony Ghiotto was recently detailed to take lead on this case. Captain Castanien does not intend to withdraw as counsel, but her remaining on this case will not delay Lt Col Ghiotto's review or filing of the AOE. However, because she has not withdrawn, her priority list is included with Lt Col Ghiotto's below. A.F. Ct. Crim. App. R. 23.3(m)(6).

Lieutenant Colonel Ghiotto will be on orders periodically over the next two months (December 2024 – January 2025). He has one pending case prioritized over Appellant's, *United States v. Titus*, No. ACM 40557. He has already begun reviewing the record for *Titus*, a guilty plea case with five Prosecution Exhibits, five Defense Exhibits, 31 Appellate Exhibits, and five Court Exhibits. The transcript is 142 pages. Upon completing his review and filing any appeal for *Titus*, Lt Col Ghiotto will turn to Appellant's case.

Captain Castanien is currently assigned 38 cases; 21 cases are pending before this Court (16 cases are pending AOEs), 15 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF), and two cases are pending petitions to the United States Supreme Court.

To date, eight cases have priority over Appellant's case, although these cases and Capt Castanien's prioritization should not delay the filing of Appellant's AOE any further due to Lt Col Ghiotto taking lead:

1. *United States v. Leipart*, No. 24A288 – The CAAF issued a decision in this case on 1 August 2024. Since Appellant's last enlargement of time, undersigned counsel drafted the petition of certiorari to the United States Supreme Court. The filing is undergoing final review and editing before being sent to the printer (authorization and printing take about two weeks). It will be filed by 29 December 2024.

2. *United States v. Folts*, No. ACM 40322 – On 26 August 2024, this Court issued an opinion in this appellant's case. Since Appellant's last enlargement of time, undersigned counsel drafted two issues for the supplement to the petition for grant of review and is working with civilian appellate defense counsel to finalize the filing, due to the CAAF mid-December.

3. *United States v. Johnson*, No. 24-0004/SF – Undersigned counsel filed this two-issue Grant Brief on 4 November 2024. Any reply brief will be due after the Government's Answer, which is due 20 December 2024.

4. *United States v. Casillas*, No. 24-0089/AF – On 29 October 2024, the CAAF ordered additional briefing in this case. Briefs were filed today, 9 December 2024. Captain Castanien is beginning to prepare for oral argument, scheduled for 14 January 2025.

5. *United States v. Wells*, No. 24A520 – The CAAF issued a decision in this case on 24 September 2024. Undersigned counsel will file a petition of certiorari to the United States Supreme Court by 21 February 2025.

6. *United States v. Kim*, No. ACM 24007 – The record of trial for this direct appeal is five volumes consisting of five Prosecution Exhibits, three Defense Exhibits, 27 Appellate Exhibits, and

one Court Exhibit. The transcript is 421 pages. This appellant is not currently confined. Counsel has not yet completed her review of this appellant's record.

7. *United States v. Thomas*, No. ACM 22083 – The record of trial is four volumes consisting of 14 Prosecution Exhibits, five Defense Exhibits, and 33 Appellate Exhibits. The verbatim transcript is 528 pages. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

8. *United States v. Marin Perez*, No. ACM S32771 – The trial transcript is 108 pages long and the record of trial is an electronic ROT, which is one volume of 381 pages. There are four Prosecution Exhibits, fourteen Defense Exhibits, four Appellate Exhibits, and one Court Exhibit. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

Appellant was advised of his right to a timely appeal. Appellant was provided a status update on undersigned counsel's progress on his case and advised of the request for an 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, undersigned counsel have been unable complete 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 respectfully requests that this Court grant the requested enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

ANTHONY J. GHIOTTO, Lt Col, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: anthony.ghiotto.2@us.af.mil

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

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 Air Force Government Trial and Appellate Operations Division on 9 December 2024.

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

10 December 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) HANNES MARSCHALEK, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32776 Panel No. 1

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 opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 300 days in length. Appellant's nearly year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18 month standard for this Court to issue a decision, which only leaves about 8 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 10 December 2024.

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (EIGHTH)**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5)	)	
HANNES MARSCHALEK,	)	No. ACM S32776
United States Air Force,	)	
Appellant.	)	22 January 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **1 March 2025**. The record of trial was docketed with this Court on 5 April 2024. From the date of docketing to the present date, 292 days have elapsed. On the date requested, 330 days will have elapsed.

On 24 October 2023, at a special court-martial convened at Royal Air Force Lakenheath, United Kingdom, a military judge, consistent with Appellant's pleas, found him guilty by exceptions and substitutions of one charge and one specification of indecent conduct in violation of Article 134, Uniform Code of Military Justice (UCMJ). R. at 1, 6-8, 14, 74. Pursuant to a plea agreement, one charge and two specifications of indecent exposure in violation of Article 120c, UCMJ, were withdrawn and dismissed with prejudice. R. at 6-7, 59, 73, 197. On 25 October 2023, the military judge sentenced Appellant to be reduced to the grade of E-1, to be confined for two months, and to be discharged from the service with a bad conduct discharge. R. at 197. The convening authority took no action on the findings or sentenced and denied the Appellant's request for deferment of both his reduction in rank and automatic forfeitures; however, the convening authority did waive all automatic forfeitures for a period of six months, or release from confinement,

or expiration of service, whichever was soonest, for the benefit of Appellant's spouse and child. Corrected Convening Authority Decision on Action – *United States v. Staff Sergeant Hannes Marschale*k, dated 19 January 2024.

The trial transcript is 198 pages long and the record of trial is comprised of two volumes containing nine Prosecution Exhibits, twelve Defense Exhibits, one Court Exhibit, and three Appellate Exhibits. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel provide the following information. Lieutenant Colonel Ghiotto was detailed to take lead on this case. Captain Castanien does not intend to withdraw as counsel, but her remaining on this case will not delay Lt Col Ghiotto's review or filing of the AOE. However, because she has not withdrawn, her priority list is included with Lt Col Ghiotto's below. A.F. Ct. Crim. App. R. 23.3(m)(6).

Lieutenant Colonel Ghiotto was on orders periodically from December 2024 to January 2025. During this time, he reviewed *United States v. Titus*, No. ACM 40557, and filed a merits brief on 20 December 2024. He then reviewed Appellant's record of trial and began drafting the AOE. Lieutenant Colonel Ghiotto has so far identified at least three assignments of error, to include several issues concerning the providence of the plea. This is Lt Col Ghiotto's first non-merits AOE, and he is currently conferring with Capt Castanien to finalize the AOE. However, Lt Col Ghiotto is no longer on orders and is unable to complete the AOE at this time in light of his civilian job. An additional 30 days would allow for finalization of the AOE, including peer and leadership review.[1] Appellant's case is Lt Col Ghiotto's first priority before this Court.

[1] Peer and leadership review is a Division requirement for every substantive filing. Peer review is when another appellate defense counsel reviews the first final draft of the filing and provides feedback and edits. Leadership review is when a member of Division leadership reviews the new version of the final draft and provides feedback and edits. This process can take anywhere between a few days to over a full week depending on the case and the workload of the Division.

Captain Castanien is currently assigned 38 cases; 19 cases are pending before this Court (16 cases are pending AOEs), 17 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF), and two cases are pending before the United States Supreme Court (one is pending a petition). Since Appellant's last request for an extension of time, Capt Castanien filed the petition for certiorari for *United States v. Leipart* with the United States Supreme Court, filed with the CAAF the three-issue supplement to the petition for grant of review in *United States v. Folts*, No. 25-0043/AF, along with a reply, filed two additional petitions and supplements to the CAAF (*United States v. Scott* and *United States v. Lawson*), and completed the reply brief, along with two motions and their associated replies, in *United States v. Johnson*, No. 24-0004/SF, also for the CAAF. Captain Castanien also completed oral argument in *United States v. Casillas*, No. 24-0089/AF.

To date, Capt Castanien has five cases prioritized over Appellant's case, although these cases and Capt Castanien's prioritization should not delay the filing of Appellant's AOE due to Lt Col Ghiotto taking lead. As Capt Castanien has not withdrawn, she is providing peer-review assistance for Appellant's AOE, but her availability to assist in this capacity is not a limiting factor for completion or filing and should not cause any additional delay. Nevertheless, the cases prioritized over Appellant's are as follows:

1. *United States v. Johnson*, No. 24-0004/SF – Undersigned counsel is preparing for oral argument, scheduled for 29 January 2025.

2. *United States v. Wells*, No. 24A520 – The CAAF issued a decision in this case on 24 September 2024. From the date of decision, this appellant has 90 days to file a petition of certiorari to the United States Supreme Court. 28 U.S.C. § 1259(3); Supreme Court Rule 13(1). Due to Capt Castanien's schedule, she requested a 60-day extension to file the petition for *Wells*. Supreme Court

Rule 13(5). Thus, Capt Castanien will file a petition of certiorari to the United States Supreme Court by 21 February 2025. She intends to work *Wells* simultaneously with *United States v. Kim*, No. ACM 24007, following oral argument in *Johnson*.

3. *United States v. Kim*, No. ACM 24007 – The record of trial for this direct appeal is five volumes consisting of five Prosecution Exhibits, three Defense Exhibits, 27 Appellate Exhibits, and one Court Exhibit. The transcript is 421 pages. This appellant is not currently confined. Captain Castanien has not yet completed her review of this appellant's record.

4. *United States v. Thomas*, No. ACM 22083 – The record of trial is four volumes consisting of 14 Prosecution Exhibits, five Defense Exhibits, and 33 Appellate Exhibits. The verbatim transcript is 528 pages. This appellant is not currently confined. Captain Castanien has not yet completed her review of this appellant's record.

5. *United States v. Marin Perez*, No. ACM S32771 – The trial transcript is 108 pages long and the record of trial is an electronic ROT, which is one volume of 381 pages. There are four Prosecution Exhibits, fourteen Defense Exhibits, four Appellate Exhibits, and one Court Exhibit. This appellant is not currently confined. Captain Castanien has not yet completed her review of this appellant's record.

Appellant was advised of his right to a timely appeal. Appellant was provided a status update on undersigned counsel's progress on his case and advised of the request for an 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, undersigned counsel have been unable complete the AOE in Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and finalize the AOE after ensuring Appellant is fully advised regarding potential errors.

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

Respectfully submitted,

ANTHONY J. GHIOTTO, Lt Col, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: anthony.ghiotto.2@us.af.mil

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

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 Air Force Government Trial and Appellate Operations Division on 22 January 2025.

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

23 January 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) HANNES MARSCHALEK, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32776 Panel No. 1

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 opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 days in length. Appellant's nearly yearlong delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18-month standard for this Court to issue a decision, which only leaves about 7 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 23 January 2025.

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (NINTH)**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5)	)	
HANNES MARSCHALEK,	)	No. ACM S32776
United States Air Force,	)	
Appellant.	)	18 February 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **31 March 2025**. The record of trial was docketed with this Court on 5 April 2024. From the date of docketing to the present date, 319 days have elapsed. On the date requested, 360 days will have elapsed.

On 24 October 2023, at a special court-martial convened at Royal Air Force Lakenheath, United Kingdom, a military judge, consistent with Appellant's pleas, found him guilty by exceptions and substitutions of one charge and one specification of indecent conduct in violation of Article 134, Uniform Code of Military Justice (UCMJ). R. at 1, 6-8, 14, 74. Pursuant to a plea agreement, one charge and two specifications of indecent exposure in violation of Article 120c, UCMJ, were withdrawn and dismissed with prejudice. R. at 6-7, 59, 73, 197. On 25 October 2023, the military judge sentenced Appellant to be reduced to the grade of E-1, to be confined for two months, and to be discharged from the service with a bad conduct discharge. R. at 197. The convening authority took no action on the findings or sentenced and denied the Appellant's request for deferment of both his reduction in rank and automatic forfeitures; however, the convening authority did waive all automatic forfeitures for a period of six months, or release from confinement,

or expiration of service, whichever was soonest, for the benefit of Appellant's spouse and child. Corrected Convening Authority Decision on Action – *United States v. Staff Sergeant Hannes Marschale*k, dated 19 January 2024.

The trial transcript is 198 pages long and the record of trial is comprised of two volumes containing nine Prosecution Exhibits, twelve Defense Exhibits, one Court Exhibit, and three Appellate Exhibits. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel provide the following information. Lieutenant Colonel Ghiotto was detailed to take lead on this case. However, due to the Government's implementation of the President's Return to In-Person Work Memorandum, since 4 February 2025, Lt Col Ghiotto has not been authorized to work on Appellant's case. 90 Fed. Reg. 8,251 (Jan. 28, 2025). Lieutenant Colonel Ghiotto's role in Appellant's representation has been materially affected, and is effectively barred at present. While Lt Col Ghiotto had made substantial progress on Appellant's AOE, edits from peer review were still on-going and a new possible assignment of error was being researched (prompted by peer feedback), when Lt Col Ghiotto was barred from working on Appellant's case further. This is an evolving situation, and it provides good cause for this EOT because Capt Castanien is now effectively sole counsel on Appellant's case.

Captain Castanien is currently assigned 39 cases; 19 cases are pending before this Court (16 cases are pending AOEs), 18 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF), and two cases are pending before the United States Supreme Court (one is pending a petition). Since Appellant's last request for an extension of time, she completed oral argument in *United States v. Johnson*, No. 24-0004/SF (29 Jan. 2025) and wrote the petition of

certiorari for *United States v. Wells*, No. 24A520, which is now pending filing (due 21 Feb. 2025). To date, Capt Castanien has five cases prioritized over Appellant's case:

1. *United States v. Kim*, No. ACM 24007 – Captain Castanien has completed her review of this appellant's record and has begun researching and drafting the AOE. While working this appellant's case, she will also be participating in at least eight moots for the following cases: *United States v. Csiti*, No. 24-0175/AF; *United States v. Arroyo*, No. 24-0212; *United States v. Navarro Aguirre*, No. 24-0146/AF; *United States v. Roan*, No. 24-0104; and *United States v. Jenkins*, No. ACM S32765.

2. *United States v. Braum*, No. 25-0046/AF – On 4 February 2025, the CAAF granted review of one issue in this case. The Grant Brief is due on 25 February 2025, and while undersigned counsel is not lead on this case, she will be assisting with the joint appendix and review of the brief. Captain Castanien intends to work this case simultaneous with *Kim.*

3. *United States v. Giles*, No. ACM 40482 – This Court issued the decision in this appellant's case on 23 December 2024. The petition for grant of review was filed today, 18 February 2025, along with a request for a 21-day extension to file the supplement to the petition. C.A.A.F. R. 19(a)(5)(A). The supplement to the petition is not a carbon copy of the AOE filed at this Court. Issues must be framed and presented differently for the CAAF. Failure to present or preserve an issue to the CAAF risks losing the ability to argue a certain way. *See, e.g.*, *United States v. Leipart*, __ M.J. __, No. 23-0163, 2024 CAAF LEXIS 439, at *22 (C.A.A.F. Aug. 1, 2024) (cautioning counsel about how issues are raised and narrowing the scope of the issue to the question specifically articulated to the CAAF). Captain Castanien counsel intends to work the supplement to the petition simultaneously with *United States v. Thomas*, No. ACM 22083.

4. *United States v. Thomas*, No. ACM 22083 - The record of trial is four volumes consisting of 14 Prosecution Exhibits, five Defense Exhibits, and 33 Appellate Exhibits. The verbatim transcript is 528 pages. This appellant is not currently confined. Captain Castanien has not yet completed her review of this appellant's record.

5. *United States v. Marin Perez*, No. ACM S32771 - The trial transcript is 108 pages long and the record of trial is an electronic ROT, which is one volume of 381 pages. There are four Prosecution Exhibits, fourteen Defense Exhibits, four Appellate Exhibits, and one Court Exhibit. This appellant is not currently confined. Captain Castanien has not yet completed her review of this appellant's record.

Each of these cases have either been docketed longer than Appellant's case or take priority due to the CAAF's deadlines, which is why they are being prioritized over Appellant's case. Captain Castanien cannot perform her duty of representation under Article 70, UCMJ, or fulfill her duty to provide effective assistance of counsel without first reviewing Appellant's complete record of trial, even with Lt Col Ghiotto's work on Appellant's case to date. 10 U.S.C. § 870; *see United States v. May*, 47 M.J. 478, 481 (C.A.A.F. 1998) (citing *United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987)) ("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. . . . [I]ndependent review is not the same as competent appellate representation."). Consequently, as effectively sole counsel and because she has not completed review of Appellant's record of trial at this time, additional time is necessary to allow Capt Castanien to review Appellant's case, supplement the AOE if necessary, and complete leadership review[1] of the AOE.

[1] Depending on if additional substance or assignments of errors are added to the AOE, another peer review may be required as well.

Appellant was advised of his right to a timely appeal. Appellant was provided a status update on undersigned counsel's progress on his case and advised of the request for an 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, detailed counsel have been unable complete the AOE in Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and complete the AOE after ensuring Appellant is fully advised regarding potential errors.

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

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

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 Air Force Government Trial and Appellate Operations Division on 18 February 2025.

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

20 February 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) HANNES MARSCHALEK, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32776 Panel No. 1

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 opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 360 days in length. Appellant's nearly yearlong delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18-month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 20 February 2025.

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (TENTH)**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5)	)	
HANNES MARSCHALEK,	)	No. ACM S32776
United States Air Force,	)	
Appellant.	)	18 March 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **30 April 2025**. The record of trial was docketed with this Court on 5 April 2024. From the date of docketing to the present date, 347 days have elapsed. On the date requested, 390 days will have elapsed. Undersigned counsel anticipate this being the last EOT request, barring any unforeseen circumstances.

On 24 October 2023, at a special court-martial convened at Royal Air Force Lakenheath, United Kingdom, a military judge, consistent with Appellant's pleas, found him guilty by exceptions and substitutions of one charge and one specification of indecent conduct in violation of Article 134, Uniform Code of Military Justice (UCMJ). R. at 1, 6-8, 14, 74. Pursuant to a plea agreement, one charge and two specifications of indecent exposure in violation of Article 120c, UCMJ, were withdrawn and dismissed with prejudice. R. at 6-7, 59, 73, 197. On 25 October 2023, the military judge sentenced Appellant to be reduced to the grade of E-1, to be confined for two months, and to be discharged from the service with a bad conduct discharge. R. at 197. The convening authority took no action on the findings or sentenced and denied the Appellant's request

for deferment of both his reduction in rank and automatic forfeitures; however, the convening authority did waive all automatic forfeitures for a period of six months, or release from confinement, or expiration of service, whichever was soonest, for the benefit of Appellant's spouse and child. Corrected Convening Authority Decision on Action – *United States v. Staff Sergeant Hannes Marschale*k, dated 19 January 2024.

The trial transcript is 198 pages long and the record of trial is comprised of two volumes containing nine Prosecution Exhibits, twelve Defense Exhibits, one Court Exhibit, and three Appellate Exhibits. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel provide the following information. Lieutenant Colonel Ghiotto was detailed to take lead on this case. The President's Return to In-Person Work Memorandum, 90 Fed. Reg. 8,251 (Jan. 28, 2025), barred Lt Col Ghiotto from working on Appellant's case until 3 March 2025. While Lt Col Ghiotto can now work on Appellant's AOE again, he can only do so on weekends for points because has performed all his allotted days for the year and will not be on orders at all during the next month. While Appellant's case is Lt Col Ghiotto's first priority before this Court, he needs additional time to complete the AOE, which has undergone peer review, but still requires researching and drafting of an additional assignment of error. Depending on the length and complexity of the new error assigned for review, another peer review may be needed, and leadership review must still occur before filing. Based on Lt Col Ghiotto's schedule and the remaining work required on Appellant's AOE, there is good cause to grant what is anticipated to be the final EOT request for Appellant's case.

Because Capt Castanien does not intend to withdraw as counsel, her priority list is included below. However, her remaining on this case will not delay Lt Col Ghiotto's review or filing of the AOE. Captain Castanien is currently assigned 38 cases; 19 cases are pending before this Court (18

cases are pending AOEs), 18 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF), and one case is pending before the United States Supreme Court. Since Appellant's last request for an extension of time, Capt Castanien wrote the brief for *United States v. Kim*, No. ACM 24007, reviewed the record of trial for *United States v. Marin Perez*, No. ACM S32771, filed the supplement to the petition for the grant of review in *United States v. Giles*, No. 25-0100/AF, filed a petition for reconsideration for *United States v. Folts*, No. 25-0043/AF, and completed five peer reviews while participating in five moots. To date, four cases have priority over the present case:

1. *United States v. Kim*, No. ACM 24007 – The AOE is undergoing final review before filing on or before 23 March 2025.

2. *United States v. Marin Perez*, No. ACM S32771 – Capt Castanien has completed her review of the record and is consulting with this appellant on identified issues.

3. *United States v. Braum*, No. 25-0046/AF – Since Appellant's last EOT request, Capt Castanien assisted with compiling the Joint Appendix and peer reviewed the Grant Brief, which was filed on 25 February 2025. Any reply brief will be due at the beginning of April, with which Capt Castanien will likely assist.

4. *United States v. Thomas*, No. ACM 22083 - The record of trial is four volumes consisting of 14 Prosecution Exhibits, five Defense Exhibits, and 33 Appellate Exhibits. The verbatim transcript is 528 pages. This appellant is not currently confined. Capt Castanien has not yet completed her review of this appellant's record.

Appellant was advised of his right to a timely appeal. Appellant was provided a status update on undersigned counsel's progress on his case and advised of the request for an 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, detailed counsel have been unable complete the AOE in Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and complete the AOE after ensuring Appellant is fully advised regarding potential errors.

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

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

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 Air Force Government Trial and Appellate Operations Division on 18 March 2025.

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **HANNES MARSCHALEK,** United States Air Force, *Appellant.*	)	No. ACM S32776
	)	18 March 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 opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 390 days in length. Appellant's over year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed more than two thirds of the 18-month standard for this Court to issue a decision, which only leaves about 5 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 18 March 2025.

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **HANNES MARSCHALEK,** United States Air Force, *Appellant.*	)	No. ACM S32776
	)	30 April 2025

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

ASSIGNMENTS OF ERROR

I.

WHETHER STAFF SERGEANT MARSCHALEK'S CONVICTION UNDER ARTICLE 134, UCMJ, WAS PREEMPTED AND THUS BARRED BY ARTICLE 120C, UCMJ.

II.

WHETHER, IN THE ALTERNATIVE, STAFF SERGEANT MARSCHALEK'S PLEA WAS IMPROVIDENT AS THE MILITARY JUDGE ABUSED HIS DISCRETION BY NOT RESOLVING AN ISSUE OF FACT AS TO THE ACTUS REUS, NEGLECTED TO CONSIDER WHETHER STAFF SERGEANT MARSCHALEK'S CONDUCT INVOLVED A LIBERTY INTEREST, AND INCORRECTLY DETERMINED STAFF SERGEANT MARSCHALEK'S CONDUCT TO BE INDECENT.

III.

WHETHER THE TRIAL COURT ERRED IN ADMITTING PROSECUTION EXHIBITS 4 AND 5 INTO EVIDENCE UNDER RULE FOR COURTS-MARTIAL 1001 AS MATTERS IN AGGRAVATION.

IV.

WHETHER STAFF SERGEANT MARSCHALEK'S SENTENCE IS INAPPROPRIATELY SEVERE.

STATEMENT OF THE CASE

On October 25, 2023, Appellant, Staff Sergeant (SSgt) Hannes Marschalek, was tried by a special court-martial at Royal Air Force Lakenheath, United Kingdom. Corrected Entry of Judgment at 1. In accordance with his pleas, the military judge found SSgt Marschalek guilty of one charge and one specification of indecent conduct, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934(b) (2018).[1] *Id* at. 1-2. The military judge sentenced SSgt Marschalek to a reduction in pay grade to E-1, to be discharged from the Air Force with a bad-conduct discharge (BCD), and to be confined for two months. *Id* at 2. The Convening Authority took no action on the findings or sentence and denied SSgt Marschalek's request for waiver of all automatic forfeitures. Convening Authority Decision on Action.

STATEMENT OF FACTS

SSgt Marschalek was born in East Germany, where he resided as a German citizen until moving to the United States as a fifteen-year-old. Def. Ex. L at 1. While attending high school, he met his future wife. *Id.* Upon graduating high school, SSgt Marschalek decided to join the Air Force. *Id.* However, he first had to lose sixty pounds, and he struggled to pass the military qualification exam, finally passing on the third attempt. *Id.* Once he joined the Air Force in 2015, SSgt Marschalek became a United States citizen and he and his wife had a daughter. *Id.* Including a deployment to Al Udeid Air Base, SSgt Marschalek served honorably and without incident until 2022. Pros. Ex. 2; Pros. Ex. 3; Def. Ex. K at 8.

In October 2022, on different dates, different individuals reported to the Cambridgeshire Constabulary that they observed a naked man at a house located at 33 The Holmes, Littleport, Ely, United Kingdom. Pros. Ex. 1 at 2. SSgt Marschalek resided at this home. *Id.* On October 9, 2022,

[1] All references to the UCMJ, Military Rules of Evidence (M.R.E.), and Rules for Courts-Martial (R.C.M.) refer to the versions printed in the *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*].

the Police Constable interviewed SSgt Marschalek about the reported incidents. *Id.* During the interview, SSgt Marschalek admitted that he often walked around his house naked, but would not go outside when doing so. *Id*.; Pros. Ex. 3. He did admit that at times, while naked, he would prop his front door open to create a draft in his home. *Id.* SSgt Marschalek emphasized that he did not linger in the doorway and did not recall anyone seeing him naked. *Id.*

SSgt Marschalek later clarified that he would work out on an elliptical located on the first floor of his off-base home. R. at 29. After working out, SSgt Marschalek would take his clothes off, place them in the wash, and then prop open the front and back doors to his home. *Id.* At the time, SSgt Marschalek's house had no air conditioning, so he would prop his doors open to get a cross breeze and some fresh air. *Id*. When propping his doors open, SSgt Marschalek would not stand in his doorway for any unnecessary length of time; he stood in the doorway only long enough to prop his front door open, typically for only ten-to-twenty seconds. R. at 33-34.

SSgt Marschalek's commander referred two charges against him to a special court-martial. Charge Sheet, April 3, 2023. Charge I alleged a violation of Article 120c, UCMJ, 10 U.S.C. § 920c. *Id.* This charge contained three specifications that alleged SSgt Marschalek, on three separate occasions, *intentionally* exposed himself in an indecent manner by exposing his penis to the public, while standing in the doorway of his home. *Id (emphasis added).* Charge II alleged a violation of Article 134, 10 U.S.C. § 934. *Id.* This charge contained two specifications that alleged on two separate occasions SSgt Marschalek committed indecent conduct by standing outside his residence masturbating in public view. *Id.*

The convening authority withdrew and dismissed specification three of Charge I and specification two of Charge II. *Id.* SSgt Marschalek subsequently entered into a pretrial agreement with the Government. App. Ex. I at 4-5. Per the pretrial agreement, SSgt Marschalek agreed to plead not guilty to Charge I, along with its two remaining specifications. *Id.* at 1. He also agreed to plead

guilty to the remaining specification of Charge II, except the words "on or about 9 August 2022," "outside," and "masturbating," substituting the words "on divers occasions between on or about 9 August 2022 and on or about 4 October 2022," "at or near the door," and "naked." *Id.* To the substituted words, SSgt Marschalek agreed to plead guilty. *Id.*

With the agreed-upon substitutions and additions, SSgt Marschalek pled guilty to only this conduct, charged as follows: "on divers occasions between on or about 9 August 2022 and on or about 4 October 2022, SSgt Marschalek engaged in indecent conduct, to wit: standing at or near the door of his residence naked in view of the public." Corrected Entry of Judgment at 1-2. The charge included the allegation that such conduct was of a nature to bring discredit upon the armed forces but included no *mens rea* requirement. *Id.* The military judge accepted SSgt Marschalek's plea of guilty based on the facts provided above. R. 24-73. Additional facts relevant to consideration of the assigned errors are set out in the Argument section below.

ARGUMENT

I.

SSGT MARSCHALEK'S CONVICTION UNDER ARTICLE 134, UCMJ, WAS PREEMPTED AND THUS BARRED BY ARTICLE 120C, UCMJ.

Standard of Review

"Whether Articles 80 through 132, UCMJ, preempt a specification alleging a violation of Article 134, UCMJ" presents a question of law, which this Court reviews *de novo. United States v. Grijalva*, 84 M.J. 433, 435 (C.A.A.F. 2024) (citing *United States v. Avery*, 79 M.J. 363, 366 (C.A.A.F. 2020)).

Law and Analysis

The preemption doctrine, in general, bars the government from using Article 134 "to charge conduct by Articles 80 through 132, UCMJ . . . ." *Grijalva*, 84 M.J. at 434 (citing *United States v. Avery*, 79 M.J. 363, 366 (C.A.A.F. 2020)). It serves "to prevent the government from eliminating

elements from offenses under the UCMJ in order to ease its evidentiary burden at trial." *Avery,* 79 M.J. at 366 (cleaned up); *see also Grijalva*, 84 M.J. at 439. Specifically, a primary purpose of the preemption doctrine is to prevent the Government from attempting to eliminate "an important element – such as the requisite intent" required to prove a particular crime. *See United States v. Gleason*, 78 M.J. 473, 477 (C.A.A.F. 2019) (Ryan, J., dissenting).

Implicit to the preemption doctrine is the understanding that "if Congress has occupied the field for a given type of misconduct, then an allegation under Article 134, Clause 2, fails to state an offense." *United States v. Hill*, No. ACM 38848, 2016 CCA LEXIS 291, at *4 (A.F. Ct. Crim. App. May 9, 2016) (citing *United States v. Robbins*, 52 M.J. 159, 160 (C.A.A.F. 1999)). As such, a claim of preemption constitutes a question of the trial court's subject matter jurisdiction and cannot be waived by either a plea or failure to object. *United States v. Jones*, 66 M.J. 704, 706 (A.F. Ct. Crim. App. 2008). A preemption claim arises only when "(1) Congress intended to limit prosecution for a particular area of misconduct to offenses defined in specific articles of the Code, and (2) the offense charged is composed of a residuum of elements of a specific offense." *United States v. Curry,* 35 M.J. 359, 360-61 (C.M.A. 1992) (cleaned up).

Here, the alleged misconduct consisted of SSgt Marschalek, on divers occasions, standing at or near the door of his private off-base residence naked in view of the public. Pros. Ex. 1 at 1-2. For this alleged misconduct, the Government elected to charge SSgt Marschalek under Article 134 as opposed to under Article 120c, UCMJ. Corrected Entry of Judgment at 1-2. By doing so, the Government benefitted by dropping the mental state element of *intentionally* as required by Article 120c(c). 10 U.S.C. § 920c(c); *MCM*, Part IV, ¶ 63.b.(6)(c). The Government bears a *significantly* lighter burden if it does not need to prove that SSgt Marschalek acted "intentionally," as in "willful[ly] or on purpose." Dep't of the Army, Pam. 27-9, Legal Services, Military Judges' Benchbook ch. 3A, para. 3A-44C-3 (2020); *see United States v. Pittman*, No. ACM 40298, 2024

CCA LEXIS 145, at *7 (A.F. Ct. Crim. App. Apr. 22, 2024) ("Purpose is the most culpable level in the standard mental-state hierarchy, *and the hardest to prove*.") (quoting *Counterman v. Colorado*, 600 U.S. 66, 78-79 (2023)) (emphasis added). The preemption doctrine barred the Government from receiving the benefit of a lower burden of proof because (1) Congress intended for SSgt Marschalek's conduct to fall under Article 120c, and (2) this Article 134 offense is a residuum of elements of Article 120c.

A. Congress Intended to Preempt Article 134 by the Specifically Enumerated Offense of Indecent Exposure Under Article 120c.

By both its text and genesis, Article 120c's prohibition of Indecent Exposure, along with its requisite mental state, targets the very conduct of which SSgt Marschalek was convicted—standing naked in view of the public. Article 134 contains the enumerated offense of Indecent Conduct, whereas Article 120c prohibits Indecent Exposure. As the United States Court of Appeals for the Armed Forces (CAAF) recently found in *Grijalva,* express Congressional intent as evidenced in the legislative history is not required for the preemption doctrine to apply. 84 M.J. at 438-39. Rather, in cases where the elements are "essentially the same," the CAAF feels "no need to delve into legislative history to ascertain anything further intent of Congress." *Id.* at 439. This is because the plain language of Article 134 controls; "[t]he initial phrase of the article expressly restricts its reach only to conduct 'not specifically mentioned in this chapter.'" *Id*. at 435. Thus, legislative history is only relevant when it contradicts the plain language in the statute to show Congress intended prosecution under both an enumerated article and Article 134. *Id.* at 439. Per *Grijalva*, in cases where the elements are essentially the same, the CAAF will presume congressional intent in favor of preemption, without delving into any legislative history. *Id.*

Here, like in *Grijalva*, the elements of the charges at issue, Article 120c and Article 134, are essentially the same. Both Article 120c, Indecent Exposure, and Article 134, Indecent Conduct, as applied in this case, required the Government to prove that SSgt Marschalek (1) exposed his naked

body, and (2) that the exposure was indecent, in that he exposed himself in public.

There are only two differences between Article 120c and Article 134. First, Article 120c contains a mental state requirement whereas Article 134 has none. 10 U.S.C. § 920c(c). Specifically, Article 120c requires the accused willfully exposed him or herself whereas Article 134 has no required mental state—nor was one charged in this case. Charge Sheet, April 3, 2023. Second, Article 134 contains the terminal element requirement of the conduct being either service discrediting or prejudicial to good order and discipline. *MCM*, Part IV, ¶ 104.b.(3).

These two differences, however, do not suggest that Congress intended for the Government to have its charging choice between Article 120c and Article 134. In fact, only one of them has any bearing on the preemption analysis, and the other difference cuts firmly against the charging in this case.

Starting with the inconsequential distinction, courts do "not consider the terminal element of Article 134, UCMJ." *Avery*, 79 M.J. at 368. Thus, the fact that conduct "of a nature to bring discredit upon the armed forces," *MCM*, Part IV, ¶ 104.b.(3), was alleged has no impact on the preemption analysis.

But the other difference—elimination of the requirement to prove willful conduct—is the very reason the preemption doctrine exists. Preemption is "designed to prevent the government from eliminating elements from offenses under the UCMJ in order to ease its evidentiary burden at trial." *Avery*, 79 M.J. at 366 (cleaned up). At least one judge from the CAAF specifically flagged the use of Article 134 to remove burdensome mental-state elements. *Gleason*, 78 M.J. at 477 (C.A.A.F. 2019) (Ryan, J., dissenting) (noting the preemption doctrine "preclud[es] the government from taking an existing UCMJ offense . . . removing an important element – such as the requisite intent – and charging the remaining elements as a 'novel' Article 134, UCMJ, offense"). Had SSgt Marschalek been charged under Article 120c, the Government would have been required to prove that SSgt

Marschalek exposed himself "intentionally." 10 U.S.C. § 920; *MCM*, Part IV, ¶ 63.b.(6)(c). Yet the Government had no such burden because it impermissibly chose to charge under Article 134 no such requirement.

Because the elements of the two charges here "are essentially the same," there is "no need to delve into legislative history to ascertain anything further about the intent of Congress." *Grijalva*, 84 M.J. at 439. The conclusion here, as in *Grijalva*, is that "[t]he preemption doctrine applies" due to the plain language of Article 134. *Id*.

Although not dispositive after *Grijalva*, it is also worth noting that both this Court and the Army Court of Criminal Appeals have found that the purpose of Article 120c is to punish the exposure of one's genitals in the presence of a victim or the public. *See United States v. Carlile*, No. ACM 40053, 2022 CCA LEXIS 542, at *28 (A.F. Ct. Crim. App. Sept. 21, 2022), *rev. denied*, 83 M.J. 270 (C.A.A.F. 2023) (stating the congressional intent of Article 120c is to punish the public or in-person indecent exposure of one's genitals—not the sending of pictures of genitalia through electronic communications, therefore such conduct charged under Article 134 was not preempted); *United States v. Williams*, 75 M.J. 663, 668-69 (A. Ct. Crim. App. 2016) (finding Congress did not intend to criminalize exposure of one's genitals via electronic communication under Article 120c). Taken together, both this Court and its Army counterpart have recognized that the congressional intent of Article 120c is the criminalization of in-person indecent exposure. Consistent with the applicable text, this only reinforces how Article 120c preempts the use of Article 134 to prosecute the same conduct without the burden to prove intentionality. Yet that is exactly what the Government did here.

B. Article 134 is Composed of a Residuum of the Elements of Article 120c Charge.

The other half of the preemption analysis requires this Court to assess whether the Article 134 offense is a residuum of the Article 120c offense, *Curry*, 35 M.J. at 360-61, which is just as

evident as the congressional intent discussed above. To be composed of a residuum means to be made up of the core "residue" left behind after everything extraneous is stripped away. Residuum, *The Concise Oxford Dictionary* 885 (7th ed. 1982). In other words, if a charge brought under Article 134 is made up of the same essential elements as a charge that could be brought under a different article, then it is composed of a "residuum." *See Grijalva*, 84 M.J. at 439 (finding an offense is composed of a residuum when "the elements [of the two offenses] are implicitly the same"). Here, the Article 134 specification of which SSgt Marschalek was convicted does just that.

Specifically, Article 120c requires proof that an accused: (1) exposed his genitalia, anus, or buttocks; (2) that the exposure was in an indecent manner; and; (3) the exposure was intentional. 10 U.S.C. § 920; *MCM*, Part IV, ¶ 63.b.(6)(c). In comparison, Article 134, as charged, required proof that SSgt Marschalek: (1) stood naked at his residence door in view of the public; (2) that such conduct was indecent; and (3) that such conduct was service discrediting. 10 U.S.C. § 920; *MCM*, Part IV, ¶ 104.b. Both Article 120c and Article 134 required proof that SSgt Marschalek did something to expose at least part of himself. And while the specification at issue here alleged SSgt Marschalek was completely naked, such exposure inherently required that his genitalia and buttocks were uncovered. But the Article 134 allegation in this case otherwise cast aside—and thus captured a mere subset of—the Article 120c offense. Gone was the requirement that the exposure itself be indecent. Instead, the exposure only needed to happen at all because the Article 134 offense equated being naked with being indecent. Also gone was the requirement of intentionality. Taken together, the Article 134 allegation in this case took three required elements of proof and collapsed them into one. Thus, the preemption doctrine applies, barring the Government from charging SSgt Marschalek under Article 134 in lieu of Article 120c. As a result, his convictions should be set aside.

WHEREFORE, SSgt Marschalek respectfully requests that this Court set aside his conviction and sentence.

II.

IN THE ALTERNATIVE, SSGT MARSCHALEK'S PLEA WAS IMPROVIDENT AS THE MILITARY JUDGE ABUSED HIS DISCRETION BY NOT RESOLVING AN ISSUE OF FACT AS TO THE ACTUS REUS, NEGLECTING TO CONSIDER WHETHER SSGT MARSCHALEK'S CONDUCT INVOLVED A LIBERTY INTEREST, AND INCORRECTLY DETERMINING SSGT MARSCHALEK'S CONDUCT TO BE INDECENT.

Standard of Review

Where an appellant entered a guilty plea and admitted guilt of the charged offense, the standard of review is whether the military judge abused their discretion in accepting the appellant's guilty plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) (citing *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996)). Questions of law arising from the guilty plea are reviewed de novo. *United States v. Byunggu Kim*, 83 M.J. 235, 238 (C.A.A.F. 2023) (citing *Inabinette*, 66 M.J. at 322).

Law and Analysis

"[I]n reviewing a military judge's acceptance of a plea for abuse of discretion appellate courts apply a substantial basis test: Does the record as a whole show a 'substantial basis' in law and fact for questioning the guilty plea." *Inabinette,* 66 M.J. at 322 (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)); *see also* Article 45(a), UCMJ, 10 U.S.C. § 845(a) ("If an accused . . . makes an irregular pleading . . . or . . . entered the plea of guilty improvidently or through lack of understanding of its meaning and effect . . . a plea of not guilty shall be entered in the record . . . ."); R.C.M. 910(e) ("The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea.").

In reviewing the providence of a guilty plea, the trial judge must: (1) establish that the accused believes and admits that he was guilty of the charged offenses; and (2) provide a set of factual circumstances-admitted by the accused that supports the guilty plea. *United States v. Simmons*, 63 M.J. 89, 92 (C.A.A.F. 2006); R.C.M. 910(e). A military judge may rely upon a stipulation of fact in

conjunction with the *Care*[2] inquiry colloquy, but there must also be sufficient evidence that the accused is "convinced of, and able to describe[,] all the facts necessary to establish guilt." *United States v. Faircloth,* 45 M.J. 172, 174 (C.A.A.F. 1996) (quoting R.C.M. 910(e), Discussion, *MCM* (1995 ed.)[3]; *see also United States v. Sweet*, 42 M.J. 183, 185-86 (C.A.A.F. 1995) (discussing how the requirements of *Care* have been codified in R.C.M. 910). "[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *Byunggu Kim*, 83 M.J. at 238 (quoting *Care*, 18 C.M.A. at 539, 40 C.M.R. at 251.

The elements for indecent conduct under Article 134, UCMJ, are: (1) that the accused engaged in certain conduct; (2) that the conduct was indecent; and (3) that, under the circumstances, the conduct of the accused was of a nature to bring discredit upon the armed forces. *MCM*, Part IV, ¶ 104.b. "Indecent" means "that form of immortality 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." *MCM*, Part IV, ¶ 104.c.(1). "Discredit" means to "injure the reputation of . . . to bring the service into disrepute or [conduct] which tends to lower it in public esteem." *MCM*, Part IV, ¶ 91.c.(3).

Here, the military judge abused his discretion in accepting SSgt Marschalek's plea of guilty to indecent conduct for three reasons: (1) the military judge failed to resolve an issue of fact regarding what conduct constituted the *actus reus* in this case; (2) the military judge failed to consider whether SSgt Marschalek's conduct amounted to a constitutionally protected liberty interest warranting heightened scrutiny—which it did; and (3) the record leaves substantial doubt as to both whether SSgt Marschalek's admitted to *actus reus* - standing in his doorway naked on two separate occasions

[2] *United States v. Care*, 18 C.M.A. 535, 539, 40 C.M.R. 247, 251 (1969).
[3] This particular language has not changed to date.

for 10-20 seconds in public view - constituted "indecent conduct."

A. The Military Judge Failed to Resolve an Issue of Fact Regarding What Conduct Constituted the Actus Reus.

The United States Supreme Court has long recognized that due process of law requires an accused's guilt or innocence of a criminal accusation must be determined by objective and clearly understood standards of criminality. *Smith v. Goguen,* 415 U.S. 566, 572-73 (1974). Similarly, due process mandates those criminal statutes – and any service-related implementing regulations – must provide fair notice to the public that certain proscribed behavior is subject to criminal sanction. *Parker v. Levy*, 417 U.S. 733, 757 (1974). Consequently, "criminal statutes must define (and based on that definition, judges must accurately instruct the triers-of-fact) precisely what constitutes criminal behavior and set forth an adequate yardstick by which to distinguish it from non-criminal behavior." *United States v. Peszynksi,* 40 M.J. 874, 878 (N-M. Ct. Crim. App. Aug. 30, 1994) (citing *Smith*, 415 U.S. at 574).

The UCMJ requires that for an accused to be guilty of indecent conduct, the accused must have committed some "act." *MCM*, Part IV, ¶ 91.b.(2)(a). Here, the record is unclear as to what act committed by SSgt Marschalek constituted the *actus reus.* The charge itself provides that the intended *actus reus* was that on divers occasions, SSgt Marschalek stood naked at or near the door of his residence in view of the public. Corrected Entry of Judgment at 1-2; R. at 27; Pros. Ex. 1 at 3. SSgt Marschalek supported this *actus reus* throughout the proceedings, admitting to such conduct both in his stipulation of fact and throughout the *Care* inquiry. Pros. Ex. 1 at 1-3; R. at 26-46.

Specifically, in the *Care* inquire, SSgt Marschalek provided that "[o]n more than one occasion, between on or about 9 August and on or about 4 October, I removed my clothes after working out and placed them in the washing machine and I was naked when I opened the front door of my residence." R. at 29. His explanation for his conduct was "[his] house did not have air condition, so to get a cross breeze going in the house and cool things down, [he] opened a front and

back door of [his] residence after exercising." *Id.*

Nonetheless, the stipulation of fact included a different and more incriminating *actus reus.* Pros. Ex. 1 at 2. The stipulation of fact included stipulated testimony from two individuals. *Id*. One witnessed SSgt Marschalek "standing at or near the doorway with the door completely open," with no shirt, his shorts pulled down to his knees, and his penis exposed. *Id.* "His left hand was holding his cell phone with the screen facing toward him and the camera facing out at an angle toward where [she] was standing." *Id.* "His right hand was on his penis." *Id.* The other individual claimed that she observed SSgt Marschalek "posing" at the door completely naked and that "he had a blue Pepsi can in his left hand and his right hand was above his head on top of the door frame." *Id.*

These two stipulated witnesses present a very different *actus reus* from the one presented by SSgt Marschalek. To SSgt Marschalek, he is propping his door open with a shoe after working out and would be in "the doorway long enough for someone to potentially see [him] while doing that." R. at 34; Pros. Ex. 1 at 2. To the witnesses, he is standing at his doorway with his phone facing outward, a hand on his penis, drinking a Pepsi, and posing on the door frame. Pros. Ex. 1 at 3. SSgt Marschalek thus admitted to conduct that was not criminal, *see infra* at II.B., whereas what the witnesses described would be more likely to be considered criminal.

During the *Care* inquiry, the military judge failed to reconcile these competing factual bases for the plea. The military judge confirmed with SSgt Marschalek that the witnesses did see him on "those dates as they have described." R. at 36. However, the military judge also accepted SSgt Marschalek's statement that the act in question that he was pleading to was him opening his door naked. R. at 72-73. The military judge did not clarify which was the factual basis for the offense, nor did the military judge advise SSgt Marschalek that he was using the behavior as alleged by the witnesses as the factual basis. R. 24-73. And as such, the military abused his discretion by "fail[ing] to obtain from the accused an adequate factual basis to support the plea." *Byunggu Kim*, 83 M.J. at

238 (C.A.A.F. 2023) (quoting *Prater*, 32 M.J. at 436).

The military judge's failure to reconcile the tension between these descriptions of fleetingly visible nudity within the home versus the blatant exposure to the public was particularly problematic for two reasons. First, as discussed below, the two different versions had one from SSgt Marschalek's *Care* inquiry that would likely not pass constitutional muster, whereas the different, more severe, stipulated conduct had a greater likelihood. *See*, *e.g.*, *United States v. Rogers*, No. ACM S32545, 2020 CCA LEXIS 113, at *23-24 (A.F. Ct. Crim. App. Mar. 31, 2020) (affirming that an accused touching himself and rubbing his penis constitutes indecent conduct), *rev. denied*, 80 M.J. 266 (C.A.A.F. 2020). As it stands, though, the mere act of propping a door open in one's own home is not criminal. *See infra* at II.B. Second, the competing characterizations of the *actus reus* raised a question of whether SSgt Marschalek had fair notice of the offense to which he was pleading guilty. *See United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2010) ("[A]n accused has a right to know what offense and under what legal theory he or she is pleading guilty. This fair notice resides at the heart of the plea inquiry.") (quoting *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008)). At minimum, the military judge was required to resolve the discrepancy over the conduct at issue. Article 45(a), UCMJ. He did not.

The military judge abused his discretion in accepting SSgt Marschalek's guilty plea without first resolving the disputed issue of fact as to what conduct formed the *actus reus* of his guilty plea. Therefore, this Court should set aside his conviction and sentence.

B. Even If the Military Judge Established the Actus Reus, the Military Judge Failed to Consider Whether SSgt Marschalek's Conduct Involved a Liberty Interest Warranting Heightened Scrutiny.

"When a charge against a servicemember may implicate both criminal and constitutionally protected conduct, the distinction between what is permitted and what is prohibited constitutes a matter of crucial significance." *Byunggu Kim*, 83 M.J. at 238 (citing *United States v. Hartman*, 60

M.J. 467, 468 (C.A.A.F. 2011)). In situations where a charge may implicate both criminal and constitutionally protected behavior, the military judge must conduct a "heightened" inquiry, "explaining the distinction between constitutionally protected behavior and criminal conduct and ensuring the accused understands the differences." *United States v. Van Velson*, No. ACM 40401, 2024 CCA LEXIS 283, at *6-7 (A.F. Ct. Crim. App. July 12, 2024); *see also United States v. Moon*, 73 M.J. 382, 389 (C.A.A.F. 2014) ("Without a proper explanation and understanding of the constitutional implications of the charge, [a]ppellant's admissions in his stipulation and during the colloquy . . . do not satisfy *Hartman*.").

Here, SSgt Marschalek testified during his *Care* inquiry, consistent with statements he had made to both British and Air Force law enforcement, that on both occasions, he was naked within his home, prior to propping his door open for ten to twenty seconds on two separate occasions. The United States Supreme Court has recognized a liberty interest in private activities performed in one's home. *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003) ("The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime . . . ."). And as a United States citizen, SSgt Marschalek maintained this liberty interest in the private activities at home, despite the fact his home was located in England. *See generally Reid v. Covert,* 354 U.S. 1, 5-6, 77 S. Ct. 1222, 1225 (1957) ("When the Government reaches out to punish a citizen who is abroad, the shield with the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away . . . .). Quite simply, SSgt Marschalek had a privacy interest in being naked within his home. As such, the military judge should have given heightened scrutiny during the Care inquiry to this protected conduct and that conduct which may be criminalized. The military judge failed to do so and thus abused his discretion.

C. Even If the Military Judge Established the Actus Reus, SSgt Marschalek's Public Nudity Was Not Indecent.

Assuming the *actus reus* was in fact SSgt Marschalek standing at his doorway naked in public

view, and not the conducted alleged by the witnesses, the military judge abused his discretion in accepting SSgt Marschalek's guilty plea as the record raises substantial doubt that such conduct was in fact indecent. "The determination of whether an act is indecent requires examination of all the circumstances, including the age of the victim, the nature of the request, the relationship between the parties, and the location of the intended act." *United States v. Rollins*, 61 M.J. 338, 344 (C.A.A.F. 2005). "The definition of indecency requires consideration of both the circumstances of the act itself and societal standards of common propriety." *United States v. Burkhart*, 72 M.J. 590, 596 (A.F. Ct. Crim. App. 2013), *overruled on other grounds by United States v. Cabuhat*, 83 M.J. 755, 762 (A.F. Ct. Crim. App. 2023).

Although SSgt Marschalek was found guilty of indecent *conduct* and not indecent *exposure*, federal, military, and state courts considering indecent exposure have repeatedly found that nudity alone is not inherently indecent. *See Fordyce v. State*, 994 N.W.2d 893, 902 (Minn. 2023) ("[A]n accidental exposure in one's own home—or anywhere else—would be insufficient to support a conviction for indecent exposure under Minnesota Law."); *see also Betansos v. Barr*, 928 F.3d 1133, 1140 (9th Cir. 2019) (concurring with an agency's interpretation that a California Code differentiates between "simply public nudity" and "indecent exposure with a lewd intent"); *United States v. Shaffer*, 46 M.J. 94, 97 (C.A.A.F. 1997) (finding that indecent exposure occurs "in places 'so public and open,' including privately owned homes that they are 'certain to be observed' by the general population"); *State v. Whitaker*, 164 Ariz. 359, 363 (Ariz. Ct. App. 1990) (finding that nudity within the home may become indecent if the exposure was reasonably likely to be viewed by another); *State v. Chiles*, 53 Wash. App. 453, 456 (Wash. App. 1989) (room with an uncovered window was a public place within the public-decency statute); *State v. Romero*, 103 N.M. 532, 536 (N.M. Ct. App. 1985) (requiring under plain language of state law that nudity must be "intentionally perpetrated in a place accessible or visible to the general public to come within the ambit of proscribed criminal behavior");

Payne v. State, 463 So. 2d 271, 271-72 (Fla. 2d DCA 1984) (reversing conviction for indecent exposure where the defendant exposed his penis to urinate in public, but did the record did not show the exposure was "vulgar" or "indecent"); *United States v. Hymans*, 463 F.2d 615, 619 (10th Cir. 1972) ("[M]ere public nudity does not in itself constitute the crime of indecent exposure. To constitute that crime there must be an intentional exposure of the body or the private parts . . . . ." (citing *State v. Nelson*, 178 N.W. 2d 434 (Iowa 1970), *cert. denied*, 401 U.S. 923)).

Rather, nudity becomes indecent when two conditions are met. First, when nudity is done openly and notoriously, meaning that "such acts are performed in such a place and under such circumstances that it is reasonably likely to be seen by others even though others actually do not view the acts. *United States v. Izquierdo,* 51 M.J. 421, 423 (C.A.A.F. 1999) (citing *United States v. Berry*, 6 C.M.A. 609, 614 (C.M.A. 1956)). Second, when nudity occurs with the willful intent to expose the body to public view. *See Nelson*, 178 N.W.2d at 438 ("The violation is the act of public nudity, combined with the intent to perform the act in a place or in a context in which the act violates recognized and accepted norms of social behavior."); *see also United States v. Stackhouse*, 37 C.M.R. 99, 101 (C.M.R. 1967) (noting negligence is not a sufficient basis for willful indecent exposure); *Hearn v. District of Columbia*, 178 A.2d 434, 437 (D.C. 1962) ("Nudity is not per se 'obscene.' It is not illegal for a man to be completely unclothed in his room. It becomes so only if he intentionally exposes himself to other persons."); *Berry,* 6 C.M.A. at 330 ("We doubt, for example, that any reasonable person would contend that an act of fornication committed in full and open view of twenty persons gathered in a private home is not so aggravated in nature as to constitute an offense. . . .").

Additionally, when reviewing indecent *conduct* offenses for factual and legal sufficiency, this Court generally relies upon behavior above and beyond public nudity in affirming that such conduct is grossly vulgar, obscene, and repugnant to common propriety. Such behavior includes sending unsolicited photographs of genitalia to minors, rubbing genitals, sending inappropriate photos of a

minor, and exposing an erect penis through transparent underwear. *See, e.g.*, *United States v. Pulley*, No. ACM 40438, 2024 CCA LEXIS 442, at *42-45 (A.F. Ct. Crim. App. Oct. 24, 2024) (affirming an indecent conduct conviction involving the accused sending a video of his daughter, who was under the age of twelve years, sucking the accused's toe to another person while discussing the possibility of engaging in lewd acts with his daughter and other children), *rev. denied*, __ M.J. __, No. 25-0063/AF (C.A.A.F. Mar. 31, 2025); *Carlile*, No. ACM 40053, 2022 CCA LEXIS 542, at *36 (finding that a rational factfinder could find that an individual sending unsolicited photos of his genitalia to sixteen year old minors was indecent); *Rogers*, 2020 CCA LEXIS 113, at *18-25 (finding that the accused, sitting on his couch with his uniform pants open and his penis erect but covered by underwear and later "rubbing his genitals or groin area both constituted indecent conduct).

Here, the record casts substantial doubt as to whether SSgt Marschalek's public nudity was either so open and notorious that he was reasonably likely to be observed or that it arose to the level of grossly vulgar, obscene, and repugnant to common propriety. As he described it, SSgt Marschalek's conduct consisted of standing in his doorway naked on two different occasions for ten-to-twenty seconds each. R. at 34. Common sense calls into question whether such brief and fleeting conduct was certain to be observed. When exposed to the public for those ten-to-twenty seconds on two separate occasions, SSgt Marschalek did not target a particular individual, did not make any physical contact with anyone, did not masturbate, did not rub his penis, did not have an erect penis, and did not make any verbal comments or noises to accompany his nudity. Pros. Ex. 1 at 1; Pros. 1 at Attachment 3; R. at 29-46; *but see* Pros. Ex. 1 at 2.

In sum, the miliary judge abused his discretion throughout SSgt Marschalek's *Care* inquiry. The military judge failed to resolve an issue of fact regarding what behavior constituted the *actus reus*, failed to recognize SSgt Marschalek's liberty interest in nudity within his home warranting heightened scrutiny through the *Care* inquiry, and ultimately found conduct to be indecent that was

not legally or factually indecent. As such, SSgt Marschalek's guilty plea was improvident.

WHEREFORE, SSgt Marschalek respectfully requests that this Court set aside his conviction and sentence.

III.

THE MILITARY JUDGE ERRED IN ADMITTING PROSECUTION EXHIBITS 4 AND 5 INTO EVIDENCE UNDER RULE FOR COURTS-MARTIAL 1001 AS MATTERS IN AGGRAVATION.

Additional Facts

At sentencing, over trial defense counsel's objection, the military judge admitted Prosecution Exhibits 4 and 5 into evidence. R. at 107-108, 113. Prosecution Exhibit 4 was a photograph purported to be from SSgt Marschalek's phone that showed a text conversation between SSgt Marschalek and an individual named "Tasha." Pros. Ex. 4; R. at 93-96. The photographed messages were dated "Mon, Jul 11" (nearly one-month prior to the conduct charged) and consisted of SSgt Marschalek discussing an incident where he allegedly went to open his window naked and noticed that two women saw him. *Id.* Prosecution Exhibit 5 also included photographs purported to be from SSgt Marschalek's phone. Pros. Ex. 5; R. at 111. These photographs were of a text message exchange between SSgt Marschalek and an individual named "Pat." *Id*. These messages were also dated "Mon, Jul 11," and involved SSgt Marschalek potentially being seen by two women when he opened his window naked. Pros. Ex. 5.

Trial defense counsel objected to the admission of these exhibits based on relevance, hearsay, and a lack of authentication. R. at 97-98, 112. In arguing that these exhibits were not relevant, trial defense counsel highlighted that these messages were sent outside of the charged time period and involved different alleged victims. R. at 101-102. The military judge summarily overruled the hearsay and authentication exhibits. R. at 107, 109-110, 112. In overruling trial defense counsel's objection as to relevance, the military judge found that these exhibits were relevant as matters in

aggravation under R.C.M. 1001(b). R. at 107-108, 112-113. Specifically, following a M.R.E. 403 balancing test, the military judge found that the aggravation evidence was directly related to the charged offense and provided context to SSgt Marschalek's course of conduct around the timeframe of his charged offense. R. at 108.

Standard of Review

This Court reviews a trial court's admission of evidence for an abuse of discretion. *United States v. Gogas*, 58 M.J. 96, 99 (C.A.A.F. 2003) (citing *United States v. Vickers*, 13 M.J. 403, 406 (C.M.A. 1982)).

Law and Analysis

An abuse of discretion occurs when a military judge's "findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Finch*, 79 M.J. 389, 394 (C.A.A.F. 2020) (quoting *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019)). Here, the military judge's finding was both clearly erroneous in fact and influenced by an erroneous view of the law.

A. The Admission of Prosecution Exhibits 4 And 5 Was Erroneous as a Matter of Fact and Law.

"Trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." R.C.M. 1001(b)(4). "This rule does not authorize introduction in general of evidence of uncharged misconduct and is a higher standard than mere relevance." *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007) (cleaned up). The connection between the admitted aggravation evidence and the charged offense must be "direct as the rule states, and closely related in time, type, and/or often outcome, to the convicted crime." *Hardison*, 64 M.J. at 282. In affirming that aggravation evidence and charged offenses must be directly related, the CAAF has regularly examined whether the evidence of other

crimes involve the "same or similar crimes, the same victims, and a similar status within the military community." *United States v. Mullens*, 29 M.J. 398, 400 (C.M.A. 1990); *see also United States v. Nourse*, 55 M.J. 229, 231-32 (C.A.A.F. 2001) (noting the reason evidence of this nature could be considered is because it "reflects the true impact" on the victims).

In SSgt Marschalek's case, the military judge improperly found that the uncharged misconduct in Prosecution Exhibits 4 and 5 was directly related to SSgt Marschalek's conviction for two main reasons. First, the admitted aggravation evidence and the charged offense did not have the same victims. While Prosecution Exhibits 4 and 5 make references to two women seeing SSgt Marschalek naked, the record provides no facts to suggest who these women are. Pros. Exs. 4-5; R. at 93-108. In contrast, there were two identified witnesses to SSgt Marschalek's charged offense—assuming, of course, the conduct at issue was more than just standing in the doorway as described in SSgt Marschalek's *Care* inquiry. Pros. Ex. 1 at 2. Based upon their statements, they do not appear to be the same women as the incidents described in Prosecution Exhibits 4 and 5 since those dealt with SSgt Marschalek at his door and the texts provided that he was at a window and there was a different timeframe involved. *Compare id*, *with* Pros. Exs. 4-5.

Second, the actions are not the same. As discussed earlier, both military and civilian courts draw an important distinction between, first, nudity that occurs in the home and nudity that occurs in public, and, second, between nudity that is inadvertent and nudity that is intentional. For example, in *Hearn*, law enforcement saw the defendant naked on two occasions through his hotel room window. 178 A.2d at 437. With the window and blinds open, the defendant stood by the window and would occasionally lean out the window and expose his genitals. *Id.* at 436-37. Following his conviction, the D.C. Court of Appeals found the evidence insufficient to establish guilt of indecent exposure. *Id.* at 438-39. The court noted that "[t]he required criminal intent is usually established by some action by which a defendant draws attention to his exposed condition or by a display in a

place so public that it must be presumed it was intended to be seen by others." *Id.* at 437. The D.C. Court of Appeals emphasized that "nudity is not per se 'obscene.' It is not illegal for a man to be completely unclothed in his room." *Id*.; *see also Stackhouse,* 37 C.M.R. at 101 (finding that someone being seen nude three times through a partially open apartment door did not qualify as willful indecent exposure absent any additional gestures or words).

The military judge found SSgt Marschalek guilty of opening his front door and exposing his naked body; he did not find SSgt Marschalek of being naked in his home and accidentally exposing his naked body by standing near or in front of an open window. Corrected Entry of Judgment at 1-2; R. at 72-73. In contrast, Prosecution Exhibits 4 and 5 refer to the same conduct as in *Hearn*: inadvertent, unintentional nudity that occurred within the defendant's home. Pros. Exs. 4-5. In other words, the remoteness in time of the text messages (sent months apart from the conduct charged) and the complete lack of any intent wholly separates the texts from the conduct charged. The military judge appeared to not be aware of this distinction, demonstrating an erroneous view of the law – that all nudity undergoes the same analysis in determining whether it rises to the level of indecency. Therefore, the military judge abused his discretion in admitting Prosecution Exhibits 4 and 5 as aggravation evidence because his finding that the aggravated evidence and charged offense was directly related was clearly erroneous and reflected a clearly erroneous understanding of the applicable law.

B. The Erroneous Admission of Prosecution Exhibits 4 and 5 Materially Prejudiced Staff Sergeant Marschalek's Right to a Fair Sentencing Hearing.

Further, the trial court's abuse of its discretion materially prejudiced SSgt Marschalek's substantial right to a fair sentencing hearing. *See United States v. Jones*, 85 M.J. 80, 84 (C.A.A.F. 2024) ("[A] finding or sentence may be held incorrect as a matter of law only if the error materially prejudiced a substantial right of the accused.") (citing Article 59(a), UCMJ, 10 U.S.C. § 859(a)

(2018)). "When the Court finds error in the admission of sentencing evidence (or sentencing matters), the test for prejudice is 'whether the error substantially influenced the adjudged sentence.'" *United States v. Edwards*, 82 M.J. 239, 246 (C.A.A.F. 2022) (quoting *United States v. Barker*, 77 M.J. 377, 384 (C.A.A.F. 2018) (internal quotation marks omitted)). In conducting the prejudice analysis, courts weigh "(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." *Barker*, 77 M.J. at 384 (quoting *United States v. Bowen*, 76 M.J. 83, 89 (C.A.A.F. 2017) (internal quotation marks omitted)). The Government bears the burden of demonstrating that the admission of erroneous evidence is harmless. *United States v. Flesher*, 74 M.J. 303, 318 (C.A.A.F. 2014).

Here, the admission of Prosecution Exhibits 4 and 5 materially prejudiced SSgt Marschalek's right to a fair sentencing proceeding. First, the Government's sentencing argument was relatively weak. Prior to the allegations against him, SSgt Marschalek had no other documented misconduct. Pros. Ex. 2; R. at 80-125. Short of these text messages and the portions of the Stipulation of Fact that included the conduct described by the two women who allegedly saw SSgt Marschalek outside his home, trial counsel provided very little matters in aggravation. *Id.* Second, SSgt Marschalek presented several matters in mitigation. He pled guilty, expressed remorse, and presented testimony and evidence as to his positive character. R. at 134-150. Third, the text messages were not related to the actual offense for which he pled guilty: being naked on two occasions between August 9, 2022, and October 4, 2022, at his door. Corrected Entry of Judgment at 1-2; R. at 72-73. These messages related to him being seen naked by an uncovered window and were from a different timeframe. Pros. Exs. 4-5. Fourth, the Government relied heavily upon these text messages, with trial counsel arguing that SSgt Marschalek earned a severe punishment by "repeatedly exposing his genitalia to unexpected women, and then bragging about it, and then laughing about it . . . in Prosecution Exhibit 4 . . . where most concerningly at the end, there is a laughing emoji after he says that he has took off all his clothes

. . . ."). R. at 175. Absent the text messages, SSgt Marschalek presented himself as an apologetic noncommissioned officer who had never been in trouble before and made two errors of judgment during the time charged period. R. at 134-150. With the text messages, trial counsel painted SSgt Marschalek as a serial flasher, and as someone with no regret for his mistakes. R. at 175-181. The admission of Prosecution Exhibits 4 and 5 substantially prejudiced SSgt Marschalek's right to a fair sentencing proceeding.

WHEREFORE, SSgt Marschalek respectfully requests that this Court set aside his sentence.

IV.

STAFF SERGEANT MARSCHALEK'S SENTENCE IS INAPPROPRIATELY SEVERE.

Standard of Review

The appropriateness of a sentence is reviewed de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006).

Law and Analysis

For two incidents of public nudity in the doorframe of his own home, each lasting between 10 and 20 seconds, SSgt Marschalek received two life punishments – a felony conviction on his record[4] and a BCD – as well as a potential third life punishment: registration as a sex offender.[5] Following the military judge advising SSgt Marschalek on the sex offender registration requirements,

[4] Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012) ("[A] new civil death is meted out to persons convicted of crimes in the form of . . . disenfranchisement . . ., criminal registration and community notification requirements, and the ineligibility to live, work, or be present in a particular location.").

[5] *See United States v. Riley*, M.J. 115, 121 (C.A.A.F. 2013) (holding "that in the context of a guilty plea inquiry, sex offender registration consequences can no longer be deemed a collateral consequence of the plea," and instead the military judge must advise the accused of the consequences of sex offender registration.); *see generally*, Major Alex Altimas, *The Modern Day Scarlet Letter: Challenging the Application of Mandatory Sex Offender Registration and Its Collateral Designation on the Members of the Armed Forces*, 230 MIL. L. REV. 189 (2022) (discussing the significant consequences of sex offender registration and argues that these consequences should be admissible as matters in mitigation in court-martial sentencing procedures).

SSgt Marschalek accepted the consequences of his actions by pleading guilty, understanding his conviction would result in the certainty of a felony conviction and in the potential of registration as a sex offender. App. Ex. I at 1; App. Ex. II at 1-2; R. at 70-73. However, in addition to these other lifetime consequences, the BCD unnecessarily burdens SSgt Marschalek, punishes his family, and is inappropriately severe, especially when considering SSgt Marschalek's prior service and the nature of seriousness of the charged offense.

This Court "may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." *United States v. Cook,* No. ACM 40333, 2024 CCA LEXIS 276, at *59 n.28 (A.F. Ct. Crim. App. July 3, 2024); *see also,* Article 66(d), UCMJ, 10 U.S.C. § 866(d). Considerations include "the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." *United States v. Fields*, 74 M.J. 619, 625 (A.F. Ct. Crim. App. 2015) (quoting *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006)). "The breadth of the power granted to the Courts of Criminal Appeals to review a case for sentence appropriateness is one of the unique and longstanding features of the [UCMJ]." *United States v. Hutchison*, 57 M.J. 231, 233 (C.A.A.F. 2002). This Court's role in reviewing sentences under Article 66(d) is to "do justice," as distinguished from the discretionary power of the convening authority to grant mercy. *United States v. Boone*, 49 M.J. 187, 192 (C.A.A.F. 1998) (citing *United States v. Healy*, 26 M.J. 394, (1988). In reviewing sentence appropriateness, the Court must also be sensitive to considerations of uniformity and even-handedness. *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001).

Here, the BCD, which the plea did not require, is inappropriately severe for several reasons. First, the facts surrounding the charged offense were mundane. The admitted evidence shows that SSgt Marschalek was not convicted of masturbating in front of any named victims and there was no

evidence to support that he targeted any women, knew their ages, or knew they would be outside. R. at 29-46. While trial counsel argued that SSgt Marschalek "violated all standards of human decency over and over again by opening that door and exposing himself to unsuspecting, unconsenting [*sic*] young women . . . [f]rom the evidence, it's clear that the accused had a plan that targeted young women," the actual evidence does not support this exaggerated version of the facts. R. at 179. There was no evidence to suggest that SSgt Marschalek orchestrated the two occasions that supported the charged offense, that he reveled in them, or that he found the experience to be funny, as trial counsel suggested by referencing the much earlier text messages. Pros. Ex. 4; Pros. Ex. 5; R. at 175-176.

In fact, for the charged offenses, he did not even realize anyone saw him until he read the witness statements. R. at 35-36. SSgt Marschalek has been consistent that his primary intent was to let air into his home and that he was only at his doorway naked for ten-to-twenty seconds on each occasion. Pros. Ex. 1, Attachment 3; Pros. Ex. 1 at 2; R. at 33-37. Those are the facts he pled guilty to. While two women witnessed SSgt Marschalek's nudity, the only facts admitted by the Government about the women viewing him naked was through the stipulation of fact.[6] Pros. Ex. 1. In the stipulation of fact, there is no suggestion and no assertion that the women were traumatized or experienced hardship as a result of what they observed. *Id.* at 2. Such conduct—two incidents of public nudity lasting for a total of twenty-to-forty seconds with no documented impact—perhaps shows a lack of judgment but does not reflect serious misconduct that violated all standards of human decency warranting the permanent stain of a BCD. Corrected Entry of Judgment at 1; R. at 72-73; App. Ex. I at 1-2.

[6] Of note, during the Government's sentencing argument, trial counsel argued that "Staff Sergeant Marschalek's actions directly led to Amy Belfield not feeling safe in her hometown." R. at 179. This fact does appear in any of the Government's admitted exhibits or in testimony it solicited during presentencing proceedings. Rather, it appears to derive from Amy Belfield's victim impact statement, which the military judge admitted as Court Exhibit A. *See United States v. Tyler*, 81 M.J. 108, 113-14 (C.A.A.F. 2021) ("we hold either party may comment on properly admitted unsworn victim statements.")

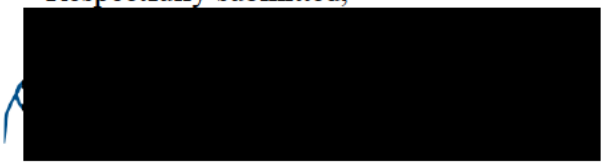
Second, SSgt Marschalek's life experiences and prior service weigh against a punitive discharge. SSgt Marschalek came to the United States, became a naturalized citizen, learned English, and then decided to join the Air Force. R. at 141-44; Def. Ex. L. at 1. But in order to join the Air Force, SSgt Marschalek needed to lose a significant amount of weight and take the Air Force admission test three times to pass. Def. Ex. L. at 1. Despite these obstacles, SSgt Marschalek persevered and overcame, ultimately earning the right to join the Air Force. Once he joined the Air Force, SSgt Marschalek supported his fellow Airmen, deployed, and received stellar performance reports. Pros. Ex. 2; Pros. Ex. 3; Def. Ex. C; Def. Ex. H; Def. Ex. J. Prior to the charged offense, SSgt Marschalek had never been in trouble with the Air Force. At sentencing, six individuals provided letters in support of SSgt Marschalek, and his stepfather testified during the proceedings that he believed SSgt Marschalek still had rehabilitative potential, even after having committed the charged offense. Def. Exs. B-G; R at 145-46. SSgt Marschalek provided for his wife and daughter, who both have significant medical needs, and now faces raising his daughter as a convicted felon and potentially a registered sex offender. Def. Ex. L. at 2. The Government's minimal sentencing case—consisting of the text messages from outside the charged time period, the stipulation of fact, and the *Care* inquiry—pales in comparison to the mitigating evidence presented by trial defense counsel. Such a disparity reflects that SSgt Marschalek's life experiences and prior service support that a BCD is overly severe.

In sum, SSgt Marschalek took responsibility for his actions and pled guilty to the charged offense. Def. Ex. L. at 3. He did so fully aware of the lifetime punishment of a felony conviction and the potential of the lifetime punishment of sex offender registration. He also served his confinement and saw his rank reduced to E-1. Corrected Entry of Judgment at 2. Any additional punishment—especially a BCD, which is an additional lifetime punishment—is inappropriately severe for an individual who served proudly without incident prior to the charged offense and took

responsibility for the two occasions when he stood outside his doorway for ten-to-twenty seconds to let some air into his home.

WHEREFORE, SSgt Marschalek respectfully requests that this Court disaffirm the part of his punishment which calls for a bad-conduct discharge.

Respectfully submitted,



ANTHONY J. GHIOTTO, Lt Col, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: anthony.ghiotto.2@us.af.mil

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 Air Force Government Trial and Appellate Operations Division on April 30, 2025.

[redacted]

Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: anthony.ghiotto.2@us.af.mil

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **HANNES MARSCHALEK** United States Air Force *Appellant.*	)	No. ACM S32776 30 May 2025

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

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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

ISSUES PRESENTED

I.

WHETHER STAFF SERGEANT MARSCHALEK'S CONVICTION UNDER ARTICLE 134, UCMJ, WAS PREEMPTED AND THUS BARRED BY ARTICLE 120C, UCMJ.

II.

WHETHER, IN THE ALTERNATIVE, STAFF SERGEANT MARSCHALEK'S PLEA WAS IMPROVIDENT AS THE MILITARY JUDGE ABUSED HIS DISCRETION BY NOT RESOLVING AN ISSUE OF FACT AS TO THE ACTUS REUS, NEGLECTED TO CONSIDER WHETHER STAFF SERGEANT MARSCHALEK'S CONDUCT INVOLVED A LIBERTY INTEREST, AND INCORRECTLY DETERMINED STAFF SERGEANT MARSCHALEK'S CONDUCT TO BE INDECENT.

III.

WHETHER THE TRIAL COURT ERRED IN ADMITTING PROSECUTION EXHIBITS 4 AND 5 INTO EVIDENCE UNDER RULE FOR COURTS-MARTIAL 1001 AS MATTERS IN AGGRAVATION.

IV.

WHETHER STAFF SERGEANT MARSCHALEK'S SENTENCE IS INAPPROPRIATELY SEVERE.

INTRODUCTION

This Court has recognized that "[s]ecuring a favorable pretrial agreement via a guilty plea, and then on appeal attacking the facial legality of one of the specifications, is inconsistent with the fair and efficient administration of justice." United States v. Kennedy, 2021 CCA LEXIS 575, *8 (A.F. Ct. Crim. App. 2021) (unpub. op.) (quoting United States v. Sanchez, 81 M.J. 501, 504 (A. Ct. Crim. App. 2021)). Appellant does even more here. As part of his plea agreement, Appellant agreed to plead guilty, by exceptions and substitutions, to an indecent conduct specification under Article 134, UCMJ for standing at or near his door naked on divers occasions. In exchange, the government agreed, *inter alia*, to dismiss with prejudice two originally charged specifications of indecent exposure under Article 120c, UCMJ for standing naked in his doorway. Appellant also agreed to a sentence cap of 270 days and to waive all waivable motions. Having secured the benefit of his bargain, Appellant now complains that he should have been tried under Article 120c, indecent exposure, after all. He claims that his conviction should be set aside because the Article 134 specification he specifically agreed to plead guilty to in exchange for dismissing the Article 120c specifications was preempted by Article 120c.

Using this type of bait-and-switch tactic is inconsistent with the fair and efficient administration of justice. But for the agreement made with Appellant, the Government could have proceeded on the Article 120c specifications as originally planned and avoided any preemption issues. Appellant's bold assertions should cause this Court to reevaluate its holding that all preemption arguments are jurisdictional in nature and cannot be waived. *See* United

States v. Jones, 66 M.J. 704, 706 (A.F. Ct. Crim. App. 2008); *c.f.* United States v. Guardado, 75 M.J. 889, 900 (A. Ct. Crim. App. 2016) *reversed on other grounds*, 77 M.J. 90 (C.A.A.F. 2017).

STATEMENT OF CASE

The government initially charged Appellant with one charge and two specifications of indecent exposure in violation of Article 120c, UCMJ:

> Specification 1: [Appellant] did, at or near Littleport, Ely, United Kingdom, on or about 9 August 2022, intentionally expose his genitalia in an indecent matter, to wit: standing outside of his residence exposing his penis to the public.
>
> Specification 2: [Appellant] did, at or near Littleport, Ely, United Kingdom, on or about 26 September 2022, intentionally expose his genitalia in an indecent matter, to wit: standing outside of his residence exposing his penis to the public.

(*Charge Sheet*, dated 3 April 2023, ROT, Vol. 1.) And the government initially charged Appellant with one charge and one specification of indecent conduct under Article 134:

> Specification: [Appellant] did, at or near Littleport, Ely, United Kingdom, on or about 9 August 2022, commit indecent conduct, to wit: standing outside of his resident masturbating in view of the public, and that said conduct was of a nature to bring discredit upon the armed forces.

(Id.)

As part of a plea agreement, Appellant pleaded not guilty to one charge and two specifications of indecent exposure (in violation of Article 120c). (R. at 14; *Entry of Judgment*, dated 7 February 2024, ROT, Vol. 1.) Then Appellant ***agreed to plead guilty*** to one specification of ***indecent conduct*** under Article 134 by exceptions and substitutions – most

importantly the word "naked" was substituted for the word "masturbating."[1] After the exceptions and substitutions, Appellant pleaded guilty to the following specification:

> [Appellant] [d]id, at or near Littleport, Ely, United Kingdom, on divers occasions between on or about 9 August 2022 and on or about 4 October 2022, commit indecent conduct, to wit: standing at or near the door of his residence naked in view of the public, and that said conduct was of a nature to bring discredit upon the armed forces.

Appellant also agreed to waive all waivable motions. (App. Ex. I at 2.)

In return for his guilty plea, the Appellant received the following benefits:

- The indecent exposure charge under Article 120c and its two specifications were dismissed ***with prejudice*** after the sentence was announced. (App. Ex. I at 2; R. at 73.)

- The maximum confinement available to the sentencing authority under the plea agreement was only 270 days when 365 days were available under the special court-martial forum. (App. Ex. I at 2.)

- And Appellant would be permitted to argue the plea agreement as mitigation in sentencing. R.C.M. 1001(g)(1).

A military judge, sitting alone as a special court-martial, found Appellant's plea to be provident. (R. at 72.) The military judge sentenced Appellant to a reduction in grade to E-1, two months confinement, and a bad conduct discharge. (C*orrected Entry of Judgment*, dated 7 February 2024, ROT, Vol. 1.)

[1] The words "on or about 9 August 2022" was excepted and substituted with "on divers occasions between on or about 9 August 2022 and on or about 4 October 2022." The word "outside" was excepted and substituted with "at or near the door." The word "masturbating" was excepted and substituted with "naked." (*Corrected Entry of Judgment*, ROT, Vol. 1.)

STATEMENT OF FACTS

The house located off-base in a local neighborhood of the United Kingdom felt stuffy after Appellant worked out on the elliptical. (R. at 29.) To cool down his residence Appellant opened the front and back doors to create a cross breeze. (R. at 29.) But before he opened the doors, he stripped off every piece of clothing on his body, placed it in the washing machine, and proceeded to open both external doors completely naked. (R. at 29, 34.) When he opened the doors, he made no effort to cover his body, and he fully exposed his genitals to any passerby. (R. at 30, 34; Pros. Ex. 1 at 3.) When he exposed his genitals to the neighborhood, he stood in the doorway for approximately 10 to 20 seconds. (R. at 34.) And he repeated this process on more than one occasion. (R. at 29.)

Appellant knew that his doorway was visible from Station Road, a road that led to a train station that people used daily commuting to and from work. (R. at 30, 35; Pros. Ex. 1 at 1.) Appellant explained, "I knew that people traveled along the road to go to and from work." (R. at 39; Pros. Ex. 1 at 1.) He also admitted that between two and five people traveled on that road to and from work. (R. at 39.) Appellant admitted, "I knew people walked and drove on the road and, therefore, could see me if they looked at my house while passing." (R. at 30.) He went on, "I understand and believed that I was in the view of the public when I stood at or near the door of my residence naked on one [sic] more than one occasion between 9 August and or about 4 October 2022." (R. at 30.) Appellant said, "This wasn't in private." (R. at 36-37.)

Being naked with the possibility that someone might see him, "sexually excited" Appellant. (R. at 30.) Appellant opened the door naked in hopes that he would be seen. (R. at 40, 41, 44.) While walking on Station Road, two women witnessed Appellant's fully naked form in his door. (R. at 31; Pros. Ex. 1.) Appellant admitted that "I understand and believe my

behavior specifically opening the door to be seen naked, which sexually excited me, could have been perceived by others as vulgar, obscene and repugnant." (R. at 31.) He explained, "I believe that people passing my house on Station Road could have perceived by behavior as vulgar, obscene because I was naked[,] and they could see me." (R at 42.) He admitted, "I also believed that my behavior could have been -- could have tended to excite sexual desire or deprave the morals of people passing by on Station Road." (R. at 31.) "It was indecent because there was a sexual reason to my actions. I did that -- I did what I did for the exciting -- of potentially being seen." (R at 42.)

Appellant admitted that his conduct was of a nature to bring discredit on the armed forces, and British nationals who saw him naked would think less of the United States' military because of his conduct. (R. 31-32; Pros. Ex. 1 at 3.) "Instead, my behavior was not good for [the armed forces'] overall reputation. (R. at 31.)

At the beginning of Appellant's guilty plea inquiry, the military judge explained the elements of indecent conduct in violation of Article 134, UCMJ, to Appellant:

> One, that at or near Littleport, Ely, United Kingdom, on divers occasions between on or about 9 August 2022 and on or about 4 October 2022, you engaged in certain conduct, to wit: standing at or near the door of your residence naked in view of the public;
>
> Two, that the conduct was indecent; and,
>
> Three, that, under the circumstances, your conduct was of a nature to bring discredit upon the Armed Forces.

(R. at 27.) Appellant admitted that he believed he was guilty of each of these elements and explained as much in his own words during his guilty plea inquiry and in the stipulation of fact. (R. at 24-47; Pros. Ex. 1.)

ARGUMENT

I.

CONGRESS DID NOT INTEND FOR ARTICLE 120C TO OCCUPY THE FIELD. THUS, APPELLANT'S CONVICTION FOR THE PRESIDENTIALLY ENUMERATED OFFENSE OF INDECENT CONDUCT UNDER ARTICLE 134 WAS NOT PREEMPTED BY ARTICLE 120C, UCMJ.

Standard of Review

Whether an appellant has waived an objection is a legal question that this Court reviews de novo. United States v. Gudmundson, 57 M.J. 493, 495 (C.A.A.F. 2002).

"Whether Articles 80 through 132, UCMJ, preempt a specification alleging a violation of Article 134, UCMJ, is a question of law," that courts review de novo. United States v. Grijalva, 84 M.J. 433, 435 (C.A.A.F. 2024) (citations omitted).

Law and Analysis

A. This Court should reassess its precedent in United States v. Jones and find that preemption is a waivable issue.

This Court should overturn its precedent in United States v. Jones, that states preemption is a nonwaivable issue of subject matter jurisdiction when an appellant pleads guilty. 66 M.J. 704, 706 (A.F. Ct. Crim. App. 2008). Preemption should be a waivable issue because it is akin to failure to state an offense – a waivable issue under R.C.M. 907(b)(2)(E). Preemption is not an issue of subject matter jurisdiction – a non-waivable issue.

Stare decisis is the doctrine of precedent. An appellate court must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself (horizontal stare decisis); and courts must strictly follow the decisions handed down by higher courts (vertical stare decisis). United States v. Quick, 74 M.J. 332, 343 (C.A.A.F. 2015). "The doctrine of stare decisis

ordinarily obliges us to adhere to our own precedent in interpreting successive cases on the same subject matter." United States v. Cabuhat, 83 M.J. 755, 766 (C.A.A.F. 2023). "The doctrine of stare decisis is 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" United States v. Rorie, 58 M.J. 399, 406 (C.A.A.F. 2003) (quoting Payne v. Tennessee, 501 U.S. 808, 827 1991)). "The doctrine is 'most compelling' where courts undertake statutory construction." Id. (first citing Hilton v. S. Carolina Pub. Rys. Comm'n, 502 U.S. 197, 205 (1991); and then citing Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989)).

But courts are not bound by precedent where "there has been a significant change in circumstances after the adoption of a legal rule, or an error in legal analysis, and we are willing to depart from precedent when it is necessary to vindicate plain, obvious principles of law and remedy continued injustice." United States v. Andrews, 77 M.J. 393, 399 (C.A.A.F. 2018) (internal citations omitted). Stare decisis "is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision." United States v. Falcon, 65 M.J. 386, 390 (C.A.A.F. 2008) (internal quotation marks and citation omitted). Stare decisis is a decision-making process not a bright line rule. Quick, 74 M.J. at 336. When conducting a stare decisis analysis, a court weighs four factors: (1) whether the prior decision is unworkable or poorly reasoned; (2) any intervening events; (3) the reasonable expectations of servicemembers; and (4) the risk of undermining public confidence in the law. Id.

The first, second, and fourth stare decisis factors weigh in favor of overturning Jones. The Jones court incorrectly interpreted United States v. Robbins, 52 M.J. 159, 160 (C.A.A.F.

1999). Intervening events support overturning Jones. And public confidence in the law is undermined if Jones is maintained as precedent.

1. The first stare decisis factor weighs in favor of overturning Jones because the prior decision was based on an overly broad reading the Robbins decision.

The Jones court broadly stated that "[o]n the issue of waiver, our superior court has found that preemption is not waived by the appellant's guilty plea." Jones, 66 M.J. at 706. But the Jones decision glosses over the important caveats of Robbins. CAAF decided that ***"[i]n this case***, the issue relates to subject-matter jurisdiction. If the offense was improperly assimilated, it was not cognizable by a court-martial. Thus, we hold that the preemption issue was not waived by the guilty plea or appellant's failure to raise it at trial." Robbins, 52 M.J. at 160 (emphasis added). The Robbins decision was limited to the facts of the case where a state offense was assimilated, and the Court questioned whether a court-martial had subject matter jurisdiction to hear that offense at all. CAAF did not go so far as to say that "in every case" preemption is an issue of subject matter jurisdiction that is not waivable. The Robbins decision was a case specific determination because a non-military and non-federal offense was being charged in a court-martial.

Robbins does not apply here because Appellant was charged with a presidentially enumerated Article 134 offense under clause 2 – not an assimilated state offense as in Robbins. There is no question that a court-martial would have subject matter jurisdiction over an offense that the President enumerated under Article 134 clause 1 or 2. *See* R.C.M. 201. Robbins discussed waiver only in the context of an assimilated offense under clause 3 where subject matter jurisdiction of the offense is at issue. Thus, this Court should decline to apply the Robbins waiver principle here because different clauses of Article 134 apply. This Court should decline to continue reading Robbins so broadly.

The Jones court incorrectly interpreted Robbins. The Jones court stated that preemption is always an issue of subject matter jurisdiction without noting the case-specific caveats put forth by CAAF in Robbins. Thus, the Jones decision inaccurately painted with broad strokes by stating that preemption is a matter of subject matter jurisdiction in all situations; thus, cannot be waived. Jones, 66 M.J. at 706. This is an incorrect restatement of Robbins, and for that reason, Jones is incorrectly decided and should be overturned. *See also* Guardado, 75 M.J. at 901 (finding that "the preemption doctrine, at least when applied outside of the [Assimilated Crimes Act], is not a question of subject matter jurisdiction."

2. The second stare decisis factor weighs in favor of overturning Jones because the precedent Jones depends on was abrogated by other CAAF and Supreme Court precedent.

When a court is "clearly convinced that [precedent] ... is no longer sound because of changing conditions and that more good than harm will come by departing from precedent, [the Court is] not inexorably bound by [its] own precedents." Andrews, 77 M.J.at 399 (citing State v. Mauchley, 2003 UT 10, 67 P.3d 477, 481 (Utah 2003)).

The Robbins Court held that a defect in assimilating a state offense under Article 134 is "jurisdictional" because "[i]f the [state] offense was improperly assimilated, it was not cognizable by a court-martial." 52 M.J. 159, 160 (C.A.A.F. 1999). But, as one federal court has recognized, to the extent that Robbins suggests preemption is a jurisdictional issue, Robbins' holding was abrogated by United States v. Cotton, 535 U.S. 625 (2002) and United States v. Humphries, 71 M.J. 209 (C.A.A.F. 2012). *See* Forbes v. Del Toro, 2022 U.S. Dist. LEXIS 218655, at *13-14 (D.D.C. Dec. 5, 2022)

"The basis for the preemption doctrine is the principle that, if Congress has occupied the field for a given type of misconduct, then an allegation under Article 134, UCMJ, fails to state an

offense." United States v. Costianes, 2016 CCA LEXIS 391, *3-4 (A.F. Ct. Crim. App. 30 June 2016) (unpub op.). As clarified by cases issued after Robbins, failure to state an offense is not a jurisdictional defect, as it does not "deprive a court of its power to adjudicate a case." Cotton, 535 U.S. at 630; *see* Humphries, 71 M.J. at 212-13. Failure to state an offense is a waivable defect under R.C.M. 907(b)(2)(E). This Court should therefore reject the holding in Jones that preemption is an unwaivable jurisdictional matter. Instead, this Court should hold that preemption is akin to failure to state an offense and is thus waivable.

3. The fourth stare decisis factor weighs in favor of overturning Jones because the public confidence in plea agreements in the military is currently undermined by Jones.

Maintaining this Court's precedent in Jones risks undermining public confidence in the law. Quick, 74 M.J. at 336. Society has an interest in successful and fair plea negotiations and agreements. That interest in undermined when an appellant is allowed to voluntarily plead guilty to a chosen specification, benefit from a deal, and then escape criminal liability and gain a windfall on appeal by claiming preemption. "Securing a favorable pretrial agreement via a guilty plea, and then on appeal attacking the facial legality of one of the specifications, is inconsistent with the fair and efficient administration of justice." Kennedy, 2021 CCA LEXIS 575, *8.

Here the government charged Appellant with indecent exposure for standing naked in his open doorway and indecent conduct for masturbating in the open doorway of his house in full view of the public on more than one occasion. (*Charge Sheet*, ROT, Vol. 1.) Because of the bargain that he struck with the government, Appellant was only required to explain that he was standing completely naked in his doorway – he was not required to admit to the more egregious conduct of masturbating in public. (*Corrected Entry of Judgment*, ROT, Vol. 1.)

Now on appeal he is reneging on his contract with the convening authority by claiming that the offense to which ***he offered to plead guilty*** is not permitted under the law. This is an attempt to escape criminal liability by baiting the government into withdrawing and dismissing two specifications ***with prejudice***, and then pulling a switch by claiming set aside is an appropriate remedy because preemption prohibits the government from charging Appellant's conduct under Article 134 – an offense Appellant agreed was appropriate in his plea agreement.

This situation weighs in favor of finding that preemption is waivable and is waived by a waive all waivable motions clause. If Appellant's argument is accepted by this Court, then the government has no reason to accept a plea agreement. In other words, the government will not and should not accept future plea agreements because future accuseds will ignore their contracts once the court is adjourned and their appellate attorney reviews the case.

This will only hurt future accuseds. No prosecutor will want to agree to a specific specification written at the accused's behest when that same accused will turn around on appeal and claim the specification was faulty. Failure to state an offense is a waivable issue for this reason. R.C.M. 907(b)(2)(E). If an appellant fails to bring the issue to the court's attention at trial – the appropriate venue to litigate issues of faulty specifications – then the appellant should not gain a windfall on appeal by pleading guilty, eliminating specifications, and litigating the issue for the first time on appeal to escape criminal liability. This scenario would be remedied by reevaluating and the waivability of a preemption claim and overturning Jones.

This Court should decide that preemption is a waivable issue akin to failure to state an offense. On appeal, an appellant should not be able to destroy an entire plea agreement that he agreed to with the convening authority in hopes that his conviction will be set aside.

Using this type of bait-and-switch tactic is inconsistent with the fair and efficient administration of justice. But for the agreement made with Appellant, the Government could have proceeded on the Article 120c specifications as originally planned and avoided any preemption issues. Appellant's bold assertions should cause this Court to reevaluate its holding that all preemption arguments are jurisdictional in nature and cannot be waived. *See* Jones, 66 M.J. at 706; *c.f.* Guardado, 75 M.J. at 900.

B. Appellant waived any preemption claim on appeal when he agreed to waive all waivable motions pursuant to his plea agreement.

If this Court overturns its precedent in Jones, then it should find that Appellant abandoned the right to challenge the indecent conduct specification due to preemption to benefit from a plea agreement. "Waiver can occur either by a party's intentional relinquishment or abandonment of a known right or by operation of law." United States v. Day, 83 M.J. 53, 56 (C.A.A.F. 2022) (citing United States v. Jones, 78 M.J. 37, 44 (C.A.A.F. 2018)). "A waiver by operation of law happens when a procedural rule or precedent provides that an objection is automatically waived upon the occurrence of a certain event and that event has occurred." Day, 83 M.J. at 56.

Appellant waived the preemption issue he now raises on appeal by abandonment of a known right and by operation of law. He unequivocally abandoned a known right when he stated that he was waiving all motions, "I agree to waive all motions that may be waived in accordance with current legal precedent, public policy, and the Rules for Court-Martial (R.C.M.s)." (App. Ex. I at 2.) Then at trial, the military judge asked trial defense counsel to list all the motion they had intended to file, and trial defense counsel did not list a motion claiming an issue with preemption or failure to state an offense. (R at 54-55.) The defense originated the waiver of motions provision. (R. at 54.) Unlike Day, the military judge here did not

inaccurately state whether a motion was waived or not. This was an abandonment of a known right. Appellant knew that he could make a preemption motion, but he intentionally chose not to benefit from his plea agreement, plead to a less egregious indecent conduct specification, and have two indecent exposure specifications dismissed with prejudice.

By pleading guilty, Appellant waived any preemption motion that he may have brought at the trial level. "A waiver by operation of law happens when a procedural rule or precedent provides that an objection is automatically waived upon the occurrence of a certain event and that event has occurred." Day, 83 M.J. at 56. "An unconditional guilty plea generally 'waives all defects which are neither jurisdictional nor a deprivation of due process of law.'" United States v. Schweitzer, 68 M.J. 133, 136 (C.A.A.F. 2009) (quoting United States v. Rehorn, 9 C.M.A. 487, 488-89, 26 C.M.R. 267, 268-69 (1958)). Preemption is not jurisdictional in this case. Robbins does not apply to this case because Appellant was charged with a presidentially enumerated Article 134 offense under clause 2 – not an assimilated offense as in Robbins. There is no question that a court-martial would have subject matter jurisdiction over an offense that the President enumerated. *See* R.C.M. 201. Appellant waived any preemption motion with his unconditional plea.

C. Congress did not preempt indecent conduct under Article 134 when it enacted indecent exposure under Article 120c.

Congress's indecent exposure offense under Article 120c does not preempt the presidentially enumerated indecent conduct offense under Article 134. "The 'preemption doctrine' limits the general article's expansive scope, prohibiting 'application of Article 134 to conduct covered by Articles 80 through 132.'" United States v. Avery, 79 M.J. 363, 366 (C.A.A.F. 2020) (quoting Manual for Courts-Martial, United States, pt. IV, ¶ 60.c.(5)(a) (2012 ed.)); *see also* MCM, pt. IV, ¶ 60.c.(5)(a) (2016 ed.); MCM, pt. IV, ¶ 91.c.(5)(a)(2019 ed.).

"[T]he preemption doctrine applies only when (1) Congress intended to limit prosecution for . . . a particular area of misconduct to offenses defined in specific articles of the Code, and (2) the offense charged is composed of a residuum of elements of a specific offense." United States v. Curry, 35 M.J. 359, 360-361 (C.M.A. 1992) (internal citation and quotations omitted); *see also* Grijalva, 84 M.J. at 435-436 (finding the same).

First, Congress did not intentionally limit the prosecution of indecent exposure or public nudity offenses to Article 120c. Courts "only find a congressional intent to preempt in the context of Article 134, UCMJ, where Congress has indicated 'through direct legislative language or express legislative history that particular actions or facts are limited to the express language of an enumerated article.'" Avery, 79 M.J. at 366 (quoting United States v. Anderson, 68 M.J. 378, 387 (C.A.A.F. 2010)).

Historically, indecent conduct existed in Article 134 as a presidentially enumerated offense before Congress created Article 120b and Article 120c. Congress then pulled some of the language from Article 134 to codify offenses in Article 120c that are first found in the 2012 Manual for Courts-Martial. National Defense Authorization Act for Fiscal Year 2012, 112 P.L. 81, 125 Stat. 1298. But at no point during the creation of these newly enumerated offenses did Congress specifically state an intent to occupy the field. Id. Accompanying legislative history does not clearly reveal an intent to preempt the Article 134 offense of indecent conduct. Congress knew of the presidentially enumerated offenses – they pulled the language to codify these offenses from Article 134 – but they still did not provide explicit language stating that Article 120c occupied the field for other sexual misconduct.

In the explanation of the presidentially enumerated indecent conduct offense, the President flagged the possibility that Article 120b, UCMJ, may preempt some conduct. "For

child offenses, some indecent conduct may be included in the definition of lewd act and preempted by Article 120b(c). See subparagraph 91.c.(5)(a)." MCM, pt. IV, ¶104.c.(2). Although the note is written by the President, the explanation indicates Congress' known intent to preempt some indecent conduct when it codified portions of the indecent conduct enumerated offense in 2012. But the intent did not encompass all indecent conduct – just that involving children. The President and Congress both understood the notion of preemption, but neither Congress nor the President noted an intent to occupy the field of indecent conduct involving adults. Both entities were silent on whether Article 120c preempted Article 134 indecent conduct. Because Congress was silent this Court should refrain from reading in a congressional intent to preempt. Any intent to preempt must be explicit, and that language is missing in Article 120c. Avery, 79 M.J. at 366. Thus, this Court should not assume that Congress intended to occupy the field of "other sexual misconduct" with Article 120c. Without explicit preemption language, the government is free to charge offenses under presidentially enumerated Article 134 offenses or even create novel offenses if applicable.

Second the Article 134 offense of indecent conduct is not made up of a residuum of elements from Article 120c.

Indecent Conduct, Article 134	**Indecent Exposure, Article 120c**
That the accused engaged in certain conduct;	That the accused exposed his or her genitalia, anus, buttocks, or female areola or nipple;
That the conduct was indecent; and	That the exposure was in an indecent manner; and
That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.	That the exposure was intentional.

MCM, pt. IV, ¶104.b.; MCM, pt IV, ¶63.b.(6). Indecent conduct and indecent exposure share two similar elements. Both require that the accused engaged in an act – either certain conduct or an exposure. However, indecent exposure is a more specific action – specifically exposing certain areas of the body. Both require that Appellant committed the conduct or the exposure in an indecent manner. "Indecent" and "indecent manner" share the same definition: "that 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." *Compare* MCM, pt. VI, ¶ 63.d.(6) *and* MCM, pt. VI, ¶ 104.c.(1).

But the two offenses diverge on their third elements, and because they each contain a different element, they are different offenses. Indecent conduct requires proof of the terminal element. MCM, pt. IV, ¶104.b.(c). Our superior court has rejected the proposition that the terminal element under Article 134, UCMJ, can be ignored when the government is proving their case at trial[2], and it should not be ignored when determining if the offense is preempted. United States v. Phillips, 70 M.J. 161, 165 (C.A.A.F. 2011) ("The terminal element in a clause 1 or 2 Article 134 case is an element of the offense like any other" and it must be "proved beyond a reasonable doubt like any other element."). Indecent exposure requires that the act be intentional. In United States v. Erickson, our superior court found no congressional intent to limit prosecution; thus, the doctrine of preemption did not prevent punishing servicemembers under Article 134, UCMJ, for wrongfully using mind-altering substances which were not covered by Article 112a, UCMJ. 61 M.J. 230, 233 (C.A.A.F. 2005).

[2] Apart from using the Blockburger test to determine jurisdictional double jeopardy issues, the terminal element cannot be ignored when comparing the elements of offenses. United States v. Rice, 80 M.J. 36, 42 (C.A.A.F. 2020); United States v. Driskill, 84 M.J. 248, 253 (C.A.A.F. 2024).

Here the government properly charged Appellant with two indecent exposure (Article 120c) specifications for standing in his doorway naked and one specification of indecent conduct (Article 134) for publicly masturbating in his doorway. (*Charge Sheet*, ROT, Vol. 1.) Masturbating in public is not the same offense as indecent exposure and would have required that the government prove more than an exposure of genitals. The government would have needed to prove visible masturbation. But to lessen his criminal exposure, Appellant ***agreed to plead guilty*** to one specification of ***indecent conduct*** by exceptions and substitutions – most importantly the word "naked" was substituted for the word "masturbating." (App. Ex. I.) The original indecent conduct specification on the charge sheet exceeded the elements of indecent exposure – indecent exposure only requires a revealing of the genitals to the public, not public masturbation. The originally charged indecent conduct involved public masturbation which is more than a genital reveal to passersby. The government was permitted to charge Appellant's misconduct as a presidentially enumerated offense under Article 134 – indecent conduct – and it was not preempted by Article 120c – indecent exposure. The government correctly charged Appellant, and neither charge was preempted by the other.

Appellant then took matters into his own hands and offered to plead guilty to a facially less egregious offense under Article 134. But Appellant chose to plead guilty to an offense that would have otherwise been charged under Article 120c (and the government had charged under Article 120c). Appellant created this alleged preemption problem by formulating his own charge to which he pleaded guilty. He should not gain a windfall on appeal because he is unhappy with being found guilty of an agreed upon specification that he agreed to plead guilty to in exchange for other benefits. This Court should deny this assignment of error and Appellant's requested relief.

II.

APPELLANT'S PLEA WAS PROVIDENT. HE ADMITTED TO THE ACTUS REUS OF OPENING HIS DOOR AND SHOWING HIS GENITALS TO THE PUBLIC, AND HE ADMITTED THE ACT WAS INDECENT. APPELLANT DID NOT HAVE A PROTECTED LIBERTY INTEREST THAT ALLOWED HIM TO PUBLICLY DISPLAY HIS PENIS TO RANDOM PASSERSBY.

Standard of Review

Courts review a military judge's decision to accept a guilty plea for an abuse of discretion. United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008). But questions of law arising from the guilty plea are reviewed de novo. Id.

Law and Analysis

"During a guilty plea inquiry[,] the military judge is charged with determining whether there is an adequate basis in law and fact to support the plea before accepting it." Inabinette, 66 M.J. at 321-322 (citing United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991). "We give the military judge broad discretion in the decision to accept a guilty plea because the facts are undeveloped in such cases." United States v. Byunggu Kim, 83 M.J. 235, 238 (citing Inabinette, 66 M.J. at 321-322). This Court reviews a military judge's providencey determination using a substantial basis test: "Does the record as a whole show a 'substantial basis in law and fact for questioning the guilty plea.'" Inabinette, 66 M.J. at 321-322 (quoting Prater, 32 M.J. at 436).

"[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." United States v. Care, 18 C.M.A. 535, 539, 40 C.M.R. 247, 251 (C.M.A. 1969) (quoting McCarthy v. United States, 394 U.S. 459, 466 (1969)).

"[A]ppellant bears the burden of establishing that the military judge abused that discretion, i.e., that the record shows a substantial basis in law or fact to question the plea." United States v. Phillips, 74 M.J. 20, 21-22 (C.A.A.F. 2015) (citation omitted). Appellant failed to meet that burden. During the guilty plea inquiry, the military judge established a factual basis for both the actus reus and indecency elements of the offense. In addition, the military judge established that Appellant's conduct was public, and not private, thus, no liberty interest was at issue.

A. The military judge established a factual basis for the actus reus, and he did not abuse his discretion by accepting Appellant's guilty plea.

No basis in law or fact exists to overturn the military judge's decision to accept Appellant's guilty plea because the military judge established a factual basis supporting an actus reus for the offense. "During a guilty plea inquiry the military judge is charged with determining whether there is an adequate basis in law and fact to support the plea before accepting it." Inabinette, 66 M.J. at 321-322 (citing Prater, 32 M.J. at 436). "A military judge abuses his or her discretion by failing to obtain from the accused an adequate factual basis to support the plea—an area in which we afford significant deference or if his or her ruling is based on an erroneous view of the law." Byunggu Kim, 83 M.J. at 238 (cleaned up). Here the military judge established an actus reus. Appellant must have committed "certain conduct" to be found guilty of indecent conduct. MCM, pt. IV, ¶ 104.b.(1). Appellant established the actus reus of the offense in his guilty plea inquiry: "standing at or near the door of his residence naked in view of the public." (*Corrected Entry of Judgement*, ROT, Vol. 1.) Appellant stripped off his clothing and then stood naked in his open exterior doorway. (R. at 30, 34.)

Appellant then argues that "the competing characterizations of the actus reus raised a question of whether SSgt Marschalek had fair notice of the offense to which he was pleading

guilty." (App. Br. at 13.) Appellant points to the stipulation of fact and claims now on appeal that the stipulations of expected testimony (contained in paragraphs 5 and 6 of Pros. Ex. 1) included a different and more incriminating actus reus; thus, creating a notice concern. (App. Br. at. 13.) They did not.

No tension exists within the facts to support Appellant's claim. Indecent conduct (to which Appellant chose to plead guilty) requires proof that "under the circumstances" the conduct was service discrediting. MCM, pt. IV, ¶104.b. The additional facts in the stipulation were just that: additional – not contradictory – and they tended to prove the terminal element. The evidence was available to the fact finder and sentencing authority to further prove that Appellant's conduct brought discredit to the armed forces, thus, ensuring the terminal element was met and Appellant's plea was provident.

Appellant chose to admit under oath the minimum facts necessary to establish a factual basis for the plea. Testifying to the minimum criminal conduct (e.g. only two occasions even if more exist for divers occasions) is anticipated in guilty plea inquiries, but it does not invalidate the plea. *See generally* United States v. Rodriguez, 66 M.J. 201, 203 (C.A.A.F. 2008). The government in response may bolster its case in the stipulation of fact so long as the parties agree to it and its accepted by the military judge. R.C.M. 811(c). But by adding additional information to the stipulation of fact, the government did not diminish Appellant's fair notice.

"Due process requires 'fair notice' that an act is forbidden and subject to criminal sanction." United States v. Vaughan, 58 M.J. 29, 31 (C.A.A.F. 2003) (citing United States v. Bivins, 49 M.J. 328, 330 (C.A.A.F. 1998)). "Citing Parker v. Levy, [417 U.S. 733, 755 (1974)], [CAAF] has held that as a matter of due process, a service member must have fair notice that his conduct [is] punishable before he can be charged under Article 134 with a service discrediting

offense." Vaughan, 58 M.J. at 31 (internal citations and quotations omitted). Indecent conduct has long been a Presidentially enumerated offense under Article 134, and after 2012 similar sexual conduct was congressionally codified (but not preempted) under Article 120c.[3] *See* MCM, pt. IV, ¶ 87-90 (1995 ed.) (Indecent acts and liberties with a child, Indecent exposure, Indecent language, Indecent acts with another). *See also* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 573 (1991) (Scalia, J., concurring) ("Public indecency-including public nudity-has long been an offense at common law. *See* 50 Am.Jur.2d, Lewdness, Indecency, and Obscenity 449, 472-474 (1970).")

Appellant was on notice of the conduct he committed and that his conduct was criminal – he was not surprised by the elements read to him or the stipulation of fact presented to him to read in court. Appellant signed the stipulation of fact before the military judge conducted a guilty plea inquiry. The transcript is chronological, and the stipulation of fact review occurred on page 21 of the transcript while the guilty plea inquiry began after on page 24 of the transcript. When the military judge asked Appellant to read the stipulation of fact before delving into the guilty plea inquiry, Appellant did not state that he was confused about or disagreed with the stipulation of fact.

Preferral occurred on 23 March 2023. (*Charge Sheet*, ROT, Vol. 1.) And between preferral and arraignment, no motions were raised indicating insufficient notice. On the record, trial defense counsel, listed the specific motions they were abandoning in favor of the plea. And they did not list a motion claiming lack of notice, a request for a bill of particulars, or a motion for failure to state an offense. (R. at 54-55.) Even if reading the stipulation of fact was the first

[3] "Other sexual misconduct" was added to Article 120c, UCMJ in 2012 via section 541 of the National Defense Authorization Act for Fiscal Year 2012, P.L. 112-81, 31 December 2011.

time Appellant had seen any of the facts in this case, he still would have been provided the information before he chose to plead guilty. In addition, he had the opportunity to withdraw his guilty plea any time before the announcement of the sentence. (R. at 72.) He did not do so. Nothing in the record indicates that Appellant was unsure of the offense to which he was pleading guilty. To the contrary, Appellant agreed that he understood and wanted to plead guilty because he was guilty at each stopgap available in the proceedings. A substantial basis in law and fact for questioning the guilty plea – specifically the actus reus – does not exist in this case. Inabinette, 66 M.J. at 321-322 (quoting Prater, 32 M.J. at 436).

B. The military judge established a factual basis that Appellant's conduct was indecent, and he did not abuse his discretion by accepting Appellant's guilty plea.

No basis in law or fact exists to overturn the military judge's decision to accept Appellant's guilty plea because the military judge established a factual basis supporting the conclusion that Appellant's conduct was indecent. "When analyzing indecency, the totality of the circumstances approach recognizes that the definition of indecency requires consideration of both the circumstances of the act itself and the societal standards of common propriety." United States v. Carlile, 2022 CCA LEXIS 542, *31 (A.F. Ct. Crim. App. 21 September 2022) (unpub. op.) (internal citations omitted). "The determination of whether an act is indecent requires examination of all the circumstances, including the age of the victim, the nature of the request, the relationship of the parties, and the location of the intended act." United States v. Rollins, 61 M.J. 338, 344 (C.A.A.F. 2005) (citation omitted).

"Indecent means that 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." MCM, pt. IV, ¶104.c.(1). Appellant admitted that he stood in his doorway naked on two separate occasions for 10-20 seconds in public view,

and between two and five people passed by and could have seen him. (R. at. 24-72.) Although he did not admit it during his guilty plea inquiry, Appellant stipulated to the expected testimony of two witnesses. (Pros. Ex. 1. at 2.) Both women saw Appellant naked in his doorway. One woman saw him holding his penis in his hand, and the other woman saw him stretching upward and posing with his genitals in full view. (Id.) Appellant's signature was on the stipulation of fact, he agreed that the contents were accurate, and he agreed on the record that the witnesses would testify to that information. (R. at 22.) The military judge also explained how he would use the stipulation of fact, "If I admit this stipulation into evidence, it will be used in two ways. First, I will use it ***to determine if you are guilty of the offense*** to which you have pled guilty. Second, I will use it to determine an appropriate sentence for you." (R. at 20.) And Appellant agreed to these two uses. (R. at 20.)

The record supports a factual basis that Appellant's conduct was indecent. Appellant was exposing himself to anyone that passed by regardless of age, and he did it for his own sexual purpose. Appellant became sexually excited when he was seen fully naked by the public. In addition, two women stated that they saw him either posing or holding his penis while naked in public. This conduct is repugnant to common propriety. Society does not condone public displays of nudity in neighborhoods while people, including children, are trying to commute back and forth to school or work.

Appellant argues that simply being naked is not enough to constitute indecent conduct. (App. Br. at 17.) Appellant cites United States v. Stackhouse, 37 C.M.R. 99, 101 (C.M.R. 1967) for the proposition that "negligence is not a sufficient basis for willful indecent exposure." In Stackhouse, the appellant inadvertently left the door cracked, and a neighbor investigated the partially cracked door of the appellant's apartment where he stood naked. But Stackhouse's

negligence is distinguishable from this case. Here Appellant intentionally stripped all his clothes off before opening the exterior door. He opened the door with the intent to excite his sexual desire. Then he lingered in the doorway in hopes that someone – ***anyone*** – would see him. This is open and notorious conduct – he was on his front porch in view of the street without any trees, columns, or screen doors blocking the view. And the photos provided in evidence show the lack of obstacles between the street and the front door. (Pros. Ex. 1 at 6-8). In addition, Prosecution Exhibit 1 at page 16 shows a Halloween skeleton decoration that Appellant stated was about six feet tall. (R. at 39.) The decoration demonstrated how easy and obvious it was to see a person standing near Appellant's doorway.

Appellant argues, "Here, the record casts substantial doubt as to whether SSgt Marschalek's public nudity was either so open and notorious that he was reasonably likely to be observed or that it arose to the level of grossly vulgar, obscene, and repugnant to common propriety." (App. Br at 18.) No doubt exists in the record that Appellant was in public view of others and was in fact viewed by others. (R. at 30; Pros. Ex. 1.) He personally believed that two to five people could have seen him naked, and in reviewing the evidence in this case he came to find out that at least two women did actually see him naked in his doorway. (R. at. 36, 39; Pros. Ex. 1 at 2.) Appellant wanted to be viewed naked by the public, and he was viewed naked by the public. His conduct was indecent.

The record supports the military judge's decision to find Appellant's plea provident. A substantial basis in law and fact for questioning the guilty plea does not exist in this case. Inabinette, 66 M.J. at 321-322 (quoting Prater, 32 M.J. at 436).

C. The military judge established that Appellant lacked a liberty interest in being naked in his open exterior doorway when Appellant stated his conduct was public.

Appellant did not have a liberty interest that allowed him to publicly parade his naked body before his neighbors. "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and ***certain*** intimate conduct." Lawrence v. Texas, 539 U.S. 558, 562 (2003) (emphasis added). But importantly, not ***all*** intimate conduct is protected by a liberty interest under Lawrence. When reading the elements and definitions to Appellant, the military judge explained:

> This provision is not intended to regulate wholly private consensual sexual activity. In the absence of an aggravating circumstance, private consensual sexual activity, which could include walking around in your own house nude with no one else present, to the extent that could be considered sexual activity, is not punishable as indecent conduct.

(R. at 27.) Appellant stated that he understood the elements and definitions that were read to him, and he proceeded to explain four times that his conduct was intentionally public. (R. at 30-31.) "I understand and believed that I was in the view of the public when I stood at or near the door of my residence naked on one [sic] more than one occasion between 9 August and or about 4 October 2022." (R. at 30.)

Appellant argues, "Quite simply, SSgt Marschalek had a privacy interest in being naked within his home." (App. Br. at 15.) Appellant continues that "[t]he United States Supreme Court has recognized a liberty interest in private activities performed in one's home." (App. Br. at 15) (citing Lawrence, 539 U.S. at 578-79). Even if this were an accurate statement of Lawrence's scope, it does not describe Appellant's conduct. The moment Appellant opened the door to the ***public*** street in hopes that someone outside of his home would see his genitals, his

private household conduct became public. Upon opening the door and standing in full view of the street, he lost any claim that he had a private liberty interest under Lawrence.

Appellant argues that "[i]n situations where a charge may implicate both criminal and constitutionally protected behavior, the military judge must conduct a "heightened" inquiry." (App. Br. at 15) (citing United States v. Van Velson, No. ACM 40401, 2024 CCA LEXIS 283, at *6-7 (A.F. Ct. Crim. App. July 12, 2024)). But during the guilty plea inquiry, the military judge asked extensive questions to determine how public Appellant's conduct was – if the conduct was public then no liberty interests were at stake. (R. at 34-38.) In admitting that the conduct was public, Appellant admitted he had no liberty interest in his public naked endeavors. Lawrence v. Texas does not apply to Appellant's public conduct where he exposed himself to all passersby. Lawrence v. Texas does not apply to public conduct. Thus, Appellant's claim that his liberty interest was affected is meritless.

Appellant's plea was provident, and this Court should deny Appellant's assignment of error.

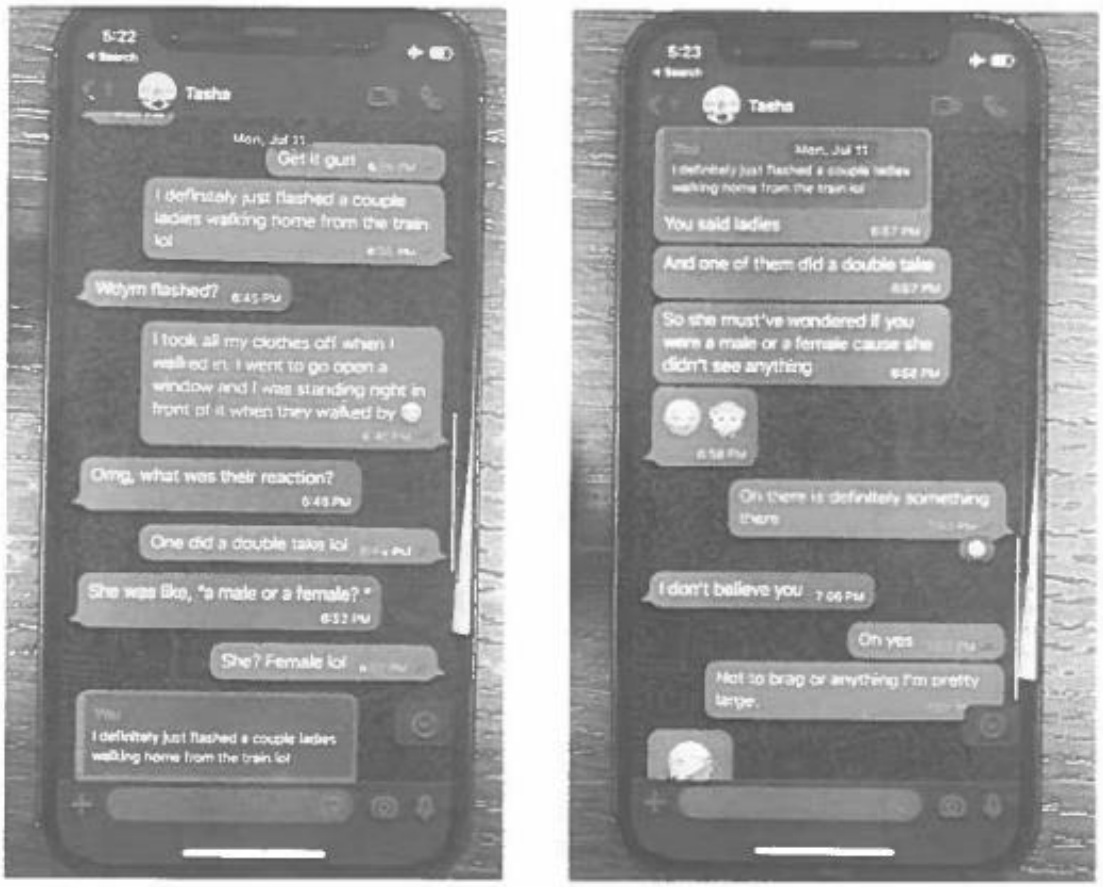
III.

THE MILITARY JUDGE DID NOT ERR IN ADMITTING PROSECUTION EXHIBITS 4 AND 5 UNDER R.C.M. 1001 AS MATTERS IN AGGRAVATION.

Additional Facts

Prosecution Exhibit 4 contained photos of Appellant's text messages from July 2022 with a supposed friend of Appellant named Tasha. (Pros. Ex. 4; R. at 104.) Special Agent TO was unable to provide the context of Appellant's relationship with Tasha. Appellant explained to Tasha, "I definitely just flashed a couple ladies walking from the train." (Pros. Ex. 4.) "I took

all my clothes off when I walked in. I went to go open a window and I was standing right in front of it when they walked by." (Id.)

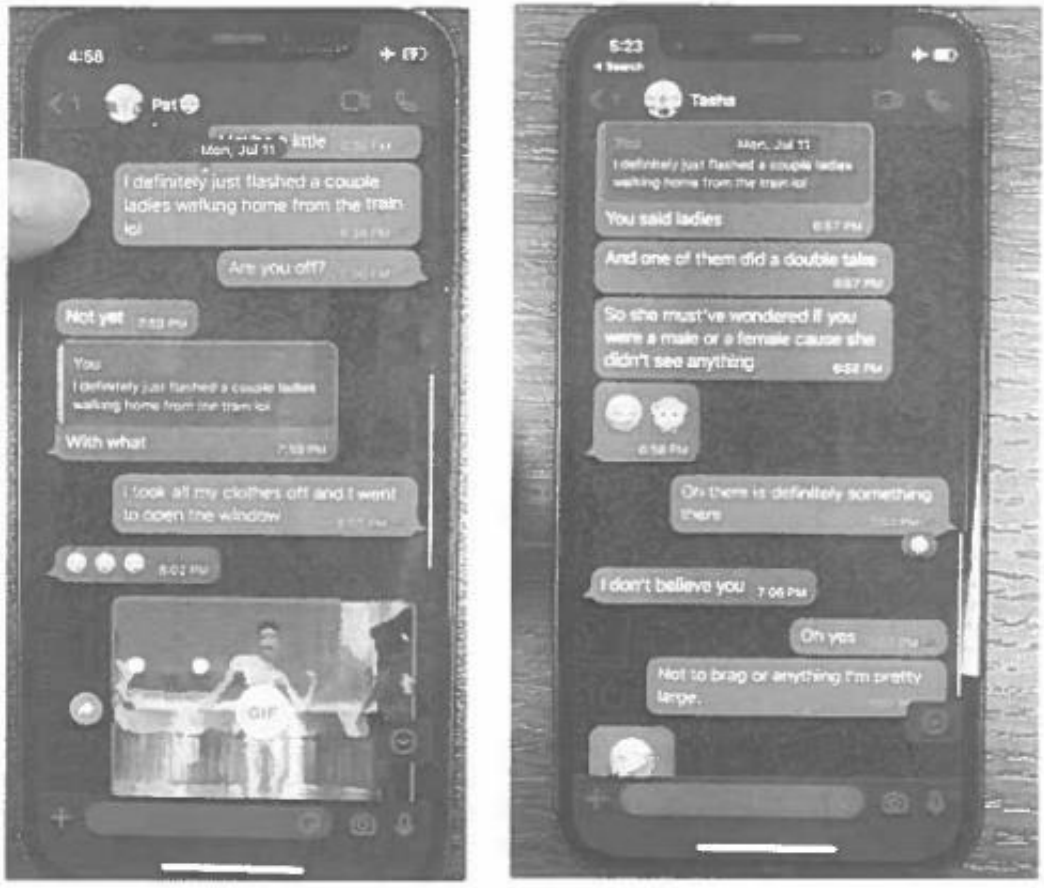


(Pros. Ex. 4.)

Trial counsel offered Prosecution Exhibit 4, and defense counsel objected to the exhibit on relevance, foundation, and authentication. (R. at 97.) The military judge restated the relevance objection as an objection based on improper aggravation evidence. (R. at 107.)

Prosecution Exhibit 5 contained photos of Appellant's text messages from July 2022 with Appellant's supposed friend Pat. (Pros. Ex. 5; R. at 113.) Special Agent TO was unable to provide the context of Appellant's relationship with Pat. In the messages he told Pat, "I definitely just flashed a coupled ladies walking home from the train lol." (Pros. Ex. 5.) When

Pat asked, "With what[?]" (Id.) Appellant said, "I took all my clothes off and went to open the window[.]" (Id.).



(Pros. Ex. 5.)

Trial counsel offered Prosecution Exhibit 5, and defense counsel objected to the exhibit on relevance, foundation, and authentication. (R. at 112.) The military judge again evaluated the relevance objection as an objection based on improper aggravation. (R. at 107.)

Both exhibits were admitted through Special Agent TO, who took pictures of Appellant's text messages with Appellant's consent. (R. at 91.) For both exhibits, trial counsel argued that Appellant's statements demonstrated a continuing course of conduct – repeated sexual arousal caused by public indecent conduct. (R. at 99.) Trial counsel cited United States v. Hardison, 64 M.J. 279 (C.A.A.F. 2007). (R. at 99.) In response, trial defense counsel argued that the offenses

involved different victims, occurred before the charged timeframe, and cited United States v. Nourse[4], 55 M.J. 229 (C.A.A.F. 2001). (R. at 102.)

Before deciding whether to admit the evidence, the military judge took a recess to review the messages and the applicable cases. (R. at 105-106.) He explained, "Here's what we are going to do, because this is the first time I've seen the messages and counsel have cited a couple of different cases, I'm going to take a brief recess to consider this issue." (R. at 105-106.)

After the recess the military judge overruled trial defense counsel's objection to Prosecution Exhibit 4:

> As to the objection related to relevance, the court takes this as, essentially, an objection as to whether or not this evidence falls within the R.C.M. 1001 construct as far as matters in aggravation or some sort of continuing course of conduct, understanding that continuing course of conduct is a higher standard of relevance than just simple relevance.
>
> The court does find that this evidence does directly relate to the offense to which the accused has pled guilty. Understanding the defense has cited to the *Norris* [sic] case for the proposition that, in this case, there's no indication that we are talking about the exact same victims. However, the court does not take the *Norris* [sic] case as a all or nothing. The only way that this evidence is admissible is if the government can prove that it's the same victims, or rather that is a factor in considering whether or not the conduct is directly related to the offense to which the accused has pled guilty and otherwise meets the construct under R.C.M. 1001(b) as far as the conduct being closely related in time type and/or possibly outcome.

(R. at 107-108.) The military judge continued, "The court has conducted an M.R.E. 403 balancing test and finds that the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice." (R. at 108.) The military judge summarized:

> Again, the court finds that this evidence is directly related to the offense to which the accused has pled guilty and serves to provide

[4] The transcript cites the case as "Norris," but the proper spelling is "Nourse." (R. at 102.)

> context as to the course of conduct in and around that timeframe of the accused, a very similar conduct. And the court is capable of keeping -- limiting this evidence to -- only to this purpose, which is to provide context to the offense to which the accused has pled guilty and, therefore, there is little risk of unfair prejudice in this case.

(R. at 108.)

Then the military judge also overruled trial defense counsel's objections to Prosecution Exhibit 5, and provided a similar basis to admit Prosecution Exhibit 5 as Prosecution Exhibit 4:

> Similar to with Prosecution Exhibit 4, the defense objection is overruled as to authentication, foundation, hearsay and relevance under R.C.M. 1001. Again, conducting an M.R.E. 403 balancing test, the court finds that the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice. For the same reasons as stated before, these messages have a tendency to provide context as to the offense to which the accused has pled guilty as far as the continuing course of conduct that would have been going on in and around that time. The court, again, will appropriately consider these messages only for their tendency to provide that context and, therefore, there is little to no risk of any unfair prejudice to the accused related to these messages. Prosecution Exhibit 5 for identification is admitted as Prosecution Exhibit 5.

(R. at 113-114.) The military judge admitted Prosecution Exhibits 4 and 5. (R. at 110, 113.)

Standard of Review

This Court reviews a military judge's admission of sentencing evidence for an abuse of discretion. United States v. Barker, 77 M.J. 377, 383 (C.A.A.F. 2018). An abuse of discretion "occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact." United States v. Donaldson, 58 M.J. 477, 482 (C.A.A.F. 2003) (citing United States v. Humpherys, 57 M.J. 83, 90 (C.A.A.F. 2002)). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." United States v. McElhaney, 54 M.J. 120, 130 (C.A.A.F. 2000) (internal citations omitted).

Law and Analysis

A. The military judge did not err in admitting Prosecution Exhibits 4 and 5 as matters in aggravation.

Prosecution Exhibits 4 and 5 demonstrated a continuing course of conduct where Appellant stripped his clothing off and stood naked in spaces where passersby could see his penis. Thus, the evidence was proper aggravation evidence.

Evidence in aggravation must be "directly relating to or resulting from the offenses of which the accused has been found guilty." R.C.M. 1001(b)(4). "[D]irectly related to or resulting from" is not a bright line rule, but this Court and our superior court determined that a continuing course of conduct may be appropriate aggravation evidence. An "ongoing scheme" with same victim or other "continuing course of conduct" may be admissible. United States v. Nourse, 55 M.J. 229 (C.A.A.F. 2001). But unrelated offenses are not admissible. United States v. Grover, 63 M.J. 653 (A.F. Ct. Crim. App. 2006).

The evidence of the uncharged naked display was admissible under R. C. M. 1001(b)(4) because it directly related to the charged offenses as part of a continuing scheme to arouse his sexual desires by publicly showing his genitals in hopes someone walking by would see his penis. The evidence showed that Appellant stripped naked in his house, walked around his house, and opened doors or windows to public spaces in hopes that someone would see him naked. The situs, act, and intent were the same in the charged offense as the conduct mentioned in Prosecution Exhibits 4 and 5.

Nourse and Mullens indicated that for a continuing course of conduct to constitute aggravation evidence, the same victim should be affected by the appellant's charged conduct and the uncharged conduct being introduced as aggravation evidence (so long as the situs and conduct are also similar). 55 M.J. 229; United States v. Mullens, 29 M.J. 398, 399 (C.A.A.F.

1990). In both Nourse and Mullens the charged offenses include named victims. In Nourse the charged offenses only involved one victim – the sheriff's office. In Nourse, the appellant robbed the same sheriff's office on multiple occasions in slightly different manners. In Mullens, the charged acts of sodomy and indecent liberties with a child and the uncharged identical acts occurred with the same named victims. Mullens, 29 M.J. at 399.

But these cases do not resolve the continuing course of conduct question when a crime is committed without a named victim in the specification. And for sentencing purposes not all victims are named in an offense. For purposes of sentencing, "a crime victim is an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty." R.C.M. 1001(c)(2)(A). The plain language of the sentencing rules does not require that a victim be named in an offense.

In Nourse and Mullens, a very similar crime was committed on the ***named*** victims. Here the same act was committed on multiple occasions at the same location, and although a specific person was not targeted, a general category of victim was targeted – the public passing by his house on their commutes to and from work. Appellant showed his genitals to the neighborhood in hopes ***anyone*** would see. He was not targeting a specific victim but rather any victim that walked to the train station. Even the charged conduct that he pleaded guilty to did not contain just one victim. Appellant admitted that anywhere from two to five people would have seen him displaying his genitals.

The military judge did not "clearly err[] in making his [] findings of fact" when he decided that the charged and uncharged conduct were factually similar enough to constitute a continuing course of conduct. Donaldson, 58 M.J. at 482. The military judge demonstrated his understanding of the law and the need for a continuing course of conduct to be like the charged

offenses, when he refused to admit Prosecution Exhibit 6 for identification because the conduct discussed in the messages – sexual fantasies – was too attenuated from the charged misconduct. (R. at 157.) Ultimately, the military judge determined that this evidence of a continuous course of conduct was admissible to show the full impact of Appellant's crimes. The military judge took a recess to research, weighed the evidence under Mil. R. Evid. 403, found it more probative than prejudicial, and limited his consideration of it to an appropriate purpose of putting the offense into proper context. Under these circumstances, there was no abuse of discretion in admitting the contested evidence.

B. Even if the military judge abused his discretion in admitting Prosecution Exhibits 4 and 5 as matters in aggravation, Appellant did not experience any prejudice.

Even if the military judge erred by admitted Prosecution Exhibits 4 and 5, Appellant's sentence was not substantially influences by the evidence. "If an error occurred during the admission of sentencing evidence, the test for prejudice "is whether the error substantially influenced the adjudged sentence." Barker, 77 M.J. at 384 (citing United States v. Sanders, 67 M.J. 344, 346 (C.A.A.F. 2009)). This Court evaluates four factors to decide whether an error had a substantial influence on a sentence: "(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." United States v. Bowen, 76 M.J. 83, 89 (C.A.A.F. 2017) (internal quotation marks omitted) (quoting United States v. Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999)). "An error is more likely to be prejudicial if the fact was not already obvious from the other evidence presented at trial and would have provided new ammunition against an appellant." Barker, 77 M.J. at 384 (citing United States v. Harrow, 65 M.J. 190, 200 (C.A.A.F. 2007)).

First, the Government's case was strong. Appellant, under oath, explained in detail why he was guilty of the offense, and specifically he explained he walked around naked in public

view for his own sexual gratification. (R. at 24-72.) He became sexually excited by the possibility of being seen. (R. at 30.) In addition, the stipulation of fact that Appellant signed, explained that two women saw Appellant naked in his doorway. (Pros. Ex. 1. at 2.) One saw him holding his penis, and one said he seemed to be posing naked in the door. (Pros. Ex. 1. at 2.) Their testimony further supports the idea that Appellant was walking around naked for his sexual excitement.

Second the defense's case was rather average, and it did not contain "any particular acts of good conduct or bravery and evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember." R.C.M. 1001(d)(1)(B). The six character letters explained he was proficient at his job, hardworking, and dependable. (Def. Ex. at B-G.) The awards and photo biography provided information about his life and family. (Def. Ex. K.) But none of these documents independently or in the aggregate overcame the stipulation of fact or guilty plea inquiry.

Third, the materiality of the evidence in question was low and weighs against its influence on the sentence. The messages did not contain a great deal of detail on the "flashing" that occurred – how long it occurred for or how much of his body was visible. It is likely that the military judge found the messages to be less influential in his sentencing decision because the evidence lacked some context. The military judge explained how he would consider the messages, "The court, again, will appropriately consider these messages ***only for their tendency to provide that context*** and, therefore, there is little to no risk of any unfair prejudice to the accused related to these messages." (R. at 113.) (emphasis added); *see also* (R. at.108.) (The military judge explains the same limitations on Prosecution Exhibit 4.). These messages were not material to the military judge's sentencing decision. Their use was limited to a proper

purpose. Evidence of a continuing course of conduct "may be considered as an aggravating circumstance because it reflects the true impact of crimes upon the victims," and essential it adds context to the crimes. Nourse, 55 M.J. at 231. The military judge articulated on the record that he understood the limited use of the exhibits; thus, it was not material to his sentencing decision.

Fourth, the quality of the evidence in question was not high and weighs against its influence on the sentence. Bowen, 76 M.J. at 89. Tasha and Pat, the recipients of the messages, did not testify to provide context to the messages. The messages were admitted based on the testimony of Special Agent TO who found them on Appellant's phone, but she was unable to provide additional information about the people involved in the conversations.

The maximum sentence available in this case – in accordance with the special court-martial forum – was a bad conduct discharge, confinement for one year, two-thirds forfeiture of pay for 12 months, and reduction to the lowest enlisted grade. (R. at 47.) Appellant's plea agreement contained a sentence cap of 270 days (9 months), and he received only 60 days along with the bad conduct discharge and reduction in grade to E-1. (*Corrected Entry of Judgment*, ROT, Vol 1.) Appellant's sentence was not out of the legal bounds available to the military judge. Nothing in the record demonstrates that the text messages were improperly considered by the miliary judge in coming to a sentence.

The military judge did not abuse his discretion in admitting Prosecution Exhibits 4 and 5. And even if the military judged erred by admitting the exhibits, their admission did not have a substantial effect on Appellant's sentence. This Court should deny Appellant's assignment of error.

IV.

APPELLANT'S SENTENCE WAS APPROPRIATE CONSIDERING HE STOOD NAKED IN HIS DOORWAY TO AROUSE HIS SEXUAL DESIRES.

Additional Facts

The military judge explained that the maximum punishment based solely on Appellant's guilty pleas was "a bad conduct discharge, confinement for up to 12 months, reduction to the lowest enlisted grade and forfeiture of two-thirds pay per month for 12 months and a reprimand." (R. at 47.) Trial counsel, defense counsel, and Appellant explicitly agreed that this calculation was accurate. (R. at 47.)

The plea agreement limited Appellant's confinement exposure to a maximum of 270 days, but he was required to spend at least 30 days in confinement. (App. Ex. I at 2.) The parties did not include any other limitation on the sentence. (Id.) In discussing the plea agreement, the military judge asked Appellant, "Do you understand, specifically, that the limitations on sentence in this case are that you could be sentenced to no more than 270 days of confinement, but no less than 30 days of confinement for the Specification of Charge II?" (R at 60.) Appellant replied, "Yes, Your Honor." (R. at 60.) The military judge then asked, "And that there are otherwise no other limitations on available punishments, other than those that are prescribed by the Manual for Court-Martial as we just discussed what the potential maximum punishment could be. Do you understand that?" And Appellant replied, "Yes, Your Honor." (R. at 61.)

During sentencing argument, the government requested a bad conduct discharge, six to nine months confinement, reduction in rank to E-1, and forfeiture of two-thirds pay (trial counsel did not articulate the period for the forfeitures). (R at 176.) Trial defense counsel argued against a bad conduct discharge, and suggested 30 days confinement, and if necessary, some forfeitures,

and a reduction in grade if the military judge determined that Appellant needed additional punishment. (R. at 184, 186.)

The military judge sentenced Appellant: "[t]o be reduced to the grade of E-1; [t]o be confined for 2 months; and [t]o be discharged from the service with a bad conduct discharge." (R. at 197; *Corrected Entry of Judgment*, ROT, Vol. 1.)

Standard of Review

Under Article 66(d), UCMJ, the Court of Criminal Appeals reviews sentence appropriateness de novo. United States v. McAlhaney, 83 M.J. 164, 166 (C.A.A.F. 2023) (*citing* United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006)). "The Court may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." 10 U.S.C. § 866(d)(1)(A).

Law and Analysis

Sentence appropriateness is assessed "by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial." United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009). In assessing this case, this Court should consider the seriousness of Appellant's conduct and his average military record.

The nature and seriousness of the offense warrants the adjudged punishment. (*Corrected Entry of Judgment*, ROT, Vol 1). On more than one occasion, Appellant stripped himself naked, opened the door to his house, and stood naked in the open doorway. He opened the door specifically during the morning and evening commutes because he hoped someone would walk by and see him. The idea of being seen by anyone on the street – male, female, old, young –

sexually excited him. (R. at 30, 37, 42.). He wanted innocent bystanders – who did not consent to seeing his penis – to look upon his naked body for his own sexual enjoyment. (R. at 41.)

Appellant's record of service was rather average. His record lacked "any particular acts of good conduct or bravery and evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember." R.C.M. 1001(d)(1)(B); *see also* United States v. Talkington, 73 M.J. 212, n.2 (C.A.A.F. 2014) (reiterating the standard for matters in extenuation and mitigation in R.C.M. 1001(d)(1)(B)). He provided six character letters that explained he was proficient at his job, hardworking, and dependable. (Def. Ex. at B-G.) He also presented copies of an Air Force Achievement Medal and a monthly "Performer Award for August 2023" that showed he did his job to an acceptable level. (Def. Ex. H-J). He also included a photo biography of his life and family. (Def. Ex. K.) But none of these items indicate exemplary service capable of outweighing Appellant's blatant disregard for societal decency.

Although this Court has great discretion to determine whether a sentence is appropriate, the Court lacks any authority grant mercy. United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted). Unlike the act of bestowing mercy through clemency, which was delegated to other channels by Congress, CCAs are entrusted with the task of determining sentence appropriateness, thereby ensuring the accused gets the punishment he deserves. United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988). Appellant received the punishment he deserved based on his actions and the exceptionally favorable plea agreement he negotiated. This Court should not provide further relief.

Appellant contests that the bad conduct discharge as inappropriately severe. He advances two reasons why he should receive leniency, and this Court should deem these reasons

unpersuasive, distinctly and in the aggregate: (1) "the facts surrounding the charged offense were mundane, and (2) Appellant's "life experiences and prior service weigh against a punitive discharge." (App. Br. at 26.)

This Court should deny Appellant's assignment of error for three reasons. First, the military judge adjudged a lawful sentence and Appellant understood and agreed that a bad conduct discharge was a possible sentence. Second, the sentence was factually correct. Appellant's conduct was not "mundane," it was criminal and warranted punishment. And third, the military judge considered Appellant's service record and matters in mitigation, and determined they did not outweigh the aggravating facts of the offense.

A. The sentence was correct in law. Appellant understood and agreed that a bad conduct discharge was a possible lawful sentence.

A bad conduct discharge was possible and appropriate for Appellant's misconduct, and Appellant conferred with counsel and stated he understood that a bad conduct discharge was possible based on his plea:

> [Military Judge]: Staff Sergeant Marschalek, the maximum punishment authorized by law in this case, based solely on your guilty plea, is a ***bad conduct discharge***, confinement for up to 12 months, reduction to the lowest enlisted grade and forfeiture of two-thirds pay per month for 12 months and a reprimand. Do you understand that?
>
> [***The accused and defense counsel confer.***]
>
> [Appellant]: Yes, Your Honor.

(R. at 47.) (emphasis added). Then Appellant stated that he understood that his plea agreement limited confinement but nothing else:

> [Military Judge]: Do you understand, specifically, that the limitations on sentence in this case are that you could be sentenced to no more than 270 days of confinement, but no less than 30 days of confinement for the Specification of Charge II?

> [Appellant]: Yes, Your Honor.
>
> [Military Judge]: And that there are otherwise no other limitations on available punishments, other than those that are prescribed by the Manual for Court-Martial as we just discussed what the potential maximum punishment could be. Do you understand that?
>
> [Appellant]: Yes, Your Honor.

(R. at 60-61.) Appellant knew that the maximum punishment for his plea included a bad conduct discharge, and the punitive discharge was not limited by his plea – only the maximum confinement was limited. Thus, he knew that a bad conduct discharge was available to the sentencing authority and a lawful sentence, and he chose to continue with his guilty plea. Now on appeal he regrets his decision. But regret is not a legal basis for setting aside a sentence. He was given all the information to make an informed decision; he conferred with his counsel; he was satisfied with his counsel; and he was told he could abandon his plea at any time before the sentence was announced. (R. at 47, 60-61, 72; App. Ex. I.) He chose to continue with his plea understanding that the sentencing authority could adjudge a bad conduct discharge.

Appellant asks this Court to reduce his punishment significantly even though the plea agreement he negotiated already lowered his punitive exposure and the military judge sentenced him in accordance with the plea agreement. (App. Ex. I). An "accused's own sentence proposal is a reasonable indication of its probable fairness to him." United States v. Fields, 74 M.J. 619, 625 (A.F. Ct. Crim. App. 2015) (citations omitted); *see* United States v. Jackson, 2024 CCA LEXIS 9, *18 (A.F. Ct. Crim. App. 2024)(unpub. op.) ("A plea agreement with the convening authority is some indication of the fairness and appropriateness of [an appellant's] sentence." (citation omitted)). Per the terms of his plea agreement and the maximums available at a special

court-martial[5], Appellant avoided ten months of confinement for indecently revealing his genitals – multiple times – to the public in hopes that someone would see his penis. (App. Ex. I; Pros. Ex. 1); 10 U.S.C. § 819(a). The plea agreement reduced his punitive exposure by limiting his confinement to between 30 and 270 days. (App. Ex. I.) In accordance with the plea agreement, the military judge sentenced Appellant to only 60 days confinement along with a bad conduct discharge, and reduction to E-1. (*Corrected Entry of Judgment*, ROT, Vol. 1). This was a lawful sentence, and the military judge was within the legal boundaries of the offense and forum when he adjudged it. This Court should find the sentence was correct in law. 10 U.S.C. § 866(d)(1)(A).

Appellant successfully negotiated a plea agreement limiting the court's available punishments, and the military judge adjudged a sentence within that range. Appellant should not gain a windfall on appeal because he is upset that he received a punitive discharge and only 22% of the available confinement under the lenient terms to which he negotiated and agreed.

B. Appellant's sentence was correct in fact because a punitive discharge was appropriate for Appellant's indecent conduct.

This Court should affirm Appellant's sentence, including the bad conduct-discharge. "The Court may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct . . . fact and determines, on the basis of the entire record, should be approved." 10 U.S.C. § 866(d)(1)(A). The Rules for Courts-Martial explain that:

> A bad-conduct discharge is less severe than a dishonorable discharge and is designed as a punishment for bad-conduct rather than as a punishment for serious offenses of either a civilian or military nature. It is also appropriate for an accused who has been

[5] The maximum punishment for indecent conduct at a general court-martial is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years. MCM, pt. IV, ¶104.d.

> convicted repeatedly of minor offenses and whose punitive separation appears to be necessary."

R.C.M. 1003(b)(8)(C). This Court should affirm Appellant's bad conduct discharge because his actions were just that – bad conduct.

Appellant chose to open his door without clothing on at least two occasions, and he admitted that between two and five people could have seen him. (R. at 40, 41, 44.) He could have opened the doors and then taken his clothing off in the privacy of his home. But instead, he decided to sexually arouse himself by fully exposing his genitals to ***any*** passerby – child, adult, male, female – in hopes that they would see him. (R. at 30, 34.) Being naked with the possibility that someone might see him, "sexually excited" Appellant. (R. at 30.) Appellant admitted that "I understand and believe my behavior specifically opening the door to be seen naked, which sexually excited me, could have been perceived by others as vulgar, obscene and repugnant." (R. at 31.) He explained, "I believe that people passing my house on Station Road could have perceived by behavior as vulgar, obscene because I was naked[,] and they could see me." (R at 42.) He admitted, "I also believed that my behavior could have been -- could have tended to excite sexual desire or deprave the morals of people passing by on Station Road." (R. at 31.) "It was indecent because there was a sexual reason to my actions. I did that -- I did what I did for the exciting -- of potentially being seen." (R at 42.) He knew that his behavior could excite sexual desires and deprave morals, but he did it anyway all with the desire to be seen. This is the type of bad-conduct – conduct that did not occur once but at least twice – is the conduct that a punitive discharge can and should be used to punish.

Appellant attempts to minimize the impact of his offense by calling it "mundane." (App. Br. at 15.) But the Appellant's characterization of an offense as humdrum does not make it any less worthy of punishment. *See* R.C.M. 1002(f)(3)(C) (A sentence may be imposed to provide

punishment for an offense.) And even Appellant agreed that some punishment was appropriate for his crime when he agreed to at least a minimum of 30 days confinement as part of his plea agreement. (App. Ex. I.) His attempts to minimize his actions and the impact those actions had on his neighbors are unconvincing. Even if this Court finds Appellant's "mundane" argument convincing, a bad conduct discharge is still appropriate because it also appropriate for repeated minor offenses. R.C.M. 1003(b)(8)(C). So even repeated "mundane" offenses are worthy of a bad conduct discharge. Appellant's requested relief should be denied. Appellant's bad conduct discharge should be affirmed.

C. The military judge considered the mitigation evidence and aggravating facts presented at trial and arrived at an appropriate sentence.

The military judge considered the mitigation evidence presented by Appellant and the aggravating facts Appellant admitted to in his guilty plea inquiry when determining an appropriate sentence for him. This Court should decline to reevaluate the military judge's sentence based on the same mitigation evidence on appeal.

Appellant argues that Appellant "took responsibility for his actions and pled guilty to the charged offense. [] He did so fully aware of the lifetime punishment of a felony conviction and the potential of the lifetime punishment of sex offender registration." (App. Br. at 27.) This evidence was available to the military judge when he sentenced Appellant.

Appellant points out that Appellant "took responsibility for his actions" when he pleaded guilty. (App. Br. 27). The government agrees that a military judge may consider a guilty plea as evidence in mitigation. United States v. Edwards, 35 M.J. 351, 355 (C.M.A.. 1992). The military judge – knowing this was proper mitigation under the law – already considered this fact when coming to an appropriate sentence for Appellant at trial. Erickson, 65 M.J. at 225. But now on appeal, Appellant's willingness to take responsibility does not warrant *additional* relief.

After considering the presentencing evidence presented by the defense and Appellant's willingness to plead guilty as mitigation, the military judge adjudged a punishment within the realm of available, lawful sentences. The sentence was appropriate, and this Court should deny Appellant relief.

This Court should find Appellant's arguments unpersuasive. Appellant's sentence of a bad conduct discharge, 60 days confinement, and reduction to E-1 is appropriate for intentionally standing naked in his doorway so anyone in the neighborhood could see his penis. Appellant's claim does not warrant leniency. This Court should deny this assignment of error.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the findings and sentence in this case.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 May 2025.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME OUT OF TIME**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **HANNES MARSCHALEK,** United States Air Force,	)	No. ACM S32776
Appellant.	)	2 June 2025

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

Pursuant to Rule 23.3(m)(3) and (6) and (7) of this Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) out of time to file a reply brief to the Government's Answer to Assignments of Error, which it filed before this Court on May 30, 2025. Appellant requests an enlargement for a period of 14 days, which will end on **June 20, 2025**. The record of trial was docketed with this Court on 5 April 2024. From the date of docketing to the present date, 423 days have elapsed. On the date requested, 441 days will have elapsed. This EOT Out of Time request is the first EOT request for the reply brief. Undersigned counsel anticipates this being the last EOT request, barring any unforeseen circumstances.

On 24 October 2023, at a special court-martial convened at Royal Air Force Lakenheath, United Kingdom, a military judge, consistent with Appellant's pleas, found him guilty by exceptions and substitutions of one charge and one specification of indecent conduct in violation of Article 134, Uniform Code of Military Justice (UCMJ). R. at 1, 6-8, 14, 74. Pursuant to a plea agreement, one charge and two specifications of indecent exposure in violation of Article 120c, UCMJ, were withdrawn and dismissed with prejudice. R. at 6-7, 59, 73, 197. On 25 October 2023, the military judge sentenced Appellant to be reduced to the grade of E-1, to be confined for two months, and to be discharged from the service with a bad conduct discharge. R. at 197. The

convening authority took no action on the findings or sentenced and denied the Appellant's request for deferment of both his reduction in rank and automatic forfeitures; however, the convening authority did waive all automatic forfeitures for a period of six months, or release from confinement, or expiration of service, whichever was soonest, for the benefit of Appellant's spouse and child. Corrected Convening Authority Decision on Action – *United States v. Staff Sergeant Hannes Marschale*k, dated 19 January 2024.

The trial transcript is 198 pages long and the record of trial is comprised of two volumes containing nine Prosecution Exhibits, twelve Defense Exhibits, one Court Exhibit, and three Appellate Exhibits. Appellant is not currently confined.

Through undersigned counsel, Appellant filed his Assignment of Errors before this Court on April 30, 2025. Appellant raised four Assignments of Error, asserting that his conviction under Article 134, UCMJ, was preempted and thus barred by Article 120C, UCMJ, that his plea of guilty was improvident, that the trial court erred in admitting two pieces of evidence under Rules for Court-Martial 1001, and that Appellant's sentence was inappropriately severe.

The Government filed its answer at 1655 on May 30, 2025. In its answer, the Government refuted each Assignment of Error and also asserted that the Court should reassess its precedent in *United States v. Jones*, 66 M.J. 704 (A.F. Ct. 2008), a matter not raised in Appellant's Assignments of Error. The current deadline for Appellant to submit a reply brief is June 6, 2025. For the reasons discussed below, Appellant requests a 14-day enlargement of time, which will end on June 20, 2025.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6) and (7), undersigned counsel provides the following information. Colonel Ghiotto is detailed to take lead on this case. He is a reservist and currently has completed all his duty for his reporting year. He is willing to perform duty on a

"points only" basis to complete the reply brief; however, due to unavoidable commitments with his civilian job he is unable to do so from June 2, 2025 to June 13, 2025.

In his civilian capacity, Colonel Ghiotto is a professor at the University of Illinois College of Law. From June 2, 2025 to June 6, 2025, he must participate in several faculty retreats and meetings required by his supervisor for the end of the academic year. Further, he must complete a substantial strategic planning document by June 6, 2025 for the academic center he directs. In turn, from June 9 to June 12, he is participating in an out-of-state academic conference where he is providing multiple trainings and presentations. The earliest he will be able to focus on the reply brief is June 13, 2025. Based on the complexity of the Assignment of Errors and the Government's new argument regarding this Court reconsidering prior precedent, Colonel Ghiotto requires from June 13, 2025 to June 20, 2025 to complete the reply brief.

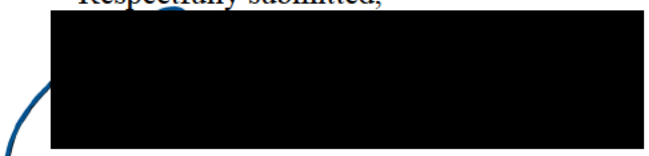
This EOT Out of Time is submitted only five days before the reply brief filing deadline of June 6, 2025. As noted earlier, the Government did not file its Answer until 1655 on Friday, May 30, 2025. Undersigned counsel is submitting the EOT Out of Time the morning of the following duty day, following a review of the complexity and length of the Government's answer, in addition to a review of his own schedule and prior employment commitments.

Appellant was advised of his right to a timely appeal. Appellant was provided a status update on undersigned counsel's progress on his case and advised of the request for an 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, detailed counsel will be unable complete the reply brief in Appellant's case prior to the current filing deadline. An enlargement of time is necessary to allow counsel to fully review the Government's answer and complete the reply brief.

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

Respectfully submitted,



ANTHONY J. GHIOTTO, Colonel, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: anthony.ghiotto.2@us.af.mil

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 Air Force Government Trial and Appellate Operations Division on 2 June 2025.

Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: anthony.ghiotto.2@us.af.mil

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **HANNES MARSCHALEK,** United States Air Force, *Appellant.*	)	No. ACM S32776
	)	3 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 opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to complete briefing to this Court in a case. If Appellant's new delay request is granted, the delay in this case will be 441 days in length. Appellant's over year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed more than two thirds of the 18-month standard for this Court to issue a decision, which only leaves about 4 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 3 June 2025.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **HANNES MARSCHALEK,** United States Air Force, *Appellant.*	)	No. ACM S32776
	)	June 20, 2025

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

Staff Sergeant (SSgt) Hannes Marschalek, Appellant, pursuant to Rule 18(d) of this Court's Rules of Practice and Procedure, files this Reply to the United States' Answer to Assignments of Error (Ans.) (May 30, 2025). In addition to the arguments in his opening brief, filed on April 30, 2025, SSgt Marschalek submits the following arguments.

I.

Preemption is a nonwaivable issue and SSgt Marschalek's conviction under Article 134, Uniform Code of Military Justice (UCMJ), was preempted and thus barred by Article 120c, UCMJ.

This Court explicitly held that "preemption is not waived by the appellant's guilty plea." *United States v. Jones*, 66 M.J. 704, 706 (A.F. Ct. Crim. App. 2008), *rev. denied* 67 M.J. 204 (C.A.A.F. 2008). The Government now requests this Court to overrule itself. In doing so, the Government is unable to satisfy its burden to persuade this Court to overturn its precedent. Rather, this Court should affirm its commitment to *Jones*, while also finding that Article 120c, UCMJ, preempted Article 134, UCMJ.

A. This Court's decision in *Jones* correctly interpreted *United States v. Robbins*, so this Court should decline the Government's invitation to revisit the issue of preemption being a waivable issue.

"The party requesting that [a military court] overturn precedent bears a substantial burden of persuasion." *United States v. Andrews*, 77 M.J. 393, 399 (C.A.A.F. 2018) (citation modified). Further, a party challenging precedent "must present a 'special justification' for [a military court] to overrule prior precedent." *United States v. Blanks*, 77 M.J. 239, 242 (C.A.A.F. 2018) (quoting *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015)). The Supreme Court defines a "special justification" as something "over and above the belief 'that the precedent was wrongly decided.'" *Kimble*, 576 U.S. at 447 (citing *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)). Importantly, the challenger still must provide such a "special justification" even if all factors[1] "weigh in favor of overturning long-settled precedent." *Andrews*, 77 M.J. at 399 (citing generally *Halliburton Co.,* 573 U.S. 258).

1. *Jones* did not overread the CAAF's decision in *Robbins.*

In arguing that *Jones* overread the Court of Appeals for the Armed Forces' (CAAF's) decision in *United States v. Robbins*, 52 M.J. 159 (C.A.A.F. 1999), the Government ignores the words used by the CAAF in *Robbins*, the meaning imparted by the grammatical structure of the operative words from that case, and this Court's repeated endorsements of *Jones*'s application of *Robbins.* Each of these omissions undermines the Government's endeavor to satisfy its burden.

At the outset, this Court has already rejected attempts to overrule *Jones*. In 2017, this Court said: "[W]e adhere to the principle of stare decisis and our own precedent in *Jones* interpreting *Robbins* to stand for the general principle that waiver of preemption is not valid. We thus hold that

[1] "We consider the following factors in evaluating the application of stare decisis: whether the prior decision is unworkable or poorly reasoned; any intervening events; the reasonable expectations of servicemembers; and the risk of undermining public confidence in the law." *Andrews*, 77 M.J. at 399 (quoting *United States v. Blanks*, 77 M.J. 239, 242 (C.A.A.F. 2018)).

preemption was not waived." *United States v. Bailey,* No. ACM 39052, 2017 CCA LEXIS 639, at *7 (A.F. Ct. Crim. App. Sept. 26, 2017) (citations omitted). This Court reaffirmed this principle in 2016, and again in 2022. *United States v. Dominguez-Sandoval*, No. ACM 40084, 2022 CCA LEXIS 203, *15 (A.F. Ct. Crim. App. Mar. 31, 2022); *see United States v. Costianes*, No. ACM 38868, 2016 CCA LEXIS 391, at *3 (A.F. Ct. Crim. App. Jun. 30, 2016); *United States v. Hill*, No. ACM 38848, 2016 CCA LEXIS 291, at *4 (A.F. Ct. Crim. App. May 9, 2016). If this Court *had* overread *Robbins*, then it would not have continued adhering to *Jones.*

Even if one acted as the Government's brief does and pretended as though this Court's prior decisions upholding *Jones* did not exist, the Government loses as a matter of first principles. The *Robbins* court stated generally that "[i]f the offense was improperly assimilated, it was not cognizable by a court-martial. Thus, we hold that the preemption issue was not waived by the guilty plea or appellant's failure to raise it at trial." *Robbins*, 52 M.J. at 160. The Government takes this language to mean that *Robbins* applies only to cases involving assimilation, but that position ignores the plain language of the decision.

While the *Robbins* case presented a situation involving assimilation, it went on to say that because of the improper assimilation, the case "was not cognizable by a court-martial." *Id*. Therefore, when the *Robbins* Court says that the "preemption issue was not waived," they are saying so because the offense was not cognizable. Therefore, it is just as accurate to say that, if another charge was non-cognizable by a court-martial, it would similarly not be waived by a guilty plea. If the Government were to charge an accused with conduct not covered by Article 134, UCMJ, the charge would be "[in]capable of being judicially tried or examined before a designated tribunal," and would not be "within the court's jurisdiction." Cognizable, BLACK'S LAW DICTIONARY (11th ed. 2019). Assimilation just happened to be the reason for the case being non-cognizable in *Robbins*.

The Government's argument forcing the modifying phrase "improperly assimilated" to the next sentence violates basic rules of grammar. The initial portion of the sentence discussing assimilation is an introductory prepositional phrase. *See* Purdue University OWL, COMMAS AFTER INTRODUCTIONS, https://owl.purdue.edu/owl/general_writing/punctuation/commas/commas_after_introductions.html. As an introductory phrase, it merely modifies its following independent clause, "serv[ing] as [a] transition[] to a main sentence, *giving added information*." University of Arkansas Sam M. Walton College of Business, INTRODUCTORY ELEMENTS, https://walton.uark.edu/business-communication-lab/resources/downloads/Introductory_Elements_L.pdf (emphasis added). Since the portion of the sentence discussing the assimilation is a modifying phrase, it is best read as: "a preemption issue is not waived by a guilty plea where the offence is not cognizable by a court-martial." In the instance of *Robbins*, the offense was not cognizable because it was improperly assimilated. Grammatically speaking, the mention of assimilation is only a modifier, not as a limiter to the next sentence as the Government suggests.

As demonstrated by both this Court's subsequent decisions and by the plain text of *Robbins,* this Court decided *Jones* correctly. Accordingly, this Court should decline the Government's invitation to overrule *Jones*.

2. Neither CAAF nor Supreme Court precedent abrogated *Jones* for purposes of the second *stare decisis* factor.

Neither of the two cases cited by the Government abrogated *Robbins* as the Government claims. The Government points to *United States v. Cotton*, 535 U.S. 625 (2002), and *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012, but misses: (a) the importance of when they were relative to *Robbins,* and the subsequent cases affirming *Jones*, and (b) how *Humphries* is about a different legal issue altogether.

First, the Supreme Court decided *Cotton* in 2002. If *Cotton* abrogated *Robbins*, then the *Jones* court would not have followed *Robbins* as it did six years later and instead would have followed

Robbins through the lens of *Cotton*. *See United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) ("Military judges are presumed to know the law and to follow it absent clear evidence to the contrary." (citing *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997))). That this Court did not even mention *Cotton* in *Jones* evinces that *Cotton* did not impact *Jones* as the Government claims.

Nor did *Humphries* abrogate or conflict with *Robbins.* The difference between *Humphries* and *Robbins* is the mischarging of a crime versus the charging of a non-existent "crime." *Humphries* held that the failure of a specification to allege an element is not a jurisdictional defect. *Humphries*, 71 M.J. at 213. By contrast, *Robbins* addressed whether the Government *could* charge a defendant with a preempted offense, i.e., whether the Government has the power to charge a servicemember with a crime that *fundamentally does not (and could not) exist* under Article 134, UCMJ. *Robbins*, 52 M.J. at 160. *See United States v. Martinez*, No. ACM 39973, 2022 CCA LEXIS 212, at *28-29 (A.F. Ct. Crim. App. April 6, 2022) (preemption doctrine completely prohibits applying Article 134, UCMJ, to conduct if another Article covers the conduct) (citing *United States v. Avery*, 79 M.J. 363, 366 (C.A.A.F. 2020)). The two cases address different issues, so they coexist without abrogation or other conflict. *Brewer v. City of Albuquerque*, 18 F.4th 1205, 1246 (10th Cir. 2021) (finding where two cases appear to conflict, generally "[courts] must endeavor to interpret [their] cases in a manner that permits them to coexist harmoniously") (quoting *United States v. Hansen*, 929 F.3d 1238, 1254 (10th Cir. 2019)).

Not only is there no conflict between *Robbins* and *Humphries*, but this Court has also continuously adhered to *Jones*'s interpretation of *Robbins* even after *Humphries.* First, consider *Bailey*, 2017 CCA LEXIS 639. Decided in 2017, this Court decided *Bailey* and followed *Jones*' s interpretation of *Robbins*. *Id.* at *7. This was five years after the 2012 decision in *Humphries*. This Court has reaffirmed *Jones* since. *See, e.g.*, *Dominguez-Sandoval*, No. ACM 40084, 2022 CCA LEXIS 203, *15 (citing *Robbins* for the proposition that "Appellant's guilty plea neither forfeits nor

waives the issue of preemption."); *Costianes*, 2016 CCA LEXIS 391, at *3-4 (citing both *Robbins* and *Jones* while holding that a guilty plea does not forfeit or waive preemption arguments); *Hill*, 2016 CCA LEXIS 291, at *4 (citing *Jones* while asserting that preemption is a non-waivable question of subject-matter jurisdiction). This Court should stay the course it's charted and maintain consistency.

Additionally, since the CAAF has not expressly overruled, abrogated, or otherwise limited *Robbins*, it remains "binding precedent on [this Court] unless and until [the CAAF] decides otherwise." *United States v. Patterson*, No. ACM 40426, 2024 CCA LEXIS 399, at *56 (A.F. Ct. Crim. App. Sept. 27, 2024) (Warren, J., concurring in part and in judgment). To the extent that the Government believes that subsequent cases undermined *Robbins*, "overruling by implication is disfavored." *United States v. Pack*, 65 M.J. 381, 383 (C.A.A.F. 2007) (citing *Eberhart v. United States*, 546 U.S. 12, 19-20 (2005)). As noted by the Supreme Court, courts should follow precedent, even if higher courts have called into question those cases underlying such precedent. *Everhart*, 546 U.S. at 19-20. Only higher courts enjoy the sole "prerogative of overruling [their] own decisions." *Id.* at 384 (quoting *Agostini v. Felton,* 521 U.S. 203, 237 (1997)). Courts of appeals, by contrast, "should follow the case which directly controls," while their higher court addresses any conflict in its decisions. *Id.*

This case raises an issue of preemption. It does not address an issue of a defective specification. *Robbins* controls this case, regardless of whether this Court finds a contradiction between *Robbins* and *Humphries*. Because *Robbins* has not been abrogated or overruled, it does not support overruling *Jones* under the second *stare decisis* factor. This Court, again, should refuse the Government's invitation to overrule *Jones*.

3. The third *stare decisis* does not support overruling *Jones* because doing so would undermine the reasonable expectations of servicemembers.

The third *stare decisis* factor that courts consider is "the reasonable expectations of servicemembers . . . ." *Andrews*, 77 M.J. at 399 (quoting *Blanks*, 77 M.J. at 242). The Government addresses this prong by only arguing that SSgt Marschalek should not receive a "windfall on appeal by claiming preemption." Ans. at 11. This argument fails to consider the heart of the preemption doctrine – to protect against the Government agreeing to a plea bargain it knows is illegal in order to lessen or circumvent its burden by eliminating vital elements. *See Grijalva*, 84 M.J. at 439 ("In the military justice system, the preemption doctrine exists to prevent the government from easing its evidentiary burden by eliminating vital elements from congressional established, enumerated offenses, and charging the remaining elements as a novel offense under Article 134[.]") (Hardy, J., concurring) (citing *Avery*, 79 M.J. at 366).

In addressing this prong on its merits, the amount of time that a precedent survives is relevant to servicemembers' expectations. *See United States v. Quick*, 74 M.J. 332, 337 (C.A.A.F. 2015) ("[I]n the over sixty years of this court's consistent interpretation, [*United States v. Miller*, 27 C.M.R. 370 (C.M.A. 1959)] has become an established component of the military justice system."). *Jones* has been around since 2008 – seventeen years. While not as long as the sixty years seen in *Quick*, seventeen years still is a substantial amount of time.

Also, this Court has reaffirmed *Jones*'s conclusion that preemption is non-waivable at least three times. *See Dominguez-Sandoval*, 2022 CCA LEXIS 203, *15; *Costianes*, 2016 CCA LEXIS 391, at *3-4; *Hill*, 2016 CCA LEXIS 291, at *4. This Court affirming a principle multiple times reinforces the expectations of servicemembers and further counsels against overruling the precedent. *See Quick*, 74 M.J. at 337.

The third *stare decisis* factor suggests that this Court should not overrule *Jones.*

4. *Jones* strengthens confidence in the military justice system under the fourth *stare decisis* factor because it prevents the Government from conveniently dispensing with hard-to-prove mens rea elements.

As explained in SSgt Marschalek's opening brief, by reversing SSgt Marschalek's conviction, this Court sends a message that the Government may not engage in the type of surreptitious activity that the CAAF warned about in *United States v. Gleason*, 78 M.J. 473, 477 (C.A.A.F. 2019) (Ryan, J., dissenting). The public enjoys a strong interest in ensuring the Government does not cut corners (like by eliminating a mens rea element) when seizing a servicemembers life, liberty, or property – even in the context of a plea agreement. *Id.* While the Government makes a number of allegations against SSgt Marschalek seeking a "windfall" or pulling a "bait-and-switch," Ans. at 12-13, the preemption doctrine protects the very bait-and-switch attempted by the Government here – agreeing to a deal that includes a charge it knows has been preempted in order to avoid having to prove a mens rea. SSgt Marschalek receiving protection from this conduct under the preemption doctrine is not a bait-and-switch, but rather what the law requires. *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) ("[I]t is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charge of its own existence.").

Omitting a mens rea element when charging a crime under Article 134 when a different Article covers the same conduct and *requires a mental state* undermines public perception of fairness. Here, the Government initially proceeded with a charge under Article 120c, UCMJ, where it would have needed to prove that SSgt Marschalek acted intentionally. Through plea negotiations, the Government agreed to go forward on a charge that removed the mens rea and created a preemption problem. This is not a situation that is totally dependent on the accused, as the Government heavily contends (Ans. at 11-12); the Government also has a role to ensure the plea agreements to which it agrees are valid, lawful, and in accordance with public policy. *Jones* maintains that balance by preventing Article 134 from becoming a work around for otherwise unproveable crimes and

criminalizing conduct that is "composed of a residuum of elements" from an enumerated article. *United States v. Grijalva*, 84 M.J. 433, 439 (C.A.A.F. 2024) (Hardy, J., concurring in the judgment). The public has no interest in allowing the military justice system to dispense with required elements under the general article because the Government overplayed its hand in the first place.

Jones improves the military's public perception by ensuring that the Government only charges servicemembers with real crimes. To accept the Government's argument in this case would be to say that courts-martial have subject-matter jurisdiction over a crime that fundamentally cannot exist under Article 134, UCMJ. *Martinez*, No. ACM 39973, 2022 CCA LEXIS 212, at *28-29. To permit such a practice "diminishes respect for the court, and . . . the integrity of the criminal justice system." *State v. Gordon*, 943 N.W.2d 1, 3 (Iowa 2020) ("permitting charges to be filed that are known to be bogus to allow defendants to escape adverse consequences diminishes respect for the court and the public's confidence in the integrity of the criminal justice system" (citing *Iowa Sup. Ct. Disciplinary Bd. v. Howe*, 706 N.W.2d 360, 379 (Iowa 2005))).

5. The Government offers no special justification for deviating from *Jones.*

None of the *stare decisis* factors counsel in favor of overruling *Jones.* But even accepting (for the sake of argument), that all factors *did* weigh in favor, the Government proffers no "special justification" for their request. *See Andrews*, 77 M.J. at 399 (citing generally *Halliburton Co.*, 573 U.S. 258). The Government complains about the possible impact of this case (and *Jones*) on future cases, Ans. at 12-13, but history does not bear these concerns out. *Jones* has been the law for seventeen years. The Government's brief offers no evidence that *Jones* causes any such issues. Without any special justification beyond a disagreement with an interpretation of *Robbins*, there is no reason to overrule *Jones.*

B. Because *Jones* is still good law, SSgt Marschalek did not waive his preemption argument.

As explained at length, *Jones* is still good law. The Government concedes that, only "if this Court overturns its precedent in *Jones*, then it should find that [SSgt Marshalek]" waived his preemption challenge. Ans. at 13. Since preemption is not waivable, SSgt Marschalek's argument is reviewable on appeal.

C. Under the preemption analysis framework in *United states v. Grijalva*, this case does not require analysis of legislative history; the relevant charge is preempted.

The Government spends a majority of its argument on the merits of preemption discussing legislative history. *See* Ans. at 15-18. It argues that "[a]ny intent to preempt must be explicit." *Id.* at 16. No such requirement exists after the CAAF's decision in *United States v. Grijalva,* 84 M.J. 433 (C.A.A.F. 2024). When determining if a charge is preempted, if the elements are "essentially the same," there is "no need to delve into legislative history to ascertain anything further intent of Congress." *Id.* at 439. As stated in SSgt Marschalek's opening brief, "[p]er *Grijalva*, in cases where the elements are essentially the same, the CAAF will presume congressional intent in favor of preemption, without delving into any legislative history." Br. on Behalf of Appellant at 6.

The one exception to the rule in *Grijalva* is when the legislative history contradicts the statute's plain language. *Grijalva,* 84 M.J. at 439. The Government does not point to any such contradiction. Instead, it relies solely on extrapolations from omissions, and mere silence. These do not trigger *Grijalva*'s exception, and legislative history may be safely ignored.

The Government then attempts to argue that the Article 134, UCMJ, offense is not made up of the residuum of the elements from Article 120c, UCMJ. Ans. at 16-17. The Government appears to concede that the two offenses "share two similar elements," and that the charges only "diverge on their third element." *Id.* at 17. In support, the Government cites *United States v. Phillips,* 70 M.J. 161, 165 (C.A.A.F. 2011). Ans. at 16-17. But *Phillips* did not address preemption. Instead, *Phillips*

addressed the proving of elements at trial. *Phillips*, 70 M.J. at 165 (explaining that terminal element must be proven before "the trier of fact," which indicates the case application is limited to adjudications of guilt).

The relevant case on this issue is *United States v. Avery*, 79 M.J. 363 (C.A.A.F. 2020) – a case the Government conspicuously does not discuss in this section of their brief. Ans. at 17-18. In *Avery*, the CAAF clearly stated: "For purposes of [preemption] analysis, *we do not consider the terminal element of Article 134, UCMJ*." *Id.* at 368 (emphasis added). At least one other Service Court of Criminal Appeals had cause to follow suit. *See United States v. McDonald*, No. ARMY 20180387, 2020 CCA LEXIS 101, at *8 n.4 (A. Ct. Crim. App. Mar. 31, 2020) ("We will not consider the terminal element of Article 134, UCMJ, as neither did our superior court in conducting its [preemption] analysis on the same issue.").

Given the Government's concession about the first two elements, and the clear statements from *Avery* and *McDonald*, the Government's residuum argument lacks support. This Court should respectfully find SSgt Marschalek's charge preempted.

WHEREFORE, SSgt Marschalek respectfully requests that this Court set aside his conviction and sentence.

II.

In the alternative, SSgt Marschalek's plea was improvident as the military judge abused his discretion by not resolving an issue of fact as to the actus reus and incorrectly determining SSgt Marschalek's conduct to be indecent.

The military judge abused his discretion in accepting SSgt Marschalek's plea of guilty to indecent conduct. He abused his discretion when he failed to resolve an issue of fact regarding what conduct constituted the actus reus in this case and again when he allowed the record to leave substantial doubt as to whether SSgt Marschalek's admitted actus reus – standing in his doorway naked on two separate occasions for ten to twenty seconds in public view - constituted "indecent

conduct."

A. The military judge failed to establish a factual basis for the actus reus.

In accepting SSgt Marschalek's guilty plea, the military judge needed a set of factual circumstances that were admitted by the accused and support the guilty plea. *United States v. Simmons*, 63 M.J. 89, 92 (C.A.A.F. 2006); Rule for Courts-Martial (R.C.M.) 910(e). A military judge may rely upon a stipulation of fact in conjunction with the *Care*[2] inquiry colloquy, but there must also be sufficient evidence that the accused is "convinced of, and able to describe[,] all the facts necessary to establish guilt." *United States v. Faircloth,* 45 M.J. 172, 174 (C.A.A.F. 1996) (quoting R.C.M. 910(e), Discussion, *Manual for Courts-Martial*, *United States* (1995 ed.);[3] *see also United States v. Sweet*, 42 M.J. 183, 185-86 (C.A.A.F. 1995) (discussing how the requirements of *Care* have been codified in R.C.M. 910).

Here, the military judge failed to clarify what conduct constituted the actus reus. The Government concedes that the proper actus reus for the charged offense was SSgt Marschalek allegedly "standing at or near the door of his residence naked in view of the public." Ans. at 20 (citing Corrected Entry of Judgment at 1-2). Further, the Government recognizes that the stipulation of fact contained a different and more incriminating actus reus; more specifically, allegations from two potential witnesses that they observed SSgt Marschalek with either his hand on his penis or posing in the door frame while completely nude. Ans. at 21; Pros. Ex. 1 at 1-2. However, the Government contends that this additional actus reus, which the military judge failed to reconcile with the intended actus reus, did not deprive SSgt Marschalek of his right to fair notice of the offense to which he was pleading guilty to. Ans. at 21. The Government's argument fails on two grounds.

First, the Government supports its position by arguing that SSgt Marschalek had fair notice

[2] *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247, 251 (C.M.A. 1969).
[3] This particular language has not changed to date.

because he had signed the stipulation of fact, admitted to the military judge to have read the stipulation, and responded to the military judge that he was not confused about or disagreed with the stipulation of fact. Ans. at 22. Nonetheless, there is nothing in the stipulation of fact to suggest that SSgt Marschalek had notice that the military judge could potentially convict or punish him for the conduct alleged by these two potential witnesses or to suggest to him that he was in fact pleading guilty to touching his penis or posing completely nude in his doorway. Pros. Ex. 1 at 1-16.

Concerningly, the Government supports its position by claiming that "Appellant's signature was on the stipulation of fact, he agreed that the contents were accurate, and he agreed on the record that the witnesses would testify to that information." Ans. at 24. This statement is incorrect. Although SSgt Marschalek agreed that the matters in the stipulation of fact are true and correct, R. at 26, the stipulation of fact does not include any affirmative statement that SSgt Marschalek agreed that the *contents* of the witness statements were true and correct. Pros. Ex. 1 at 1-16. Instead, SSgt Marschalek agreed that if called as witnesses, these individuals would testify as such. *Id.* at 2. The language and structure of the stipulation of fact support this argument. The witness statements are included in paragraphs four and five of the stipulation of fact. *Id.* at 2. Paragraph five begins with "If Ms. [A.B.] were to testify, she would testify to the following . . . ." while paragraph six begins with "If Ms. [L.B.] were to testify, she would testify to the following . . . ." *Id.* No other paragraph begins with this language. *Id.* at 1-16. As written, these witness descriptions serve as stipulated testimony. SSgt Marschalek agrees that they would testify consistent with their descriptions, but at no point in the stipulation of fact does he agree to truthfulness of the *content* of these descriptions.

Similarly, SSgt Marschalek also did not explicitly agree to the content of these witness statements during the *Care* inquiry. At no point in the *Care* inquiry did the military judge ask SSgt Marschalek whether his hand was on his penis or if he stood in the doorway posing during the two incidents when he allegedly appeared naked in his doorway. R. at 17-72. The military judge did ask

SSgt Marschalek, "Is it your belief now, having seen the statements of these particular witnesses, that they did, in fact, see you on those dates as they have described?" R. at 36. SSgt Marschalek responded, "Yes, your honor." *Id*. From the exchange, though, it is unclear whether SSgt Marschalek agreed that the two individuals in fact saw him naked or if he was agreeing that he engaged in the more egregious behavior they described.

The context of the *Care* inquiry suggests that SSgt Marschalek's agreement was to the more limited fact that the two potential witnesses saw him naked. Prior to this exchange, SSgt Marschalek had described his conduct as merely opening the door to let in air, while naked, on two occasions for ten to twenty seconds each time. R. at 29-36. The military judge's subsequent line of questioning involved the potential of someone seeing SSgt Marschalek naked. *Id.* at 32-36. SSgt Marschalek agreed that there was not only the possibility that someone would see him naked, but that the two witnesses did in fact see him naked. *Id.* at 30, 36. It was at this point the military judge asked about whether SSgt Marschalek agreed with the witness statements. *Id*. When SSgt Marschalek admitted he agreed with the witness statements, the military judge asked no questions to clarify whether SSgt Marschalek agreed with the entirety of their statements, to include the more egregious conduct they alleged. *Id.* at 36-72. The military judge also failed to address the inconsistency between SSgt Marschalek's repeated description of his conduct as appearing naked in his doorway naked for ten to twenty seconds while propping a door open on two occasions and the more egregious conduct alleged by the witnesses.

Taken together, the stipulation of fact and the *Care* inquiry leave unresolved the merits of the witness statements. If anything, they reveal that SSgt Marschalek did not have proper notice of what he was pleading guilty to. He makes clear in both the stipulation of fact and the *Care* inquiry that he stood at his doorway twice for ten to twenty seconds while naked. Pros. Ex. 1 at 1-16; R. at 17-72. At no point does he concede or agree with the Government's assertion that he had his hand on his

penis or that he was lingering while posing at the door. *Id.* Throughout the *Care* inquiry, the military judge failed to reconcile this disconnect. R. at 17-72

Second, the Government portends that the facts surrounding the more incriminating actus reus were offered not for the actus reus element, but rather for the terminal element requirement. Ans. at 21. The record, however, does not support this argument. For example, the stipulation of fact includes language to support why SSgt Marschalek's conduct was of a nature to bring discredit upon the armed forces. Pros. Ex. 1 at 3. This language is vague and never utilizes the specific allegations set forth by the two potential witnesses. Instead, it provides that "[b]ased on complaints by local British nationals, SSgt Marschalek understands that his conduct is of a nature that brings discredit on the armed forces . . . ." *Id.* From this language, though, it is unclear whether the complaints involve SSgt Marschalek's fleeting nudity or the more egregious conduct alleged by the witnesses. Similarly, during the *Care* inquiry, when asked why his conduct satisfied the terminal element, SSgt Marschalek provided that "[t]he women that witnessed me naked, as well as the local police, eventually became aware that I was a member of the United States Air Force." R. at 45. Again, though, there was no mention or reference to the content of those witness statements included within the stipulation of fact or any sort of agreement on SSgt Marschalek's part that he touched his penis or posed nude in his doorway.

Ultimately, the stipulation of fact included the conduct believed by both parties to be the actus reus – SSgt Marschalek standing naked at the doorway of his home on two occasions for ten to twenty seconds each time. In turn, the stipulation of fact also included a more severe and significant actus reus – allegations from two potential witness that SSgt Marschalek had his hand on his penis on one occasion and that on another occasion he was lingering and posing at the door – that SSgt Marschalek never agreed to substantively. The military judge failed to clarify how he used this more incriminating actus reus and to what conduct formed the basis for SSgt Marschalek's guilty plea. If the military

judge found SSgt Marschalek guilty for the conduct alleged by these two women, SSgt Marschalek never admitted to such conduct. For those reasons, the military abused his discretion by "fail[ing] to obtain from the accused an adequate factual basis to support the plea." *United States v. Byunggu Kim*, 83 M.J. 235, 238 (C.A.A.F. 2023) (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

B. The military judge failed to establish a factual basis that SSgt Marschalek's conduct was indecent.

The CAAF has recognized that "conviction of a criminal offense under the Constitution requires proof of every element of the offense beyond a reasonable doubt." *United States v. Wells*, 85 M.J. 154, 156 (C.A.A.F. 2024) (citing *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993)). As necessitated by SSgt Marschalek's guilty plea, the military judge carried the responsibility of ensuring SSgt Marschalek plead to all the elements of Article 134, that there was a factual basis to support SSgt Marschalek's plea as to all the elements, and that the conduct in question was not protected. *See Byunggu Kim*, 83 M.J. at 238; *see also United States v. Van Velson*, No. ACM 40401, 2024 CCA LEXIS 283, at *6-7 (A.F. Ct. Crim. App. July 12, 2024) (highlighting that military judges must explain the distinction between constitutionally protected behavior and criminal conduct, ensuring the accused understands the differences). The military judge failed in these responsibilities.

"The determination of whether an act is indecent requires examination of all the circumstances, including the age of [any applicable] victim, the nature of the request, the relationship between the parties, and the location of the intended act." *United States v. Rollins*, 61 M.J. 338, 344 (C.A.A.F. 2005). "The definition of indecency requires consideration of both the circumstances of the act itself and societal standards of common propriety." *United States v. Burkhart*, 72 M.J. 590, 596 (A.F. Ct. Crim. App. 2013), *overruled on other grounds by*, *United States v. Cabuhat*, 83 M.J. 755, 762 (A.F. Ct. Crim. App. 2023).

SSgt Marschalek's conduct consisted of quickly opening his door, while naked, to let some air in after working out on two separate occasions for ten to twenty seconds each time. R. at 34; Pros.

Ex. 1 at 2. The Government concedes this conduct constituted the actus reus of the charged offense. Ans. at 20. There is nothing inherently indecent about short and fleeting public nudity. Consider this Court's decision in *United States v. Carlile*, No. ACM 40053, 2022 CCA LEXIS 542, at *28 (A.F. Ct. Crim. App. Sept. 21, 2022), *rev. denied*, 83 M.J. 270 (C.A.A.F. 2023). In *Carlile,* this Court considered whether an Accused sending unsolicited nude photos to two underage individuals constituted indecent conduct. *Id.* at *31-36. This Court did not rest upon mere nudity in deeming this conduct to be indecent, but rather focused on the age of the receiving individuals, the nature of their relationships, and the fact the pictures were unsolicited and unwanted. *Id.* at *36-37. It was only by considering all of these factors that this Court determined the accused's conduct offended "societal standards of common propriety and thus, was indecent." *Id.* at *37.

Applied to SSgt Marschalek's case, SSgt Marschalek did not provide similar facts or circumstances during his *Care* inquiry that elevated his incidental nudity to indecent conduct. While SSgt Marschalek does admit that the possibility of someone seeing him did sexually excite him, R. at 36, there was still no evidence presented comparable to that in *Carlile* to suggest that SSgt Marschalek's conduct offended societal standards of common propriety. The Government asserts otherwise, but to support that argument, it relies once again on the additional conduct alleged by the two potential witnesses in the stipulation of fact – the allegations that SSgt Marschalek was holding his penis and posing with his genitals exposed. Ans. at 24. SSgt Marschalek never asserted this conduct formed the basis of his plea—nor was he ever advised as much.

The Government is trying to have it both ways with these disputed facts. In an earlier argument, the Government claimed that these potential witness statements did not amount to an additional actus reus and were instead offered to prove the terminal element. Ans. at 21. But in this portion of its answer, the Government asserted that these disputed facts are what make SSgt Marschalek's conduct indecent. Ans. at 24. Such an argument suggests that the actus reus was in fact

SSgt Marschalek touching his penis or posing with his genitals exposed—conduct which SSgt Marschalek never explicitly plead guilty to.

While the Government again makes the assertion that SSgt Marschalek agreed that the contents of these statements were accurate, that is not the case. Ans. at 24. SSgt Marschalek merely stipulated that these witnesses would provide such testimony if called as witnesses. *See supra* at II.A. At no point did he admit to such conduct or provide that these statements were true or accurate. *Id.* Consequently, whether SSgt Marschalek plead guilty to touching his penis and posing at his door or fleetingly appearing naked in his doorway on two occasions for ten to twenty seconds each while letting in air remains an unresolved issue. Most importantly, though, SSgt Marschalek never admitted that touching his penis or posing at the doorway was the conduct underlying his plea. As such, the analysis of whether SSgt Marschalek's conduct was indecent rests upon whether there was sufficient evidence presented to support that the conduct he admitted to – standing in the doorway naked for ten to twenty seconds on two separate occasions, while propping a door open to let in air after working and removing clothes to wash them – was indecent. R. at 34; Pros. Ex. 1 at 2. There is insufficient evidence to support such a finding. *See* Br. on Behalf of Appellant at 17-18.

In sum, the miliary judge abused his discretion throughout SSgt Marschalek's *Care* inquiry. The military judge failed to resolve an issue of fact regarding what behavior constituted the actus reus and ultimately found conduct to be indecent that was not legally or factually indecent. As such, SSgt Marschalek's guilty plea was improvident.

WHEREFORE, SSgt Marschalek respectfully requests that this Court set aside his conviction and sentence.

III.

The military judge erred in admitting Prosecution Exhibits 4 and 5 into evidence under R.C.M. 1001 as matters in aggravation.

The CAAF's decision in *United States v. Nourse*, 55 M.J. 229 (C.A.A.F. 2001), supports that the military judge erred in admitting Prosecution Exhibits 4 and 5. In *Nourse*, the CAAF clarified that evidence of other crimes may be admitted under R.C.M. 1001(b)(4) so long as these other crimes are part of a "continuous course of conduct involving the same or similar crimes, the *same* victims, *and* a similar situs within the military community." *Id.* at 231 (quoting *United States v. Mullens*, 29 M.J. 398, 400 (C.M.A. 1990)) (emphasis added). A plain reading of both *Nourse* and *Mullens*, where the conjunctive "and" is used, strongly supports that all requirements – to include the same victims – must be met before evidence of other crimes may be admitted under R.C.M. 1001(b)(4).

In SSgt Marschalek's case, Prosecution Exhibits 4 and 5 discuss a passerby seeing SSgt Marschalek naked in his window. Pros. Exs. 4, 5. There is no evidence to suggest this same passerby saw SSgt Marschalek naked on the two incidents the Government alleged that he stood in his doorway naked. In fact, in the two anticipated testimonies presented by the Government as part of the stipulation of fact, neither of these alleged witnesses claim they were the passerby that previously saw SSgt Marschalek naked in his window. Pros. Ex. 1 at 2. The purported victim from the potential misconduct present in Prosecution Exhibits 4 and 5 is not the same victim from the charged offenses.

The Government makes the argument that *Nourse* applies only to named victims, but not to unnamed victims. Ans. at 31-32. While creative, there is no support for this argument. The CAAF makes no such distinction in *Nourse* or in *Mullens*. *See Nourse,* 55 M.J. at 231; *see also Mullens,* 29 M.J. at 400. This Court appears to agree that *Nourse* is limited, although not in the way suggested here by the Government. Recently, in *United States v. Jackson*, No. ACM 40310, 2024 CCA LEXIS 9 (A.F. Ct. Crim. App. Jan. 11, 2024), this Court noted that the "CAAF has not required that aggravation evidence of uncharged misconduct involve precisely the same persons as the charged

misconduct to be admissible under R.C.M. 1001(b)(4)." *Id.* at *15. In *Jackson*, the uncharged misconduct involved the sale of two tablets of alprazolam. *Id.* This uncharged misconduct mirrored the charged misconduct – to include the same type of drug – albeit with a different with a different buyer. *Id.* In finding that such prior misconduct was admissible under R.C.M. 1001(b)(4), this Court appears to suggest a sliding scale analysis: the more similar the conduct is, the less significance the Court will give to whether the victims are precisely the same. *See generally id.* at *15-16. This approach seems to be the one adopted by the military judge here as well. R. at 107-08 (noting "the court does not take the *Norris* [sic] case as all or nothing" and the victims are only a "factor in considering whether or not the conduct is directly related to the offense").

But the proper reading of *Nourse* and *Mullens* is a plain reading: to introduce uncharged misconduct under R.C.M. 1001(b)(4), the victims must be the same and the means identical.[4] Same, BLACK'S LAW DICTIONARY 253 (11th ed. 2019) Nonetheless, should this Court apply the analysis set forth in *Jackson*, SSgt Marschalek still prevails. As discussed, the conduct in *Jackson* was nearly identical, with the Accused selling the same drug just to different individuals. *Jackson*, 2024 CCA LEXIS at *15. The CAAF's predecessor court made a similar determination (pre- *Nourse and Mullens)* in *United States v. Ross*, 34 M.J. 183 (C.M.A. 1992). In *Ross*, the accused was charged with altering enlistment aptitude tests for four individuals, but the Court of Military Appeals (CMA) upheld admission of the accused altering dozens of tests. *Id.* at 187. Much like in *Jackson*, the CMA looked past the fact that the victims were not the same because of how similar the conduct was. *Id.*

Here, the uncharged misconduct admitted against SSgt Marschalek was not sufficiently identical to his charged misconduct to justify looking past the fact that the victims are not the same.

[4] Of note, the CAAF in *Mullens* included some qualifying language when discussing the requirements for introducing prior misconduct as aggravation in sentencing, but not when discussing the requirement of "same victims." 29 M.J. at 400. The CAAF allows for "*same* or *similar*" crimes and a "*similar*" situs within the military community, but explicitly limited victims to the being the "*same*." *Id.*

Most significantly, the conduct involved in Prosecution Exhibits 4 and 5 occurred within the home. Pros. Exs. 4-5; R. at 93-108. In contrast, the charged misconduct involved conduct that exposed SSgt Marshalek's nudity outside the home. Pros. Ex. 1 at 2. As noted throughout the Government's Answer, the primary aggravator in SSgt Marshalek's case was the public nature of his nudity. Ans. at 23-25. For instance, the Government noted that "Appellant showed his genitals to the neighborhood in hopes anyone could see." Ans. at 33. This conduct is different from that discussed in Prosecution Exhibits 4 and 5, where SSgt Marshalek opened his window from within his own home and a passerby happened to see him naked. Pros. Exs. 4-5; R. at 93-108.

The Government's argument seems to be that it is free to use uncharged misconduct that is not the same, along with victims who are not the same, for sentencing purposes so long as it does not name victims in a charge sheet. Such a rule would swallow an accused's protection to be punished only for his offenses. Article 56, UCMJ, 10 U.S.C. § 856. And punished only for "the nature and circumstances of the offense and this history and characteristics of the accused," along with the "seriousness of the offense." *Id.* This rule would give the Government a powerful weapon to purposely avoid specifically naming victims in a charge sheet, in hopes that some prior misconduct – that the Government is unable to prove – can be later used in sentencing to increase punishment. SSgt Marschalek has already fallen victim to such Government efforts as the Government's primary sentencing case was to portray him as a serial flasher with no remorse. Absent Prosecution Exhibits 4 and 5, the Government would have been unable to do so. As such, the admission of these exhibits substantially prejudiced SSgt Marschalek.

WHEREFORE, SSgt Marschalek respectfully requests that this Court set aside his sentence.

Respectfully submitted,

ANTHONY J. GHIOTTO, Colonel, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: anthony.ghiotto.2@us.af.mil

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 Air Force Government Trial and Appellate Operations Division on June 20, 2025.

ANTHONY J. GHIOTTO, Colonel, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: anthony.ghiotto.2@us.af.mil

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32776**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
HANNES MARSCHALEK	)	**PANEL CHANGE**
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 5th day of September, 2025,

ORDERED:

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
MORGAN, CHRISTOPHER S., Colonel, Appellate Military Judge

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 S32776**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Hannes MARSCHALEK	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

Oral argument is hereby ordered on the following issues:

I.

WHETHER APPELLANT'S CONVICTION UNDER ARTICLE 134, UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. § 934, WAS BARRED BY THE PREEMPTION DOCTRINE BECAUSE THE MISCONDUCT IS COVERED BY ARTICLE 120c, UCMJ, 10 U.S.C. § 920c.[*]

II.

WHETHER THE MILITARY JUDGE FAILED TO RESOLVE AN ISSUE OF FACT AS TO ACTUS REUS, AND FAILED TO DETERMINE WHETHER APPELLANT'S CONDUCT FELL WITHIN A PROTECTED LIBERTY INTEREST, THEREBY RENDERING APPELLANT'S GUILTY PLEA IMPROVIDENT.

Accordingly, it is by the court on this 8th day of September, 2025,

ORDERED:

Oral argument in the above-captioned case will be heard at **1145 hours on Wednesday, the 29th of October 2025**, in the Moot Courtroom (Room 165)

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[*] *See specifically* section a.(c) of 10 U.S.C. § 920c. Counsel should also address whether this issue was waived by Appellant's unconditional guilty pleas.

at the University of Denver Sturm College of Law, Ricketson Law Building, 2255 E. Evans Avenue, Denver, Colorado, 80210.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32776**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Hannes MARSCHALEK	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

In view of the court's selection of the above-captioned case to be heard as part of the court's oral argument outreach program at the University of Denver Sturm College of Law on 29 October 2025, the court invites the filing of *amicus curiae* briefs on the specified issues in support of Appellant or Appellee by law students from the University of Denver Sturm College of Law acting under supervising attorneys. *See* JT. CT. CRIM. APP. R. 22(a); A.F. CT. CRIM. APP. R. 14.1(c). Such *amicus curiae* briefs will be filed in accordance with this court's Rules of Practice and Procedure. *See* JT. CT. CRIM. APP. R. 13, 17, and this court's accompanying rules.

Supervising attorneys will be deemed admitted *pro hac vice*, subject to filing an application setting forth required qualifications as directed by the court. JT. CT. CRIM. APP. R. 9(c). The Clerk of Court will provide the application.

Further, law students are invited to present oral argument relating to their briefs on the date specified above. *See* JT. CT. CRIM. APP. R. 22, 25.

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

ORDERED:

Any *amicus curiae* briefs filed in support of Appellant or Appellee shall be filed with the court **not later than 16 October 2025**. Should law students need additional time to file their briefs, *see* A.F. CT. CRIM. APP. R. 23.3(m), *Motion for Enlargement of Time*, for guidance.

Students are reminded that names of victims and witnesses will be identified by initials only in their briefs and during oral argument.

While the court allots counsel of record for each side 30 minutes to present oral argument, A.F. CT. CRIM. APP. R. 25.2(b), the court affords law students **15 minutes** for each side to present oral argument on the specified issues.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**NOTICE OF APPEARANCE**
Appellee	)	
	)	
v.	)	
	)	Before Special Panel
Staff Sergeant (E-5)	)	
HANNES MARSCHALEK	)	No. ACM S32776
United States Air Force	)	
Appellant	)	15 September 2025

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

Pursuant to Rules 12 and 13 of this Honorable Court's Rules of Practice and Procedure, the undersigned, an attorney admitted to practice before this Court, hereby enters his appearance as an appellate counsel for the appellant in the above-captioned case.

Respectfully submitted,

[redacted]

JOSHUA L. LOPES, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4770
joshua.lopes@us.af.mil

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 15 September 2025.

[redacted] USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4770
joshua.lopes@us.af.mil

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**NOTICE OF APPEARANCE OF GOVERNMENT COUNSEL**
v.	)	Before Special Panel
Staff Sergeant (E-5) **HANNES MARSCHALEK** United States Air Force *Appellant*	)	No. ACM S32776 18 September 2025

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

The undersigned hereby enters appearance as counsel for the United States in the above captioned case pursuant to Rule 12, Air Force Court of Criminal Appeals Rules of Practice and Procedure. Counsel will present oral argument.

[redacted]

REGINA HENENLOTTER, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate
Operations Division
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Appellate Defense Division on 18 September 2025.

REGINA HENENLOTTER, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate
Operations Division
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES ***Appellee,***	**No. ACM S32776**
v.	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
HANNES MARSCHALEK **Staff Sergeant (E-5)** **U.S. Air Force,** ***Appellant.***	**Special Panel**
	9 October 2025

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

Pursuant to Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, students from the University of Denver Sturm College of Law, who are invited to file an *amicus curiae* brief on behalf of Appellant, hereby move for their first enlargement of time to file their *amicus curiae* brief. The students were invited to participate as amici on behalf of Appellant on **9 September 2025**. The current deadline for the *amicus curiae* brief is no later than **16 October 2025**. The students request an enlargement of 6 days, which will end on **22 October 2025**. On the date requested, 47 days will have elapsed from the date this completed record was received from this Court. The law students drafting the *amicus curiae* brief are all students at the University of Denver Sturm College of Law with commitments to other classes, projects, and employment. None of the students have drafted an *amicus curiae* brief before.

WHEREFORE, students from the University of Denver Sturm College of Law, invited amici on behalf of the Appellant, request that this Honorable Court grant the requested enlargement.

Respectfully Submitted,

Professor Katherine Steefel, Esq.
Supervising Attorney
University of Denver
Sturm College of Law

Jonah Kunisch
Student in Support of Appellant
University of Denver
Sturm College of Law

Jillian Romps
Student in Support of Appellant
University of Denver
Sturm College of Law

Alexander Van Wagoner
Student in Support of Appellant
University of Denver
Sturm College of Law

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 Supervising Attorney and Students in support of Appellee on 9 October 2025.

[redacted]

Professor Katherine Steefel, Esq.
Supervising Attorney
University of Denver
Sturm College of Law

[redacted]

Jonah Kunisch
Student in Support of Appellant
University of Denver
Sturm College of Law

[redacted]

Jillian Romps
Student in Support of Appellant
University of Denver
Sturm College of Law

[redacted]

Alexander Van Wagoner
Student in Support of Appellant
University of Denver
Sturm College of Law

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Staff Seargent (E-5) **HANNES MARSCHALEK** United States Air Force *Appellant.*	)	**MOTION FOR ENLARGMENT OF TIME (FIRST)** Before Panel No. 1 No. ACM S32776 8 October 2025

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

Pursuant to Rule 23(m)(1) and (3) of this Honorable Court's Rules of Practice and Procedure, students from the University of Denver Sturm College of Law in support of Appellee hereby move for their first enlargement of time to file an *amicus brief*. The students in support of Appellee were invited to participate as amici on **9 September 2025.** The *amicus brief* in support of Appellee was originally due on **16 October 2025** and we respectfully request an enlargement for a period of 6 days, which will end on **22 October 2025**.

The students in support of Appellee would benefit from additional time to diligently brief and research the issues presented. In addition to their first time drafting an *amicus brief*, the students have academic obligations, such as preparing for law school classes and studying for a midterm examination, which constitutes a significant portion of their course grade.

WHEREFORE, students from the University of Denver Sturm College of Law in support of Appellee respectfully request that this Honorable Court grant the requested enlargement of time.

Respectfully Submitted,

[redacted]

Professor Justin Marceau, Esq.
Supervising Attorney
University of Denver
Sturm College of Law

[redacted]

Kamilla Vaczi
Student in Support of Appellee
University of Denver
Sturm College of Law

[redacted]

Ari Klotas
Student in Support of Appellee
University of Denver
Sturm College of Law

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 Supervising Attorney and Students in support of Appellant on 8 October 2025.

Professor Justin Marceau, Esq.
Supervising Attorney
University of Denver
Sturm College of Law

Kamilla Vaczi
Student in Support of Appellee
University of Denver
Sturm College of Law

Ari Klotas
Student in Support of Appellee
University of Denver
Sturm College of Law

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32776**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Hannes MARSCHALEK	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 8 September 2025, this court ordered oral argument in the above-captioned case on the following issues:

I.

WHETHER APPELLANT'S CONVICTION UNDER ARTICLE 134, UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. § 934, WAS BARRED BY THE PREEMPTION DOCTRINE BECAUSE THE MISCONDUCT IS COVERED BY ARTICLE 120c, UCMJ, 10 U.S.C. § 920c.*[*]

II.

WHETHER THE MILITARY JUDGE FAILED TO RESOLVE AN ISSUE OF FACT AS TO ACTUS REUS, AND FAILED TO DETERMINE WHETHER APPELLANT'S CONDUCT FELL WITHIN A PROTECTED LIBERTY INTEREST, THEREBY RENDERING APPELLANT'S GUILTY PLEA IMPROVIDENT.

Due to a lapse of appropriated funds currently in effect, the court amends the venue for the oral argument.

Accordingly, it is by the court on this 22d day of October, 2025,

ORDERED:

Oral argument in the above-captioned case will now be heard at 1345 hours EST/1145 hours MT on Wednesday, the 29th day of October 2025, in the Air

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[*] *See specifically* section a.(c) of 10 U.S.C. § 920c. Counsel should also address whether this issue was waived by Appellant's unconditional guilty pleas.

Force Court of Criminal Appeals courtroom (Suite 1900), Joint Base Andrews – Naval Air Facility Washington, Maryland 20762.

All other instructions from the court's 8 September 2025 order, and the court's 9 September 2025 order (inviting amicus curiae briefs and oral argument), remain in effect.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32776**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
HANNES MARSCHALEK	)	**PANEL CHANGE**
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 22nd day of October, 2025,

ORDERED:

The record of trial in the above styled matter is withdrawn from a Special Panel and referred to another Special Panel for appellate review.

The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
GRUEN, PATRICIA A., Colonel, Senior Appellate Military Judge
MORGAN, CHRISTOPHER S., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

JACOB B. HOEFERKAMP, Capt, USAF
Chief Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Staff Seargent (E-5) **HANNES MARSCHALEK** United States Air Force *Appellant.*	)	***AMICUS CURIAE BRIEF UNIVERSITY OF DENVER STURM COLLEGE OF LAW*** Before Panel No. 1 No. ACM S32776 22 October 2025

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

BRIEF OF *AMICUS CURIAE* UNIVERSITY OF DENVER STURM COLLEGE OF LAW IN SUPPORT OF APPELLE

22 October 2025

Justin Marceau Esq.
Counsel for Amicus Curiae
University of Denver Sturm
College of Law

(U.S. Air Force) (Appellate Brief)
U.S. Air Force Court of Criminal Appeals.

UNITED STATES, Appellee,

v.

HANNES MARSCHALEK, Staff Sergeant (E-5) United States Air force, Appellant.

No. ACM-S32776
October 22, 2025

Brief of Amicus Curiae on Behalf of Appellee

Justin Marceau, Amicus Curiae, University of Denver Sturm College of Law, (2255 E Evans Ave, Denver, CO 80210, Ari Klotas, Kamilla Vaczi Student Counsel.

***i.** *TABLE OF CONTENTS*

***ii.** TABLE OF AUTHORITIES

Interest of *Amicus Curiae*

On 9 September 2025 the Air Force Court of Criminal Appeals invited students from the University of Denver Sturm College of Law to submit amicus briefs in *United States v. Marschalek*, No. ACM S32776, on Issues 1 and 2 as part of the court's oral argument outreach program. The court advised the school that it would welcome representatives of the university to appear as *amicus curiae* and supervised law students would be allowed to present oral arguments on 29 October 2025 on behalf of the appellant and appellee. This brief is filed by students Kamilla Vaczi and Ari Klotas from the University of Denver Sturm College of Law on behalf of Appellee under the supervision of Professor Justin Marceau.

Statement of the Facts

Amicus concurs with Appellee's "Statement of the Facts."

I. Issues

1. Whether Appellant's conviction under Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934, was barred by the preemption doctrine because the misconduct is covered by Article 120c, UCMJ, 10 U.S.C. § 920c.
2. Whether the military judge failed to resolve an issue of fact as to the actus reus and failed to determine whether Appellant's conduct fell within a protected liberty interest, thereby rendering Appellant's guilty plea improvident.

Amicus curiae on behalf of Appellee address Issue 2 as it pertains to whether Appellant's conduct fell within a protected liberty interest, thereby rendering Appellant's guilty plea improvident.

II. Standard of Review

A military judge's acceptance of a guilty plea is reviewed for an abuse of discretion. *United States v. Timsuren*, 72 M.J. 823, 824 (C.A.A.F. 2013) (citing *United States v. Nance*, 67 M.J. 362, 365 (C.A.A.F. 2009). Questions of law arising from a guilty plea are reviewed de novo. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

III. Summary of the Argument

Appellant's conduct is far removed from the type of private, consensual sexual activity protected under *Lawrence v. Texas*, 539 U.S. 558 (2003). Since his actions were public, nonconsensual, indecent and service-discrediting, they fail each of the three prongs of the *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004), framework. Accordingly, Appellant was not entitled to a "heightened plea inquiry" under *United States v. Hartman*, 69 M.J. 467 (C.A.A.F. 2011), and his plea was properly accepted as provident.

IV. ARGUMENT

V. GOVERNING LAW

A. The Care Inquiry and the "Heightened" Variant

A "military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea" and "the accused must admit every element of the offense(s) [to] which" they plead guilty. R.C.M. 910(e), Discussion, *Manual for Courts-Martial*, United States (2019 ed.); *see United States v. Care*, 40 C.M.R. 247, 250 (C.M.A. 1969) ("[T]he guilty plea [must] be accompanied by certain safeguards to insure the providence of the plea, including a delineation of the elements of the offense

charged and an admission of factual guilt on the record."). "[W]hen a charge against a servicemember may implicate both criminal and constitutionally protected conduct," the accused must be made aware of and acknowledge the critical distinction between the permitted and prohibited conduct as part of the *Care* inquiry. *United States v. Hartman*, 69 M.J. 467, 468 (C.A.A.F. 2011) (internal citations omitted); *United States v. Van Velson*, No. ACM 40401, 2024 WL 3387423 at *3 (A.F. Ct. Crim. App. July 12, 2024) ("[A] military judge must conduct a "heightened" inquiry, explaining the distinction between constitutionally protected behavior and criminal conduct and ensuring the accused understands the differences.") (citing *United States v. Moon*, 73 M.J. 382, 388 (C.A.A.F. 2014)). The *Care* inquiry, therefore, confirms factual guilt of every element of the crime with which the defendant is charged and the *Hartman* "heightened plea inquiry" variant is only required when a *Lawrence* or other constitutional right is colorably implicated. C.M.R. 253; *see Hartman*, 69 M.J. at 468-69. A "heightened plea inquiry" is a confirmation by the defendant that their conduct is not constitutionally protected. *Hartman*, 69 M.J. at 468. The appellant's *Lawrence* liberty interest is not implicated here, and therefore he is not entitled to a "heightened plea inquiry."

B. The Lawrence Liberty Interest and Its Limits

The Fourteenth Amendment guarantees a right to privacy for "personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'" *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973). The Supreme Court of the United States has further recognized consenting adults have a protected liberty interest to engage in private sexual conduct in their homes under the Due Process Clause of the Fourteenth Amendment of the Constitution. *See Lawrence v. Texas*, 539 U.S 558, 578 (2003). Appellant alleges he possessed a constitutionally protected liberty interest to engage in private activities – being naked – in his own home, and therefore the military judges' failure to conduct a "heightened plea inquiry" rendered the plea

agreement improvident. (App. Br. at 15) (citing *Lawrence* 539 U.S. at 578-79 ("The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime . . . .)). However, Appellant's constitutionally protected liberty interest is not absolute, and activities are not protected from prosecution simply because they occur in the home. *Cf. Katz v. United States*, 389 U.S. 347, 351–352 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.").

C. The Marcum Tripartite Test

Appellant is not entitled to a "heightened plea inquiry" because his conduct falls outside the constitutionally protected liberty interest recognized in *Lawrence*, 539 U.S. at 578. As a result, his plea remains valid even absent a "heightened plea inquiry." Before an appellant may invoke the protections of a "heightened plea inquiry," the record must reflect that the charged conduct could colorably implicate constitutionally protected behavior thereby requiring the military judge to distinguish protected from prohibited conduct. *See Hartman*, 69 M.J. at 468. *Hartman* requires a court to engage in an as-applied analysis under a tripartite framework first articulated in *United States v. Marcum*, 60 M.J. 198, 206-07 (C.A.A.F. 2004), to determine whether the Appellant's case involved a constitutionally protected liberty interest as opposed to criminal conduct. *Hartman*, 69 M.J. at 468. To determine whether an appellant's conduct constituted a protected liberty interest, *Marcum* requires this court to ask:

(1) "[W]as the conduct . . . of a nature to bring it within the liberty interest identified by the Supreme Court?";

(2) "[D]id the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*?"; and

(3) "[A]re there additional relevant factors solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?"

Marcum, 60 M.J. at 206-07 (citing *Lawrence*, 539 U.S. at 578).

If the conduct fails any prong of this test, it falls outside the protection of *Lawrence* and does not trigger the need for a heightened plea inquiry. *See United States v. Stirewalt*, 60 M.J. 297, 312–15 (C.A.A.F. 2004). Because Appellant's conduct fails to satisfy the *Marcum* framework, it is not constitutionally protected, and the military judge was not required to engage in a heightened plea inquiry.

"[T]he *Marcum* analysis is applicable to any [alleged] private, consensual sexual conduct regardless of which UCMJ article the government chooses to charge the conduct." *United States v. Harvey*, 67 M.J. 758, 761 (A.F. Ct. Crim. App. 2009). "Under *Lawrence* and *Marcum*, certain consensual sexual activity may meet the elements of the applicable UCMJ article yet not be punishable because for the accused's constitutional liberty interest." *United States v. Timsuren*, 72 M.J. 823, 828 (A.F. Ct. Crim. App. 2013). However, the constitutional rights contemplated by *Lawrence* and subject to the *Marcum* framework "may apply differently to members of the armed forces than they do to civilians." *Marcum*, 60 M.J. at 205-206 (citing *Parker v. Levy*, 417 U.S. 733, 743 (1974). "The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." *Parker*, 417 U.S. at 758. Therefore, uncertainty as to the existence of a protected liberty interest should be weighed in light of the "specialized society" that is the Air Force and its needs. *See id.* at 743.

VI. Application: Appellant's Conduct Does Not Trigger a Heightened Plea Inquiry

Appellant has failed to engage in the *Marcum* analysis despite relying on *Hartman* - which based its decision on the tripartite framework - for the assertion that he is entitled to a "heightened plea inquiry." *See Hartman*, 69 M.J. at 206-07; (App. Br. at 14-15). It is this matter which *Amicus* asks the court to consider.

A. Prong One—Not Within Lawrence: The Conduct Was Public and Non-Consensual

The first question in the *Marcum* tripartite is whether "the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court." *Marcum*, 60 M.J. at 206. Appellant's assertion that his conduct implicated a constitutional liberty interest to engage in private, consensual sexual activity within the bounds of *Lawrence*, 539 U.S. at 567, is contradicted by his own admission that his actions were open and notorious and the lack of consent by those who witnessed his behavior.

1. *Appellant's public exposure defeats any claim of privacy*.

During his *Care* inquiry, Appellant admitted that his actions were not private as he "underst[ood] and believed that [he] was in the view of the public when [he] stood at or near the door of [his] residence naked on more than one occasion between 9 August and or about 4 October 2022." (R. at 30). Appellant admitted he intentionally exposed his naked body to members of the public and lingered in his doorway while posing and touching himself in the hopes of being observed by members of the public for his sexual gratification. (R. at 36-37). (Appellant admitted "[t]his wasn't in private . . . one of the reasons I opened the back door . . . was the potential that someone might see me naked); (*See* Stip. ¶ 5-6). Appellant was standing at the doorway of a house that was fully visible from Station Road and was regularly used by members of the public. (*See* Stip. ¶ 2-3). Appellant knew that his residence and doorway were visible from the public road and that 2-5 individuals would normally pass his residence around

the times he stood nude. (*See* R. 38-40). Appellant made no effort to cover the unobstructed view of his nude body. (R. at 34-35). Appellant's goal was to be observed and by achieving said goal his conduct could no longer be considered private and warranting constitutional protection.

2. *Lack of consent by observers (including a minor) removes the conduct from Lawrence*.

Appellant also admits that the two witnesses, A.B. and L.B., saw him on or about 9 August 2022 and 4 October 2022 at his door posing nude and touching himself. (R. at 36-37). Appellant was not under the impression that those who witnessed him would be consenting, including L.B. a minor, nor that he had their permission to be naked before them. (R. at 41-42). Witnesses did not consent to appellant's sexual behavior because they did not give agreement to his exhibitionist conduct nor give verbal or physical resistance. *See Manual for Courts-Martial*, *United States* (2019 ed.) (*MCM),* pt. IV, ¶ 60.b.(2)(b). In *State v. Jeffrey*, 400 S.W.3d 303, 306 (Mo. 2013), the defendant, as in the present case, stood nude in his doorway or by his front window when young girls passed by his home. The court held that the defendant was not being punished merely for walking around his home nude and neither is the appellant here. *Id.* at 306. By standing naked in full view of the street, like Jeffrey, and subjecting members of the public to his behavior, Appellant eliminated any right to privacy to which he was entitled. *See id.* at 312 "It is difficult to support an argument that protected activity continues to remain protected when thrust into view of the general public." *Id.*

Where "the appellant's own admissions demonstrate that his conduct . . . was not private and consensual . . . the military judge [is] not required to conduct the *Hartman* inquiry concerning the plea to conduct . . ." violating Article 134, Uniform Code of Military Justice (UCMJ), because the conduct was not of a nature to bring it within the liberty interest of *Lawrence*. *Timsuren*, 72 M.J. at 827. Therefore, the military judge was "not required to elicit the

appellant's understanding about the difference between permitted and prohibited conduct", *id.*, and the Appellant fails the first prong of the *Marcum* framework. "Nonconsensual sexual activity is simply not protected conduct under *Lawrence*" and Appellant's actions do "not implicate constitutional protections or even arguably constitute permissible behavior" and therefore "the military judge did not err in failing to explain why [Appellant's] conduct was subject to criminal sanction" and not constitutionally protected. *United States v. Whitaker*, 72 M.J. 292, 293 (C.A.A.F. 2013).

B. Prong Two—Lawrence's Express Exclusions Apply

The second question in the *Marcum* tripartite is whether "the conduct encompass[ed] any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*." *Marcum*, 60 M.J. at 206-07. The *Lawrence* court noted that the conduct before it – same-sex sodomy – was constitutionally protected because it "[did] not involve minors . . . [or] persons who might be injured or coerced . . . [or] public conduct or prostitution." 539 U.S. at 578. A court should look at whether a defendant's conduct implicates such factors to determine whether a defendant's conduct was outside of the protected liberty interest articulated in *Lawrence*. *Marcum*, 60 M.J. at 206-07.

1. *Appellant's nude exposure to a minor*.

As noted above, Appellant's conduct led to the victimization of L.B., a minor. In *Greene v. State*, 191 Ga. App. 149, 150 (Ga.App.1989), defendant – an adult – was convicted of public indecency for exposing his private parts to a babysitter – a minor – in the defendant's bedroom. The *Greene* court held that the defendant converted his bedroom from a private zone to a public place through his conduct, where his nudity might reasonably be expected to be viewed by people other than members of his family or household. *See id.* at 150. In the present case, the fact

that Appellant's actions were witnessed by a minor demonstrates that even if the first prong of the *Marcum* framework was answered in the affirmative, his conduct in relation to a minor brought his actions "outside the analysis in *Lawrence*" by placing his actions in a public place. *Marcum*, 60 M.J. at 206-07; *compare with Lawrence*, 539 U.S. at 578 ("This case does not involve minors.").

2. Appellant's conduct harmed witnesses.

Furthermore, Appellant's conduct was of a kind to cause injury to individuals. Appellant's conduct harmed A.B. by inciting fear and anxiety to leave her home as a member of the community in which Appellant's conduct transpired. (R. at 130) (Court Exhibit A). Therefore, even if this court rejects the analysis pertaining to the first prong of the *Marcum* framework, the injury to A.B. makes present the second *Marcum* prong "thereby distinguishing that conduct which may be subject to criminal sanction, and that conduct which is constitutionally protected under *Lawrence*." *United States v. Medina*, 72 M.J. 148, 149 (C.A.A.F. 2013) (citing *Hartman*, 69 M.J. at 468; *United States v. Wilson*, 66 M.J. 39, 41 (C.A.A.F. 2008)). While "[n]either *Hartman* nor *Medina* define[] precisely what types of charged activity require" a "heightened plea inquiry", *Timsuren*, 72 M.J. at 826, the harm caused to witnesses suggests no constitutional liberty interest was implicated.

3. *Appellant's conduct was indecent*.

Furthermore, the "door is held open for lower courts to address the scope and nature of the right identified in *Lawrence*, as well as its limitations, based on contexts and factors the Supreme Court may not have anticipated or chose not to address in *Lawrence.*" *Marcum*, 60 M.J. at 205. Therefore, in the context of Appellant's case, *Amicus* respectfully asks that this court consider the indecency of Appellant's actions as defined by Article 134, UCMJ, as a factor

placing his conduct outside the consideration of *Lawrence*. "'Indecent' means that 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." *MCM*, Part IV, ¶ 104.c.(1). *Lawrence* aimed to give liberty and respect beyond a particular sexual act because it recognized the importance of not demeaning or controlling a person's destiny via their private sexual conduct. *See Lawrence*, 539 U.S. at 578-79. Indecent conduct is therefore contrary to the purpose for which *Lawrence* was decided.

A court should decide whether conduct is indecent based on an objective standard because indecency is defined in relation to "common propriety." *MCM*, Part IV, ¶ 104.c.(1). Objectively, appellant's conduct was "grossly vulgar, obscene and repugnant to common propriety" because Appellant stood in his doorway nude, posed, and touched himself, all in the hopes of being observed by members of the public for his own sexual gratification. (R. at 36-37); (*See* Stip. ¶ 5-6). Additionally, as Appellant admits, someone observing his exhibitionist behavior can objectively "feel lust, which may go against their personal morals." (R. at 44). Appellant's actions and their effect on viewers objectively "tend[] to excite sexual desire or deprave morals with respect to sexual relations" and therefore constitute indecent conduct. *MCM*, Part IV, ¶ 104.c.(1).

This court should also consider Appellant's admission that he believed that others may view his actions as indecent because they were "grossly vulgar, obscene, and repugnant to common propriety." (R. at 42). The admittedly indecent nature of Appellant's actions does not compare to the harmless conduct contemplated by *Lawrence*. Therefore, the indecent nature of appellant's conduct should be considered as another factor placing the Appellant's conduct

outside of the analysis of *Lawrence*. Accordingly, Appellant was not entitled to a "heightened plea inquiry" and the plea is valid. *See Marcum*, 60 M.J. at 206-07.

C. Prong Three—Military-Specific Factors Foreclose Any Liberty Claim

The third prong of the Marcum tripartite test asks the court to decide whether "there [are] additional relevant factors solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest." *Id.* at 207. This prong recognizes a servicemember's "zone of autonomy and liberty interest" is considered "in light of the established . . . regulations [] and the clear military interests of discipline and order." *Stirewalt*, 60 M.J. at 304. Although Appellant's conduct occurred within the civilian community, it remained subject to the ethical and professional standards governing members of the Air Force, including Department of the Air Force Directive 1-1.1.1 (AFD1-1) (*1. Policy*) (16 October 2019)[1]:

> "*It is every Airman's duty and obligation to act professionally and meet all Air Force standards at all times. Only by doing so can the United States Air Force continue to be the world's greatest Air Force and retain its time-honored culture and the vital trust, respect, and confidence of the American public.*"

---

[1] The current Air Force standard on ethics: "Airmen must practice the highest standards of conduct and integrity . . . in our interaction with the civilian community; and must not engage in any conduct that is illegal or otherwise brings discredit to the Air Force. An Airman's code of ethics must be such that our behavior and motives do not create even the appearance of impropriety." Air Force Instruction 1-1 (AFF1-1) (2.3 *Standards of Ethical Conduct*) (18 August 2025).

Appellant admitted as part of the *Care* inquiry that his conduct was service discrediting because "[w]e, as military members, are held to a higher standard than members of the general public and committing misconduct as a military member tends to harm or discredit the reputation of the Air Force or the U.S. military as a whole." (R. at 45). Appellant's conduct "did not shine a favorable light on the Air Force or the U.S. Armed Forces as a whole . . . [his] behavior was not good for [the Air Force's] overall reputation." Appellant's conduct is therefore contrary to the ethical standards proscribed by the Air Force, a matter of which he is aware. Appellant has discredited the Air Force, given the appearance of impropriety, and has failed to engage in the highest standards of conduct and integrity in relation to the civilian community. *See* AAF1-1.1.1.

Additionally, previous courts have ruled, even where conduct is private and consensual it may still be punished if it implicates "relevant factors solely in the military environment." *See Stirewalt*, 60 M.J. at 303 -304; *Marcum*, 60 M.J. 198, 206-07. In *Stirewalt*, the defendant engaged in consensual private sodomy with his commissioned department head. *Stirewalt*, 60 M.J. at 303. The court "assume[d] without deciding that Stirewalt's conduct [fell] within the liberty interest identified by the Supreme Court and does not encompass behavior or factors outside the *Lawrence* analysis." *Id.* at 304. However, the court also "consider[ed] Stirewalt's zone of autonomy and liberty interest in light of the established Coast Guard regulations" pertaining to relationships between servicemembers "and the clear military interests of discipline and order that they reflect." *Id.* The court accordingly found that Stirewalt did not have a protected liberty interest under the third prong of the *Marcum* framework because his relationship with his superior, though private and consensual, violated well-established Coast Guard regulations concerning relationships between servicemembers. *Id.* Because Appellant's

conduct violated Air Force policy just as the defendant in *Stirewalt* violated Coast Guard policy, his "conduct fell outside any protected liberty interest recognized in *Lawrence*." *Id. at 304*. Therefore, Appellant's plea agreement was not entitled to a "heightened plea inquiry" during the *Care* inquiry.

VII. Because Marcum Is Not Satisfied, No Heightened Inquiry Was Required and the Plea Is Provident

Appellant has failed to establish that his conduct falls within the protected liberty interest proscribed by *Lawrence*. Appellant's conduct was not of such a nature as to bring it within the liberty interest identified in *Lawrence* because it was not private nor consensual. Appellant's conduct encompassed behavior and factors, that put it outside the analysis in *Lawrence* because it was public, impacted minors, and caused harm to others. Appellant's violation of the high ethical standards of the Air Force places his conduct beyond the reach of the *Lawrence* liberty interest. Therefore, under the tripartite framework of *Marcum*, appellant's conduct fails to avail itself to protection under *Lawrence* and therefore was not entitled to a "heightened plea inquiry" under *Hartman*. As to this matter, Appellant's plea agreement is provident.

VIII. CONCLUSION

Appellant is not entitled to a heightened plea inquiry because his actions do not fall into the bounds of a protected liberty interest recognized in *Lawrence* and therefore his plea agreement is valid.

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 Supervising Attorney and Students in support of Appellee on 22 October 2025.

[redacted]

Professor Justin Marceau, Esq.
Supervising Attorney
University of Denver
Sturm College of Law

[redacted]

Kamilla Vaczi
Student in Support of Appellee
University of Denver
Sturm College of Law

[redacted]

Ari Klotas
Student in Support of Appellee
University of Denver
Sturm College of Law

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) **HANNES MARSCHALEK,** United States Air Force, *Appellant.*	)))))))))	**BRIEF OF AMICUS CURIAE ON BEHALF OF APPELLANT** Before Panel No. 1 No. ACM S32776 October 22 2025

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

Professor Katherine Steefel, Esq., Supervising Attorney, Sturm College of Law. Alexander Van Wagoner, Jillian Romps, and Jonah Kunisch, Student Counsel Team.

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INTERESTS OF *AMICUS CURIAE*

On September 8, 2025, the Air Force Court of Criminal Appeals announced that the oral argument in *United States v. Marschalek* would be held on October 29, 2025. On September 9, 2025, the Court invited students from the University of Denver Sturm College of Law, supervised by two professors, to submit *amicus curiae* briefs and to participate in oral argument.

ISSUES

The Court invited argument on two issues, and we will focus on one of them. We will focus on whether the military judge provided an insufficient *Care* inquiry that fell short of the necessary requirements, rendering the appellant's guilty plea improvident.

STATEMENT OF THE CASE

Amicus concurs with the Appellant's Statement of the Case.

STATEMENT OF FACT

Amicus concurs with the Appellant's Statement of Facts.

ARGUMENT

This amicus brief provides additional case law and discussion regarding the military judge's failure to establish whether SSgt Marschalek's guilty plea was provident by not resolving inconsistencies between the conduct SSgt Marschalek admitted to during the *Care* inquiry and the *actus reus* alleged in the stipulation of fact. This brief also highlights the importance of resolving such inconsistencies given the potential liberty interest involved. Ensuring providence by conducting a thorough and complete *Care* inquiry is critical to (1) providing fair notice to the accused and (2) adequately protecting liberty interests involved.

I. THE *CARE* INQUIRY WAS INSUFFICIENT BECAUSE THE MILITARY JUDGE FAILED TO PROVIDE THE DEPTH AND CLARITY REQUIRED OF THE INQUIRY.

a. The military judge failed to resolve the factual inconsistency related to the alleged actus reus.

Military judges must ensure that an accused understands the terms of their plea agreement and how it might shape their guilty plea. The accused must "know and understand the plea agreement's impact on the charges and specifications which bear on the plea." *United States v. Hunter*, 65 M.J. 399, 403 (C.A.A.F. 2008) (quoting *United States v. Felder*, 59 M.J. 444, 445 (C.A.A.F. 2004)). The military judge has a responsibility to "ensure that the record reflects a clear, shared understanding of the terms of any pretrial agreement between an accused and the convening authority." *United States v. Williams*, 60 M.H. 360, 362 (C.A.A.F. 2004). This includes ensuring the accused "know[s] and understand[s] . . . the agreement's impact on the charges and specifications which bear on the plea." *Hunter*, 65 M.J. at 403. The Army recognizes that the military judge has a role to clarify ambiguities and "ensure that all parties, especially the accused, understand the terms of their implications." *See United States v. Grisham*, 66 M.J. 501, 505 (A.C.C.A. 2008); *United States v. Dunbar*, 60 M.J. 748, 751 (A.C.C.A. 2004) (citing *United States v. Reedy*, 4 M.H. 505, 506 (A.C.M.R. 1977).

An issue of fair notice may arise when the accused is not well-informed of the offense, legal theory, or conduct to which he or she is pleading guilty. The court found in *United States v. Morton*, that "[a]n accused has a right to know to what offense and under what legal theory he or she is pleading guilty. This fair notice resides at the heart of the plea inquiry." 69 M.J. 12, 16 (C.A.A.F. 2010) (*quoting United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008)). According to this rule, the accused must be aware of and understand the offense and legal theory to which they

are pleading guilty. *Id.* As a result, affirming convictions based on uncharged offenses or offenses not pleaded to undermines procedural fairness and due process. *Id.*

In *U.S. v. Frederick*, the court stated that "the requirements governing the conduct of a providence inquiry are clear. They have remained relatively unchanged since first announced . . . and military judges, like Courts of Military Review, have a marked responsibility to ensure that they are carefully followed." 23 M.J. 561 (A.C.M.R. 1986).

Courts conduct a *Care* inquiry to determine the providence of a guilty plea. Under *United States v. Care*, the military judge must (1) establish a factual basis for the plea; (2) confirm the plea is voluntary; (3) ensure the plea is informed and intelligent; and (4) resolve any inconsistencies. 18 C.M.A. 535, 539, 40 C.M.R. 247, 251 (1969). As the court in *U.S. v. Sawinski* stated:

> *United States v. Care* . . . sets forth as procedural elements to a provident plea inquiry the requirement that the military judge "question the accused about what he did or did not do . . . to make clear the basis for a determination by the military trial judge . . . whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty[.]

16 M.J. 808 (N.M.C.M.R. 1983) (citations omitted).

In this case, the military judge failed to establish a factual basis for the plea and resolve inconsistencies between the stipulation of fact and the guilty plea. First, as the Appellant argued in the Brief on Behalf of the Appellant, the stipulation of fact included a different and more incriminating *actus reus* than the charge and *Care* inquiry. App. Br. at 12-13. The charge provides that the *actus reus* was that, on divers occasions, SSgt Marschalek stood naked at or near the door of his residence in view of the public. Corrected Entry of Judgment at 1-2; Trial Tr. at 27. SSgt Marschalek confirmed this actus reus throughout the *Care* inquiry.

However, the stipulation of fact included a different *actus reus* in stipulated testimony from two individuals. One individual alleged witnessing SSgt Marschalek standing at the doorway of his home with his shorts pulled down to his knees and his right hand on his penis. Stipulation of Fact ¶ 5. The other individual alleged witnessing SSgt Marschalek "posing" naked at the door of his home. Stipulation of Fact ¶ 6. The inconsistencies in the record create ambiguity regarding the specific conduct constituting the *actus reus*.

The military judge did not resolve the inconsistency. The military judge did not make clear what were "the acts or the omission" of the accused constituting "the offense or offenses to which he is pleading guilty," as required by *Care*. *See* Trial Tr. at 28. Instead, the military judge recited the elements of the offense and provided the definition of indecent conduct and asked the Appellant whether "the elements and definitions *taken together* correctly describe what you did" Trial Tr. at 27-28 (emphasis added). But not every aspect of the definition of indecent conduct applied to SSgt Marschalek, which the military judge failed to make clear.

b. Nudity in one's home does not constitute indecent conduct.

If the actus reus is construed as merely standing in the doorway naked, rather than the conduct alleged by the witnesses, SSgt Marschalek's conduct was not indecent.

To determine whether standing naked in one's doorway is an incident requires addressing (1) what constitutes "indecent conduct" under Article 134 of the U.C.M.J.; (2) whether mere nudity satisfies the legal standard for indecency; and (3) whether the threshold of a house is private or public. For SSgt Marschalek to be on notice, and therefore able to plead guilty to the charge, the conduct in question must be criminal under Article 134.

Article 134 of the Uniform Code of Military Justice, which criminalizes conduct prejudicial to good order and discipline or service-discrediting behavior, but in fairly vague terms, raises a

question of fair notice, especially regarding those offenses not explicitly enumerated in the Article. The applicable rule, as recognized in *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003), is that military courts require sources of fair notice to include not just statutes, but also military regulations, customs, case law, and applicable civilian law. The court in *Vaughan* held that without such notice, service members cannot be fairly held criminally liable under Article 134. *Id*. Accordingly, a determination of fair notice under Article 134 requires that the prohibited conduct be either: (1) expressly enumerated in Article 134; (2) defined by an applicable federal or state statute; or (3) clearly established through military regulations, customs, or case law. *Id*.

Under U.C.M.J Article 134, "indecent" is defined as "that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or depraved morals with respect to sexual relations." *United States v. Carlile,* 2022 CCA LEXIS 542 (A.F. Ct. Crim. App. 21 September 2022), *United States v. Morales*, 2025 CCA LEXIS 85 (Army Ct. Crim. App. 28 February 2025), and *United States v. Rocha*, 84 M.J. 346, 351 (C.A.A.F. 2024), provide context for what constitutes indecent conduct.

In *Carlile*, the court found that sending sexually explicit images to minors constituted indecent conduct under Article 134. 2022 CCA LEXIS 542 at 37. Such conduct was considered indecent because the pictures were unsolicited and unwanted, and the Appellant disregarded the recipients' age. *Id.* at 36. As a result, the Appellant's conduct was sufficient to offend societal standards of common propriety, and thus, was indecent and service discrediting. *Id.* at 37. The conduct in question was targeted at a specific individual and public.

In *Morales*, the court found that the enumerated language of "indecent conduct" did not make it reasonably clear that taking photographs of clothed individuals in public without their

knowledge was criminal. 2025 CCA LEXIS 85, at *7. Such conduct was not indecent because it was merely socially unacceptable rather than criminal. *Id.* at 8.

In contrast to both *Carlile* and *Morales*, *Rocha* addressed conduct that was private rather than public. In *Rocha*, the court found that the definition of "indecent conduct" provided sufficient notice that engaging in sexual acts with a childlike sex doll was prohibited because similar conduct is prohibited under Article 134, including knowingly possessing an "obscene visual depiction of a minor engaging in sexually explicit conduct." 84 M.J. 346 at 351 (*quoting* MCM pt. IV, para. 95.c.(4)). As a result, a servicemember of ordinary intelligence could conclude that engaging in sexual acts with a depiction of a minor in the form of a doll was criminally actionable. *Id.*

The enumerated definition of indecent conduct in Article 134 does not make it apparent that standing naked in one's home, even if visible from the street, is proscribed conduct. Furthermore, unlike in *Rocha*, there is no similarly prohibited conduct in another criminal statute. A servicemember of ordinary intelligence could not be reasonably expected to conclude that such conduct was prohibited.

In the *Care* inquiry in this case, the military judge described sexual activity that is prohibited under Article 134:

> This provision is not intended to regulate wholly private consensual sexual activity. In the absence of aggravating circumstance, private consensual activity, which could include walking around in your own house nude with no one else present, to the extent that could be considered sexual activity, is not punishable as indecent conduct.
>
> Consensual sexual activity, that is "open and notorious," is not private . . . Sexual activity may also be considered open and notorious when the act occurs under circumstances in which there is a substantial risk that the acts could be witnessed by someone else, despite the fact that no such discovery occurred.

Trial Tr. page 27-28.

SSgt Marschalek said that he understood the elements and definitions, before the military judge asked, "Do you understand that your plea of guilty admits that these elements accurately describe what you did?"

The military judge described several possible sexual activities that are prohibited but did not specify what applied to the Appellant per the charges and plea agreement. The military judge did not describe what specifically SSgt Marschalek pleaded guilty to, among the possibilities that were prohibited.

It is not as if the Appellant pleaded guilty to all those possibilities, but the military judge next asked the question, "Do you believe and admit that the elements and definitions taken together correctly describe what you did?" Trial Tr. page 28. Rather than specifying what exactly pertained to the accused, the judge uses the phrase "taken together" as a catch-all.

Unlike the conduct prohibited under Article 134, as discussed in *Carlile* and *Rocha*, and the behavior described by the military judge, SSgt Marschalek actions were not indecent, as they were neither directed at a specific individual nor intentionally open and notorious. SSgt Marschalek did not linger near the doorway of his home, exit his home, or wait for passersby to be present before opening the door. Instead, SSgt Marschalek said that he "would open the door and usually...prop open the door with a shoe." Trial Tr. 34:1-2. In doing so, he would "be in the doorway long enough for someone to potentially see [him]." Trial Tr. 34:2-3. According to SSgt Marschalek's description, he would stand in the doorway for only ten to twenty seconds. Trial Tr. 34:7-8.R. As a result, similar to the conduct described in *Morales,* SSgt Marschalek's conduct may be socially unacceptable, but not criminally indecent.

The description of SSgt Marschalek's conduct further begs the question of whether the threshold of one's house is private or public, and how that impacts whether nudity is considered

indecent. In *United States v. Dunn*, 480 U.S. 294, 301 (1987), the Court determined that the "curtilage" of a house is determined by several factors including proximity to the home, enclosure, use of the area, and steps taken to prevent it from observation. In this case, a barn, located 50 yards outside the fence surrounding the house, was excluded from the curtilage of the home because it was isolated, not enclosed, not being used for "private" or "domestic" life, and not protected from public view. *Id.* at 302-03.

Whereas, in *Florida v. Jardines*, 569 U.S. 1, 6 (2013), the Court found that the front porch of a house is within the boundaries of the curtilage and therefore private. Further, the area "immediately surrounding" the home is "part of the home itself." *Id.* (*quoting Oliver v. United States*, 466 U.S. 170, 180 (1984)).

Unlike an isolated structure, the threshold or doorway of a home is connected to the main structure of the house. As a result, it is indisputably part of the home and therefore within the curtilage of the home under the definitions outlined in both *Dunn* and *Jardines*.

SSgt Marschalek's doorway, while visible from the street, stands approximately one hundred feet from the road. Trial Tr. 35:1-2; 38:13. SSgt Marschalek never exited the house while naked, called attention to himself, or did anything else to invite observers into the space. As a result, there is no reason to assume his actions were conducted anywhere but the privacy of his own home.

In sum, because the military judge failed to resolve the inconsistencies between the stipulated facts and the plea, SSgt Marschalek was not adequately placed on notice. Furthermore, the conduct to which SSgt Marschalek pleaded guilty does not meet the definition of indecent conduct under Article 134, as mere nudity within the privacy of one's home is not inherently

indecent. SSgt Marschalek took no action to make his behavior public. As a result, the plea was not provident and infringed upon SSgt Marschalek's liberty interest.

II. THE MILITARY JUDGE FAILED TO CONDUCT THE INQUIRY REQUIRED BY *HARTMAN*.

The military judge also failed to conduct an appropriate plea inquiry because (1) acts that are constitutionally protected but might be service-discrediting or prejudicial to good order and discipline are subject to a higher standard of inquiry; and (2) SSgt Marschalek's conduct was within a constitutional "gray area," meaning he deserved a plea inquiry with heightened level of inquiry. Punishing SSgt Marschalek for his conduct can have unforeseen consequences that may over-punish servicemembers for inadvertent and accidental acts.

a. *Hartman* requires a heightened level of inquiry for acts potentially implicating constitutionally protected conduct.

The Court of Appeals of the Armed Forces (C.A.A.F.) has recognized that certain conduct within the U.C.M.J. is sometimes constitutionally protected. Servicemembers engaging in constitutionally protected conduct can be charged with Article 134 when they prejudice good order and discipline or bring discredit upon the military. *United States v. Moon*, 73 M.J. 382, 388 (C.A.A.F. 2014). This means that some servicemembers can commit acts that are constitutionally protected that are simultaneously criminal acts in the Armed Forces, creating a constitutional "gray area." *United States v. Kim*, 83 M.J. 235, 239 (C.A.A.F. 2023).

To circumvent this concern, the C.A.A.F. has established that a servicemember pleading guilty to conduct that might be constitutionally protected should undergo additional inquiry. *United States v. Hartman*, 69 M.J. 467, 469 (C.A.A.F. 2011). In *Hartman*, the Appellant pleaded guilty to Article 125 (Sodomy). *Id.* at 468. Prior to *Hartman*, *Lawrence v. Texas* ruled Texas's sodomy statute unconstitutional as it violated an individual's right to liberty to engage in same sex

"intimate sexual conduct." 539 U.S. 558, 562, 578. A year later, C.A.A.F. addressed *Lawrence* in *United States v. Marcum,* which established a test addressing *Lawrence* challenges:

> First, was the conduct . . . of a nature to bring it within the liberty identified by the Supreme Court [in *Lawrence*]? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*? Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?

Hartman, 69 M.J. at 468 (quoting *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).

During the *Care* inquiry in *Hartman*, the military judge described sodomy only as described in the Manual for Courts-Martial and asked Appellant to explain the wrongfulness of his offense. *Id.* at 468-69. The military judge did not address *Marcum* or *Lawrence. Id.* at 469. After the military judge asked the Appellant all his questions, trial counsel engaged in a dialogue with the military judge about *Lawrence* and *Marcum*. *Id.* This prompted the military judge to ask more clarifying questions to the Appellant regarding the location of the offense, whether others were present in the room, and the relationship between Appellant and the other person involved in the act. *Id*. Despite asking these questions, the military judge did not educate the Appellant as to the questions' significance within the *Lawrence* and *Marcum* framework. *Id.* In the C.A.A.F.'s eyes, this failure to instruct the Appellant in "the relationship between the supplemental questions and the issue of criminality" by explaining the significance of the added questions in "lay terminology" required the findings and sentence to be set aside. *Id.*

Recent cases in this Court and the C.A.A.F. expanded *Hartman* to include some violations of Article 92 (Dereliction of Duty) and Article 134 (Indecent Conduct), respectively. *Kim*, 83 M.J. 235 (C.A.A.F. 2023); *United States v. Sanger*, No. ACM S32773, 2025 CCA LEXIS 370 (A.F. Ct. Crim. App. 2025) (unpub. op.). In *Kim*, a Soldier charged with Indecent Conduct pleaded guilty to

searching for specific pornographic videos using queries such as "rape sleep" and "drugged sleep." *Kim,* 237. The Soldier told the military judge that he did so because it reminded him of sexually abusing a victim in one of his other charged offenses. *Id*. Long before *Kim, Stanley v. Georgia* upheld the act of possessing obscene matter, stating that "mere private possession of obscene matter cannot constitutionally be made a crime." 394 U.S. 557, 559 (1969). While the military judge and the Soldier connected how these searches could potentially be chargeable conduct under Indecent Conduct, the military judge did not ask any questions or discuss the Soldier's rights as recognized by *Stanley*: that a simple act of watching pornography is constitutionally protected. *Kim,* 239. Even if the constitutionally protected act prejudices good order and discipline or brings discredit upon the military, the military judge should still ask why the behavior breaches the confines of the Constitution's protections and steps into the service-discrediting or prejudicial conduct. *Id.* at 239-40.

In *Sanger*, an Airman charged with Dereliction of Duty pleaded guilty to espousing extremist rhetoric, contrary to Air Force policy. *Sanger*, unpub. op. at *2. Like the constitutional rights observed by *Lawrence* and *Stanley*, servicemembers often enjoy a right to freedom of speech and freedom of assembly, with certain limitations. *Id.* at *19-20. The military judge initially accepted the Appellant's guilty plea after establishing that his statements contravened Air Force policies by advocating supremacist and extremist ideologies. *Id.* at *6. However, the military judge reopened the *Care* inquiry after the Appellant suggested that he did not receive notice as to the wrongfulness of his actions prior to being criminally charged. *Id.* at *6-8. After reopening the *Care* inquiry, the military judge asked if the Appellant had a basis for a possible First Amendment defense to his actions, to which the Appellant denied. *Id.* at *9-10. This Court held that the military judge should have a dialogue with the accused and acknowledge the "distinction between

permissible and prohibited behavior." *Id.* at *20 (quoting *Hartman*, 468). When the military judge fails to hold this dialogue, they abuse their discretion by failing to abide by *Hartman's* heightened plea requirements, resulting in an improvident plea. *Id.* In other words, mere illusory discussions are not enough to satisfy the *Hartman* requirement.

b. Walking around one's domicile while naked is constitutionally protected.

SSgt Marschalek walking in his house naked is constitutionally protected conduct as there is a privacy interest in an Airman having the ability to walk around their home while disrobed. While the student amicus curiae counsel were unable to find any cases from the Supreme Court or the military justice system engaging in discussions regarding the concept of walking around nude in one's domicile, other federal courts have. *See Richards v. Thurston*, 424 F.2d 1281, 1285 (1st Cir. 1970) (describing a right to appear nude in one's home); *Williams v. Hathaway*, 400 F. Supp. 122, 127 (D. Mass. 1975) (holding that nude bathing at a public beach is entitled to some constitutional protection due to unique circumstances); *cf. Chapin v. Southampton*, 457 F. Supp 1170, 1175, n.4 (E.D.N.Y. 1978) (discussing a "right to be left alone").

SSgt Marschalek is entitled to engage in private consensual acts with others within the privacy of his own home. *See Lawrence*, 539 U.S. at 578. *Lawrence* further recognized that the drafters of the Due Process Clause and Fourteenth Amendment could not know "the components of libery in its manifold possibilities." *Id.* SSgt Marschalek possesses a liberty interest to be undressed within his domicile. SSgt Marschalek, however, is subject to the laws and regulations of the U.S. Air Force, where constitutionally protected conduct may prejudice good order and discipline or discredit the service. Therefore, SSgt Marschalek's conduct of standing within his property naked, but potentially seen by others, constitutes that "gray area" that cases like *Hartman, Sanger, Kim,* and *Marcum* are concerned with.

While SSgt Marschalek's conduct may not be entirely protected, his acts demonstrated that a gray area exists in his conduct that was somewhere between completely private and "open and notorious," especially in the military setting. Like in *Hartman, Kim,* and *Sanger*, there are gray areas between the constitutionally protected conduct and criminal conduct that require a heightened level of inquiry during the *Care* inquiry to determine what makes that conduct criminal. SSgt Marschalek, too, deserved that level of inquiry.

The military judge failed to distinguish SSgt Marschalek's conduct as "permissible or prohibited." Sanger, unpub. op. at *20. The military judge failed to ask whether constitutional provisions could provide a defense. *Id.* at *19-20. The military judge did not ask whether other case law that recognizes constitutional rights could provide a defense. The military judge's failure to ask these questions implicating SSgt Marschalek's liberty interests meant the *Care* inquiry was insufficient.

CONCLUSION

For the reasons stated above, we respectfully concur with the Appellant that the *Care* inquiry was insufficient, and thus, the guilty plea was made improvidently.

Respectfully Submitted,

Katherine Steefel, Esq.
Supervising Attorney
University of Denver
Sturm College of Law

Jonah Kunisch
Student in Support of Appellant
University of Denver
Sturm College of Law

Jillian Romps
Student in Support of Appellant
University of Denver
Sturm College of Law

Alexander Van Wagoner
Student in Support of Appellant
University of Denver
Sturm College of Law

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the parties on 22 October 2025.

Katherine Steefel, Esq.
Supervising Attorney
University of Denver
Sturm College of Law

Jonah Kunisch
Student in Support of Appellant
University of Denver
Sturm College of Law

Jillian Romps
Student in Support of Appellant
University of Denver
Sturm College of Law

Alexander Van Wagoner
Student in Support of Appellant
University of Denver
Sturm College of Law

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**NOTICE OF APPEARANCE OF GOVERNMENT COUNSEL**
v.	)	Before Special Panel
Staff Sergeant (E-5) **HANNES MARSCHALEK,** United States Air Force *Appellant*	)	No. ACM S32776 24 October 2024

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

The undersigned hereby enters appearance as counsel for the United States in the above captioned case pursuant to Rule 12, Air Force Court of Criminal Appeals Rules of Practice and Procedure. The undersigned counsel will appear as co-counsel for the United States.

[redacted]

ALLISON R. GISH, Maj, USAF
Appellate Government Counsel
Government Trial & Appellate Operations Division
Military Justice & Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Appellate Defense Division on 24 October 2024.

ALLISON R. GISH, Maj, USAF
Appellate Government Counsel
Government Trial & Appellate Operations Division
Military Justice & Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	NOTICE OF APPEARANCE
v.	)	
Staff Sergeant (E-5) **HANNES MARSCHALEK** United States Air Force *Appellant*	)	Before Special Panel No. ACM S32776 28 October 2025

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

COMES NOW the undersigned counsel and enters an appearance pursuant to Rules 12 and 13 of both the Joint Rules of Appellate Procedure for Courts of Criminal Appeals and this Honorable Court's Rules of Practice and Procedure. Undersigned counsel will be sitting second chair at Appellant's table as supervisory counsel for oral argument.

Respectfully Submitted,

[redacted]

PILAR G. WENNRICH, Colonel, USAF
Chief, Air Force Appellate Defense Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4770

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 28 October 2025.

[redacted]

PILAR G. WENNRICH, Colonel, USAF
Chief, Air Force Appellate Defense Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4770

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' MOTION
Appellee,	)	TO CITE SUPPLEMENTAL
	)	AUTHORITIES
v.	)	
	)	Before Special Panel
Staff Sergeant (E-5)	)	
HANNES MARSCHALEK	)	No. ACM S32776
United States Air Force	)	
Appellant.	)	4 November 2025

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

Pursuant to Rules 23.3(d) and 25.2(e) of this Honorable Court's Rules of Practice and Procedure, the United States respectfully moves to cite supplemental authorities because additional relevant law has come to the Government's attention. Under Rule 25.2(e), "[c]ounsel may also submit a supplemental citation of authority within 7 days following oral argument to cite any legal authority presented in oral argument that was not previously cited." The case below was cited by undersigned counsel during oral argument and is relevant for this Court to consider when deciding Issue I: whether the charge of indecent conduct under Article 134 was preempted by the offense of indecent exposure under Article 120c.

United States v. Taylor, 38 C.M.R. 393 (U.S. C.M.A. 1968).

In Taylor, the accused was convicted of intentional injury under circumstances prejudicial to good order and discipline under Article 134 instead of malingering under Article 115. Id. at 394. On appeal, the accused argued that Article 115 preempted the field for all intentional self-injury. Id. The Court of Military Appeals found that there was no legislative history to support the idea Congress intended to preempt the field of self-injury to Article 115 and that, while malingering required a specific intent to avoid work, duty, or service, intentional injury under

Article 134 had "an objective orientation in that it is calculated to preserve good order and discipline, without necessarily considering the particular mental attitude of the accused in committing a disruptive act." Id. at 395. The CMA found that malingering under Article 115 did not preempt "the spectrum of self-inflicted injuries" and affirmed the accused's conviction for intentional injury under Article 134. Id. This premise supports that Congress did not intend Article 120c to preempt the field for exhibiting one's body indecently, and there may be situations when revealing one's naked body indecently may be service discrediting even when it is not charged as being done intentionally.

WHEREFORE, the United States respectfully requests that this Honorable Court grant its motion to submit supplemental citations of authority.

[redacted]aj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

[redacted]
MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 4 November 2025.

R aj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800