6 August 2021

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

JONATHAN M. MARTINEZ
Amn (E-2), USAF
Appellant

No. ACM 39973

REPLY BRIEF ON BEHALF OF APPELLANT

STEPHEN I. VLADECK
Civilian Appellate Defense Counsel
727 East Dean Keeton Street
Austin, TX 78705
(512) 475-9198
svladeck@law.utexas.edu

RYAN S. CRNKOVICH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
ryan.crnkovich.3@us.af.mil

Counsel for Appellant

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 3
Airman (E-2) **JONATHAN M. MARTINEZ** United States Air Force, *Appellant.*	)	No. ACM 39973 6 August 2021

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

COMES NOW, Appellant, Airman (E-2), Jonathan M. Martinez, by and through his undersigned counsel pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, and submits this reply to the Government's Answer, filed on 30 July 2021 ("Answer"). Appellant reiterates the arguments contained in his brief filed with this Court on 30 June 2021 ("Opening Br.") and further argues the following.

ARGUMENT

I.

BY DENYING APPELLANT'S MOTION TO INSTRUCT THE PANEL THAT A GUILTY VERDICT REQUIRED UNANIMITY, THE TRIAL COURT VIOLATED APPELLANT'S FIFTH AND SIXTH AMENDMENT RIGHTS.

a. Appellant Was Entitled to a Unanimous Conviction as Part of His Right to an "Impartial Jury" Under the Sixth Amendment.

In his opening brief, Appellant conceded that, at least under the settled law of this Court and CAAF, he has no Sixth Amendment right to be tried by a jury. *See* Opening Br. at 12–13 & n.8. On the Government's view, this fact is apparently the end

of the matter. Under its reasoning, if the members had flipped a coin to decide Appellant's fate, the Sixth Amendment would have nothing to say. If the victim had served on the panel, the Sixth Amendment would have nothing to say. If the members had voted to convict Appellant because he is Latino, the Sixth Amendment would have nothing to say. Because Appellant has no underlying Sixth Amendment right to a jury trial, the thrust of the Government's response is that he has no Sixth Amendment rights appertaining to the "jury" that Congress chose to provide — and that this result is reinforced by principles of stare decisis.

In fact, stare decisis is irrelevant here. Neither this Court nor CAAF has ever endorsed such a nihilistic reading of an accused's Sixth Amendment rights vis-à-vis the panel. To the contrary, and as Appellant noted in his opening brief, CAAF has explicitly applied the Sixth Amendment's right to an *impartial* jury to courts-martial panels. *See* Opening Br. at 18–19 (citing *United States* v. *Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001)). As quoted in Appellant's opening brief, *Lambert* specifically states that "the Sixth Amendment requirement that the jury be *impartial* applies to court-martial members and covers not only the selection of individual jurors, but also their conduct during the trial proceedings and the subsequent deliberations." 55 M.J. at 295 (emphasis added). Not only does the Government fail to distinguish *Lambert*; its Answer doesn't even cite it — incorrectly asserting that "[w]hile a defendant does have a right to members who are 'fair and impartial,' that right does not derive from the Sixth Amendment." Answer at 14. As *Lambert* makes clear, the Government is simply wrong on this point. Just like the seven *other* constitutional protections that CAAF has

held the Sixth Amendment to apply to courts-martial, *see* Opening Br. at 18–19, Appellant also had a Sixth Amendment right to an impartial panel. Such a conclusion is not inconsistent with principles of stare decisis, *see* Answer at 14–15; rather, it is *compelled* by them.

As Appellant argued in detail in his opening brief, the Supreme Court's intervening decision in *Ramos* v. *Louisiana*, 140 S. Ct. 2390 (2020), fundamentally alters the relevant analysis. The point is not, as the Government incorrectly characterizes Appellant's opening brief, that *Ramos* "essentially abrogates" prior Supreme Court decisions declining to extend the Sixth Amendment right to trial by jury to military tribunals. *See* Answer at 9. Nor is it, contra the Government's equally inaccurate attempt to describe Appellant's position, that the Supreme Court in *Ramos* "intended to incorporate the unanimity requirement to the military system." *Id.* Rather, the point is that, because *CAAF* has already held that the Sixth Amendment's right to an impartial jury applies to courts-martial, *Ramos*'s novel — but emphatic — recognition that unanimous guilty verdicts are a central and indispensable feature of impartiality applies to *all* cases to which the Sixth Amendment's right to an impartial jury applies. Under *Lambert* (which, again, the Government doesn't even cite), that includes this one.[1]

---

1. *Lambert* is hardly an outlier. *See*, *e.g.*, *United States* v. *Curtis*, 44 M.J. 106, 133 (C.A.A.F. 1996) (recognizing the right to impartiality as sounding in the Sixth Amendment). Indeed, this Court has expressly relied upon *Lambert* for this precise proposition in the past. *See, e.g.*, *United States* v. *Chappell-Denzer,* No. ACM 38498*,* 2015 CCA LEXIS 234*,* at *17 (A.F. Ct. Crim. App. 5 Jun. 2015) (unpub. op.) ("The Sixth Amendment right to an impartial jury governs court-martial members during the

All the Government offers in response is the unsubstantiated claim that Appellant's argument "is belied by the language of the [*Ramos*] opinion itself — which looks to the historical foundations of a jury, and not to any historical understanding of the word 'impartial.'" Answer at 15. Tellingly, this passage of the Answer does not actually cite to or quote any such language from *Ramos*. Appellant's opening brief, in contrast, cited to and quoted from the majority opinion in *Ramos* in detail. *See, e.g.*, Opening Br. at 15–17. That *Ramos* turned on Founding-era understandings of what constituted an "*impartial* jury," and not just a "jury," is reinforced by Justice Sotomayor's concurrence in *Ramos* and by the majority and dissenting opinions in *Edwards* v. *Vannoy*, 141 S. Ct. 1547 (2021), all of which were discussed and quoted in Appellant's opening brief — and none of which are even cited in the Government's Answer. The upshot is that the Supreme Court has now made clear (twice in the last 16 months) that unanimous guilty verdicts are part-and-parcel of the right to an *impartial* jury that the Sixth Amendment provides. If that right extends to courts-martial — as *Lambert* holds that it does — then the trial judge's rejection of Appellant's request for a unanimity instruction violated the Sixth Amendment.

b. Appellant Was Also Entitled to a Unanimous Conviction Under the Due Process Clause of the Fifth Amendment.

The Government's response to Appellant's due process objections fares no better. At its core, the Government's claim is that Appellant's due process challenge "is not

---

selection of individual members and the members' conduct during the proceedings and deliberations" (citing *Lambert*, 55 M.J. at 295)).

new, and fails to account for the fundamental differences between a military court-martial and a civilian jury." Answer at 16.

This is the same flawed, slapdash argument the Government made decades ago when it opposed application of the rule announced in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), to courts-martial panels. *See United States* v. *Moore*, 26 M.J. 692, 716 (A.C.M.R. 1988) ("The government's first contention, that, because the right to a jury does not apply to courts-martial, neither do the constitutional safeguards designed to protect the jury system, is overbroad."). When the Court of Military Review ultimately held that *Batson did* apply to courts-martial two years later in *United States* v. *Santiago-Davilla*, it expressly referenced the Army Court's en banc decision in *Moore*. *See Santiago-Davilla*, 26 M.J., 380, 390 n.9 (C.M.A. 1988). And as Appellant noted in his opening brief, it was *Santiago-Davilla* where the Court of Military Appeals recognized that when a jury-trial right, like that encompassed in *Batson*, applies by virtue of "due process under the Fifth Amendment . . . it applies to courts-martial, just as it does to civilian juries." *Id*. at 390; *see also* Opening. Br. at 20.

In any event, and taking the Government's contentions in turn, Appellant's argument *is* new. Once more, as noted above, *Ramos* for the first time cemented in the text of the Constitution the relationship between unanimity and impartiality. Whether Appellant's right to an impartial panel stems from the Sixth Amendment or the Fifth, the bottom line is the same: The Supreme Court has clarified exactly *what* makes the factfinders in a criminal case "impartial," and its definition excludes non-unanimous convictions. In that respect, it is quite telling that the Government's examples to the

contrary — all of which involve challenges to the minimum *size* of a panel, and not to non-unanimous convictions — all pre-date *Ramos*. *See* Answer at 16–17.[2]

Moreover, Appellant's argument *does* "account for the fundamental differences between a military court-martial and a civilian jury." *Id*. at 16. Appellant's opening brief explained that the due process question must be answered by reference to the more lenient due process standard reiterated in *Weiss* v. *United States*, 510 U.S. 163 (1994). As Appellant noted, in *Weiss*, the Petitioners challenged whether they had a right to have their courts-martial presided over by military judges with fixed terms in office. In holding that the Due Process Clause did not require fixed terms, the Court expressly tied its analysis to the lack of a connection between fixed terms and impartiality, rejecting Petitioners' claim that "a military judge who does not have a fixed term of office lacks the independence necessary to ensure impartiality." *Id*. at 178; *see* Opening Br. at 21. But "*Ramos*, in contrast, establishes the precise connection that the *Weiss* Petitioners could not." Opening Br. at 21. The animating principle of the Supreme Court's April 2020 ruling was not that *some* non-unanimous convictions raise questions as to the impartiality of the jury; it was that *all* of them do. Indeed, as three Justices pointed out earlier this year in *Edwards*, non-unanimous convictions even

2. It is for this reason that the Government's heavy reliance upon *Sanford* v. *United States*, 586 F.3d 28, 34 (D.C. Cir. 2009), is significantly misplaced. *See* Answer at 15–18. For one, *Sanford* concerned a due process challenge to the *size* of the appellant's court-martial panel. 586 F.3d at 29. The plaintiff did not challenge the panel's lack of unanimity. But even if he had done so in the course of that appeal, *Sanford* would still have little persuasive value because that decision predates *Ramos* by 11 years. "In short, even in *Ramos* itself, the Court indicated that the decision was not dictated by precedent or apparent to all reasonable jurists." *Edwards*, 141 S. Ct. at 1556.

implicate an accused's right to have the Government prove its case beyond a reasonable doubt — a concern only exacerbated by panel sizes smaller than 12. *See id*. at 22–23.

The Government responds that, by analogy to *Weiss*, the burden is on Appellant to provide "evidence that the panel members on his court-martial were not fair and impartial." Answer at 16; *see also id*. at 18 ("[Appellant] has never contested that the panel which heard his case was, itself, biased or partial in any way."). But this misses the point not only of *Weiss*, but of *Ramos*. *Weiss* held the Petitioners to a case-specific burden entirely because the Court *rejected* the claimed connection between untenured judges and unfair trials. *Ramos* not only tied unanimous convictions to impartiality (thus drawing the exact connection that *Weiss* eschewed), but it explicitly repudiated the very functional analysis that the Government would have this Court resuscitate. *See* Opening Br. at 23–24 (quoting *Ramos*, 140 S. Ct. at 1401–02). Thus, if the Sixth Amendment right to an impartial jury did not entitle Appellant to a unanimity instruction, the Fifth Amendment's Due Process Clause did.

c. The Government's Concerns About Unlawful Command Influence Do Not Support Affirmance.

The Government's only real response to this line of reasoning is its cryptic gesture toward deference to Congress and its assertion that "impartiality" in a court-martial means something fundamentally different from impartiality in a civilian court. *See* Answer at 18. Taking the deference claim first, it is notable, in this respect, that the Government does *not* rely heavily on the Military Justice Act of 2016 — in which Congress recently raised the threshold for non-capital conviction by a general court-

martial from two-thirds of the members to three-fourths after the Military Justice Review Group noted that non-unanimous convictions were still constitutional in Louisiana and Oregon. *See Report of the Military Justice Review Group Part I: UCMJ Recommendations*, at 459 (22 December 2015), https://jsc.defense.gov/Portals/99/MJRG%20Part%201.pdf (last visited 5 August 2021).

The Government's reticence on this point (reflected in a lone citation, see Answer at 12) may be related to more recent legislative action, in which the Senate Armed Services Committee voted 23–3 to include a provision in the FY2022 National Defense Authorization Act directing the Secretary of Defense to study whether Article 52's provision for non-unanimous convictions is still constitutional after and in light of *Ramos*. *See* S. Armed Services Cmte., *Fiscal Year 2022 National Defense Authorization Act: Executive Summary*, at 17 (2021), https://www.armed-services.senate.gov/imo/media/doc/FY22%20NDAA%20Executive%20Summary.pdf. Such a study would hardly be necessary if, pace the Government's Answer, Article 52's constitutionality was settled by Congress's *ipse dixit*.

As for the Government's impartiality argument, the Government claims that "impartiality is protected by the selection process of Article 25, and the anonymity of the individual panel vote — anonymity which is destroyed by a requirement of unanimity." Answer at 13. To be sure, Appellant does not dispute that Article 25's selection process *promotes* impartiality. But CAAF itself has long-since rejected the notion that Article 25's selection procedures are *all* that the Constitution requires — repeatedly holding that impartiality extends not just to how the members are *selected*,

but to how they discharge their panel duty. *See, e.g.*, *Lambert*, 55 M.J. at 295 (the constitutional right to an impartial panel "covers not only the selection of individual jurors, but also their conduct during the trial proceedings and the subsequent deliberations"). Impartiality thus only *begins* with selection; it remains a requirement all the way through the verdict, including with respect to how the verdict is voted.

As for the Government's remarkable suggestion that a requirement of unanimity "destroy[s]" impartiality, Answer at 18, that surely cannot be the Government's view of Article 52(b)(2) — which requires not one but *two* unanimous verdicts in any capital case. *See* 10 U.S.C. § 852(b)(2). The Government offers no explanation for why unanimous verdicts are appropriate in capital cases (where the panel's impartiality is only that much *more* important), but not non-capital cases. Insofar as the Government's response would be that it's because the *Constitution* requires such unanimity for capital cases, well, that only reinforces Appellant's position as to unanimity — not the Government's. All that the Government has left is a series of superficial policy arguments that a constitutional requirement of unanimous convictions would raise serious concerns about unlawful command influence ("UCI"). *See, e.g.*, Answer at 13 ("Appellant has failed to carry his burden to demonstrate that any alleged due process right in a unanimous verdict outweighs the due process interest in protecting against unlawful command influence and protecting the ability of a panel member to render a fair and impartial verdict.").

Appellant certainly does not dispute that UCI is a serious concern in all courts-martial. But that's why, among other things, it is expressly prohibited by the UCMJ.

See 10 U.S.C. § 837; *see also id*. § 931f(2) (subjecting to criminal liability anyone subject to the UCMJ who "knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused"). What's more, both this Court and CAAF have repeatedly reiterated the presumption that members follow the instructions they are given — including the standard instruction that rank has no place in deliberations. *See United States* v. *Stewart*, 71 38, 42 (C.A.A.F. 2012). Thus, if the Government's concern is that Article 37 as currently drafted and/or as enforced does not do enough to ward against UCI in the panel's deliberations and voting, its remedy lies elsewhere. *Cf.* Murl A. Larkin, *Should the Military Less-Than-Unanimous Verdict of Guilt Be Retained?*, 22 HASTINGS L.J. 237 (1971) (suggesting that less-than-unanimous verdicts create their own pressures on more junior panel members).

At a more basic level, though, the Government's UCI argument reinforces the extent to which it fundamentally misunderstands Appellant's submission. Appellant is not arguing that *all* verdicts in a court-martial must be unanimous. Rather, as the opening brief made clear, Appellant's claim is only that *convictions* require unanimity. Just like the Oregon Supreme Court held after *Ramos*, it does not follow that *acquittals* likewise require unanimity. *See State* v. *Ross*, 481 P.3d 1286, 1293 (Or. 2021); *see also* Opening Br. at 24 n.13. Thus, even under Appellant's argument, anonymity would still be preserved in acquittals, and the only cases in which commanding officers will know how individual members voted are those in which a guilty verdict is returned. The CAAF has already rejected the notion that a system which requires unanimous guilty

verdicts will result in UCI. *See United States* v. *Loving*, 41 M.J. 213, 296 (C.A.A.F. 1993) ("Where the vote is unanimous, those concerns about command influence would appear to be unfounded."); *see also* Opening Br. at 28 n.15. The Government never explains why the same officers responsible for convening a court-martial, referring charges, and selecting panel members would be displeased by a member's guilty vote. Indeed, this is already the status quo for capital cases — where the Government has, understandably, never so much as suggested a link between the unanimity requirement and UCI. If it's not an issue there, it could not possibly be an issue here. The Government's Answer does nothing to explain this dichotomy, or why its UCI concerns manifest themselves only in *non*-capital cases. That omission speaks volumes.

***

The Government's claims in its Answer notwithstanding, there is no decision by this Court or CAAF that squarely resolves the first assignment of error. And as a matter of first principles, the Supreme Court's decision last April in *Ramos* plainly connects the constitutional right to an impartial panel — that even the Government concedes Appellant has, *see* Answer at 18 — to convictions reached unanimously. Non-unanimous military convictions may trace their lineage all the way back to pre-revolutionary England, but "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897); *see also id.* ("It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."). What's more, given the dramatic

expansions to the scope of the military justice system over time, including its ability to prosecute civilian offenses such as those for which Appellant was convicted here, it's not at all obvious that non-unanimous convictions for these offenses would even have been approved by those who drafted the Constitution. *See also United States v. Martinez*, No. ACM 39973, Brief of *Amicus Curiae*, dated 10 July 2021, at 5–6 (noting that the British practice of trying uniformed soldiers for non-military, common law crimes in American civilian colonial courts — rather than at courts-martial — "continued when the Continental Congress enacted the first American Articles of War, essentially adopting the British version in our pre-Constitutional jurisprudence, i.e., general, non-military offenses were tried in *civilian* courts.").[3]

The Government's Answer offers no convincing grounds for retaining the requirement of non-unanimous convictions for non-capital offenses. The Supreme Court's decision in *Ramos*, in contrast, makes clear exactly why non-unanimous convictions are problematic — and always have been. Thus, whether because it comes from his Sixth Amendment right to an impartial jury or his Fifth Amendment right to due process, Appellant was entitled to the unanimity instruction he requested at trial. The refusal to provide that instruction was prejudicial[4] error — and should be reversed.

---

3. Notably, the Government points to *no* historical record accepting the practice of involuntarily extending a servicemember on active duty for the purposes of trying him before a court-martial on crimes which have neither a basis in military law nor common law, but instead are strictly creatures of a federal civilian statute adopted in 1952.

4. Although the Government notes the impossibility of determining how the panel voted on Appellant's convictions, Answer at 7 & n.3, it does not portray this defect as an independent obstacle to relief. The Government has thus forfeited any argument that the trial court's error in refusing to provide a unanimity instruction was harmless.

II.

APPELLANT'S CONVICTIONS FOR WIRE FRAUD AND ATTEMPTED WIRE FRAUD IN VIOLATION OF 18 U.S.C. § 1343 WERE LEGALLY AND FACTUALLY INSUFFICIENT.

a. The Government Has Disavowed Both Its Arguments at Trial and the Military Judge's R.C.M. 917 Ruling.

As Appellant noted in his opening brief, the military judge denied the Defense's R.C.M. 917 motion because — under his understanding of property rights protected by 18 U.S.C. § 1343, "Appellant could have defrauded the named victims by obtaining photographs of them in two distinct ways: (1) diminishing the value of the named victims' reputations, and (2) diminishing the pecuniary value of the photographs themselves." Opening Br. at 34. On appeal, the Government does its level best to repeatedly distance itself from that ruling. *See*, *e.g.*, Answer at 22 ("[T]his Court need not review the military judge's interpretation of the evidence . . ."); *id.* at 23 ("[r]egardless of the argument or opinion of the military judge during the R.C.M. 917 hearing . . ."); *id.* at 26 ("[w]hile perhaps inartfully discussed . . ."). These passages all-but concede what the Government's Answer implicitly admits — that the military judge misunderstood and misapplied the law.

Rather than defend the military judge's erroneous R.C.M. 917 ruling or the arguments circuit trial counsel advanced in opposition to Appellant's 917 motion, the Government argues this Court need not worry because, while the military judge's "analysis in his R.C.M. 917 ruling may have been relevant had he ultimately determined the question of guilt, Appellant elected to be tried by a panel." Answer at

22. In effect, the Government contends that this Court should not be concerned because these panel members — most if not all of whom were presumably devoid of any formal legal training, particularly within the sphere of Title 18 — surely would not have misunderstood the law in the same way that this O-6, senior judge advocate and military judge who detailed himself to Appellant's court-martial did. R. at 2, 4. As a matter of practical reality, this Court should not be so convinced.

b. At Trial, the Government Forfeited its Theory of Property Rights that it Now Advances on Appeal and Does Not Sufficiently Prove that the Nature of this Property is Covered by 18 U.S.C. § 1343.

In opposition to the Defense's R.C.M. 917 motion, the Government conceded that the photographs themselves were not "what was of value" in this case; rather, "[i]t's the content of the photos." R. at 546. Circuit trial counsel then advanced a singular argument which expressly abandoned any other theory: "He is depriving her of the ability to sell the photos but he has not deprived her of the property. He has not deprived her of the photos. *That is our argument*." *Id*.

But now, for the first time on appeal — and while simultaneously distancing itself from the military judge's R.C.M. 917 ruling — the Government advances a different theory of property rights that circuit trial counsel forfeited when he made clear the singular nature of his argument at trial—tied strictly to the victims' supposed inability to sell these photographs. Specifically, the Government contends that this Court "should be focused on two property rights: first, the unquestionable right that AL had in the naked photos themselves, and secondly the property right that AL had

in exercising exclusive control over her personal property — in this case, the naked photos." Answer at 23.

With respect to the Government's first theory, circuit trial counsel forfeited any claim that the photographs themselves were what was of value. Indeed, he not only forfeited that argument by failing to preserve it; he all-but waived it in his colloquy with the military judge:

> **MJ:** Well, I'm not sure – I'm not sure the photos themselves were what was of value, right?
>
> **CTC:** It's the content of the photos.
>
> **MJ:** Right. And she wouldn't have the control over the photos if she had them and he could publish them, right? I mean, if he could sell photos of her he is depriving her of that ability to sell those photos, isn't he?
>
> **CTC**: He is depriving her of the ability to sell the photos but he has not deprived her of the property. *He has not deprived her of the photos*. That is our argument.

R. at 546 (emphasis added).

Even if this Court were persuaded to the contrary, the Government expressly forfeited any argument that Appellant actually deprived AL of the "property right that AL had in the naked photos themselves . . . ." Answer at 23. As the Supreme Court has noted, "the Government may lose its right to raise factual issues . . . when it has made contrary assertions in the courts below, [or] when it acquiesced in contrary findings by those courts . . . ." *Steagald* v. *United States*, 451 U.S. 204, 209 (1981); *see also United States* v. *Suarez*, No. ACM 20170366, 2017 LEXIS CCA 631, at *12 (A. Ct. Crim. App. 27 Sep. 2017) (unpub. op.) ("[W]hen the government concedes an issue at trial and the

military judge accepts the concession, then the government cannot complain to this court that the military judge erred."). Circuit trial counsel could not have been any clearer when he argued that Appellant "has not deprived her of the photos." R. at 546. Accordingly, the Government cannot now resurrect a theory it expressly surrendered at trial.

The Government's second theory is premised upon "the property right that AL had in exclusive control over" the naked photos. Answer at 23. This theory is contingent upon the argument that Appellant somehow deprived AL of an "intangible right" such as that commonly attendant to intellectual property. *See* Answer at 24. At no point did the Government ever allege on the charge sheet that Appellant had deprived AL of an intangible right; it simply alleged that he devised a scheme to "obtain property" and that this property was the "nude photographs" themselves—*not* some unalleged intangible right intimately bound up in these photographs. ROT Vol. 1 – DD Form 458, Charge Sheet, referral dated 30 March 2020. As such, the Government failed to provide adequate notice that Appellant would be subject to liability on such a theory. *See United States* v. *Tunstall*, 72 M.J. 191, 192 (C.A.A.F. 2013) ("[T]he due process principle of fair notice mandates that 'an accused has a right to know what offense *and under what legal theory*' he will be convicted'" (alteration omitted; emphasis added)). The charge sheet provided Appellant no such notice that he would be defending against an intangible rights theory.[5]

5. "To prepare a defense, the accused must have notice of what the government is required to prove for a finding of guilty . . . [and] [t]he *charge sheet* provides the accused"

In any event, the Government supports this theory by citing to *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000) as a case in which the Supreme Court recognized "there can be property rights in intangible items." Answer at 24. But *Cleveland* supports Appellant's position, not the Government's: "[T]o the extent the word 'property' is ambiguous as placed in § 1341," the Court explained, "we have instructed that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland*, 531 U.S. at 25 (internal quotation marks omitted). "In deciding what is 'property' under § 1341, we think 'it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" *Id.* (quoting *United States* v. *Universal C.I.T. Credit Corp*, 344 U.S. 218, 222 (1952)). Thus, although *Cleveland* does not reject the proposition that an individual can have property rights in intangible items, it reinforces that any ambiguity as to whether a particular type of property right is encompassed by the wire fraud statute must be resolved in favor of the defendant.

The claimed right here is a far cry from the intangible property right recognized by the Supreme Court in *Carpenter* v. *United States*, 484 U.S. 19 (1987). There, the Court considered, "confidential business information," something which had "long been recognized as property." *Id.* at 26. Despite the Supreme Court's instruction that the rule of lenity should apply to questions of what constitutes property under the federal fraud statutes, the Government does not offer a single case in its Answer which treats

---

such notice. *United States* v. *Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018) (emphasis added; internal citations omitted).

as property for purposes of § 1343 digital copies of amateur naked pictures sent between co-workers. And as Appellant noted in his opening brief: "[T]o determine whether a particular interest is property for purposes of the fraud statutes, we look to whether the law traditionally has recognized and enforced it as a property right." Opening Br. at 32 (quoting *United States* v. *Henry*, 29 F.3d 112, 115 (3d Cir. 1994)). The Government points to no such historical recognition here for nude, amateur "selfies" falling within the ambit of 18 U.S.C. § 1343.

c. At a Minimum, Under the Government's Own Theory of Intangible Property Based upon Exclusive Control, the Attempted Wire Fraud Specifications Must be Dismissed.

Even if this Court were persuaded by the Government's theory of an infringement upon an intangible right given the loss of exclusivity, this theory — at the very minimum — undermines the sufficiency of the attempted wire fraud specifications relating to AW and GM-V. This is so because there is no evidence that either AW or GM-V took, much less sent, Appellant a picture over which they possessed exclusive control. Specification 1 of Charge III simply alleges that Appellant attempted "to obtain nude photographs" — it does not even allege that he attempted "to obtain nude photographs *of AW*." *See* ROT Vol. 1 – DD Form 458, Charge Sheet, referral dated 30 March 2020. The same is true of Specification 2 of Charge III vis-à-vis GM-V. *Id*. At best, the plain language of these attempted wire fraud specifications allege only that Appellant attempted to obtain *some* nude photographs belonging to AW and GM-V — *not* exclusively held digital copies of nude photographs depicting AW and GM-V.

Appellant does not contend that these specifications, as drafted, fail to state offenses — at least not under the maximum liberality standard attendant to post-conviction challenges. But the theory of property rights that the Government now advances on appeal carries certain burdens of proof that simply were not met at trial. To be sure, circuit trial counsel well-recognized the importance of establishing exclusive possession of the photographs AL sent during his redirect examination of her.[6] *See* R. at 243-44. But he did not—because the evidence could not—establish the same with respect to the pictures being sought in AW and GM-V's case.

And even if Appellant had sought to obtain a preexisting naked picture of AW or GM-V, the Government would *then* have needed to prove that this preexisting picture had not already been distributed to another such that the subjects still contained exclusive control and dominion over them. For these reasons, even if this Court is persuaded by the Government's intangible rights theory as to AL (which, again, should fail under the rule of lenity), this same exact theory is fatal to the specifications relating to AW and GM-V.

III.

IN THE ALTERNATIVE, APPELLANT'S CONVICTIONS FOR WIRE FRAUD AND ATTEMPTED WIRE FRAUD IN VIOLATION OF 18 U.S.C. § 1343 WERE PREEMPTED BY ARTICLE 121, UCMJ.

6. Some of the photographs AL sent had been previously distributed to another individual; thus, she did not have exclusive control over those photographs at the time she texted them to the individual she mistakenly believed to be AW. R. at 230. However, AL testified that the majority of the pictures she sent had not been previously submitted to anyone else. R. at 243.

a. The Government's Answer is Self-Contradicting.

The Government's response to Appellant's second assignment of error contradicts its response to his third. In arguing why it believes Appellant's wire fraud convictions are legally and factually sufficient, the Government cites *Carpenter*, 484 U.S. at 27, for the proposition that "[t]he concept of 'fraud' includes the act of embezzlement, which is 'the fraudulent appropriation to one's own use of the money or goods entrusted to one's care for another." Answer at 25. The Government then elaborates upon why, in its view, Appellant is guilty of embezzlement: "AL trusted Appellant to act as an agent to sell her naked photos — instead, Appellant's scheme resulted in him obtaining the photos for himself, for his personal use." *Id*.

But as Appellant noted in his initial brief, "[a]n examination of the legislative history of Article 121 discloses that it was the clear intent of Congress to create the single offense of 'larceny,' and to abolish the technical distinctions theretofore existing among the crimes of larceny, *embezzlement*, and taking under false pretenses[.]" Opening Br. at 46 (quoting *United States* v. *Antonelli*, 35 M.J. 122, 124 (C.M.A. 1992) (emphasis added)). Thus, Article 121, UCMJ, encompasses the crime of embezzlement—the very same crime which the Government claims Appellant committed in its Answer to Appellant's second assignment of error.[7] Answer at 25. But in response to Appellant's third assignment of error, the Government changes

7. "We are persuaded, as apparently the drafters of the Manual were, that Congress has, in Article 121, covered the entire field of criminal conversion for military law." *United States* v. *Norris*, 8 C.M.R. 36, 39 (C.M.A. 1953).

course and contends "the UCMJ does not have such a punitive article or even one that is closely related — as demonstrated by the fact Appellant attempts to analogize wire fraud with larceny." Answer at 28.

This argument stands in direct conflict with *Carpenter*, which recognized that "Sections 1341 and 1343 reach any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises." *Carpenter*, 484 U.S. at 27. That is to say, the Government could have pursued either an Article 121, UCMJ, *or* an 18 U.S.C. § 1343 charging scheme, but it decided to relieve itself of the burdens attendant to the former and subject Appellant to additional punitive exposure by going forward with the latter.

b. The Government's Argument Misconstrues and Fails to Account for Binding Precedent of the Supreme Court and CAAF.

The Government erroneously contends that the language in *United States* v. *Wheeler*, 77 M.J. 289, 291 (C.A.A.F. 2018), upon which Appellant relies is his brief, is mere dicta. Answer at 27. This ignores the very definition of dicta. "The definition of 'obiter dictum' is as follows: 'A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).'" *Richmond Health Facilities* v. *Nichols*, 811 F.3d 192, 204 (6th Cir. 2016) (quoting *Black's Law Dictionary* (10th ed. 2014)). In *Wheeler*, the CAAF made clear that this language *was* necessary to the result in that case in the passage introducing the quoted analysis: "*Unless*, and herein lies

the basis for our decision . . . ." *Wheeler*, 77 M.J. at 293 (emphasis in original). CAAF thus made clear that its discussion wasn't dicta at all.

The Government also argues that "wire fraud is aimed at separate interests from protecting victims from loss of property." Answer at 29. But this assertion cannot be squared with what the Supreme Court unanimously made clear just last year in a case involving wire fraud: "The Government in this case needed to prove *property* fraud." *Kelly* v. *United States*, 140 S. Ct. 1565, 1571 (2020) (emphasis in original). And it is likewise inconsistent with the significant length the Government goes to throughout eight pages of its Answer in an attempt to convince this Court that Appellant deprived or attempted to deprive the three named victims of their interest in property. *See* Answer at 20–27. There is a reason Appellant's third assignment of error is expressly raised in the alternative to his second assignment of error, and the Government's contradictory arguments between the two illustrate why it cannot prevail on both.

c. The Government Does Not Contest it Subjected Appellant to a Far Greater Degree of Punitive Exposure by Charging Him with Wire Fraud Instead of An Offense Premised Upon Article 121, UCMJ.

At no point in its Answer does the Government contest that it was able to secure a lengthier confinement sentence by charging Appellant with wire fraud as opposed to an Article 121, UCMJ, offense. *See* Opening Br. at 47. Nor does the Government argue that Article 121, UCMJ, would have required the Government to prove a dollar amount with regard to what these naked pictures were worth whereas charging wire fraud relieved them of this difficult — and, indeed, awkward —

burden. Its tacit silence in these respects can appropriately be construed as implicit admissions that Appellant is correct. Instead, the Government advances two different claims: (1) that Congress did not intend to "occupy the field" in Article 121, UCMJ, and (2) that wire fraud does not consist of a residuum of elements. Neither holds water.

1. The Government's Reliance Upon Supposed Differencing Interests Which it Claims are Served Between Article 121, UCMJ, and 18 U.S.C. § 1343 is a Red Herring.

Apart from the conflicting nature of the Government's contention in this assignment of error compared to how it addressed Appellant's second assignment of error, even if differing interests are served between Article 121, UCMJ, and 18 U.S.C. § 1343, this hardly means Congress did not intend to occupy the field in this sphere by adopting Article 121, UCMJ. Wire fraud has been on the books in Title 18 for many decades at this point. To the extent Congress (or even the President acting with respect to Article 134, UCMJ) thought that something was missing from Article 121, UCMJ, such that it needed to expand the scope of its ability to prosecute servicemembers under a like statute, then surely it would have added such an offense. The UCMJ has been no stranger to change since its inception—particularly as of late.

The Government then argues that even if "Congress may have intended to consolidate all 'criminal conversion' offenses when it first drafted Article 121 in the mid-20th century, it is evident that it abandoned that tact when the UCMJ was substantially revised in 2016." Answer at 30. But this argument does not follow. It

is important to note that the Government neither contends it could not have prosecuted Appellant under Article 121, UCMJ, for this same basic misconduct, nor does it contend that a newly created punitive article provided a new means by which Appellant could have been prosecuted on these facts. In effect, the Government's argument boils down to "because Congress added other crimes, albeit crimes which still do not capture what Appellant did, the field is no longer occupied and therefore — even though we could prosecute him under Article 121, UCMJ — we are now free to use Clause Three of Article 134, UCMJ, instead." This makes little logical sense.

2. A Preemption Analysis is Not Akin to the *Blockburger* Test; We Do Not Simply do a Side-By-Side Comparison of Elements, but Instead Take a "Broad Approach."

The Government's second argument — that it was actually required to prove more because Article 121, UCMJ does not require the use of wires to commit an offense — fails to appreciate how CAAF has applied the "residuum of elements" requirement in past cases. As that Court explained just two years ago in *United States* v. *Gleason*, "we need not confine ourselves to an element-by-element comparison between the drafted offense and the offense listed in the *MCM*." 78 M.J. 473, 475-76 (C.A.A.F. 2019).

While *Gleason* concerned application of these principles to a situation in which the Government charged a novel offense when a presidentially promulgated Article 134, UCMJ, offense already covered the same basic underlying conduct, this distinction makes no analytical difference here. *See id*. at 475. Although the Government in *Gleason* argued that "it did not charge this 'novel' offense to avoid

[the elements prescribed by the enumerated Article 134, UCMJ, offense], but because Appellant engaged in unique misconduct, different from obstruction of justice[,]" CAAF was quick to observe that, irrespective of this, "the 'novel' offense could have been charged as obstruction of justice" under Article 134, UCMJ. *Id.* at 476. Thus, the Government's charging scheme was illegitimate because "[i]f an offense is already listed inside Article 134's framework, it may not be charged as a 'novel' general disorder offense." *Id.*

The same principles inherent to the Court's analysis in *Gleason* are at play here. As in *Gleason*, the Government does not — and cannot — argue that it was precluded from prosecuting Appellant for an Article 121, UCMJ offense (whether it be larceny, attempted larceny, or wrongful appropriation). Article 121, UCMJ, provided a perfectly legitimate means of charging Appellant, as best demonstrated by the fact that the Government *did* originally prefer such specifications against Appellant. It was only after the PHO recommended going forward with just the wire fraud specifications based in large part upon the strategic advantage it afforded the Government that it dropped the larceny and attempted larceny specifications. And, critically, wire fraud also allowed the Government the means of securing a confinement term it otherwise could not have if it went forward with its Article 121, UCMJ, charging scheme instead.[8]

8. As noted in Appellant's opening brief, this is because the originally preferred larceny and attempted larceny specifications only alleged the photographs were of "some value" — they did not articulate a specific dollar amount, let alone a dollar amount in excess of $1,000. Opening Br. at 8. It would have been very difficult for the

Put simply, *Gleason* explicitly rejects the strict element-by-element approach that the Government would have this Court use. What matters is not whether Article 121, UCMJ, requires the use of wires in every case; instead, we take "a relatively broad approach" in analyzing specifications which are based on offenses that are not captured within the *MCM* for purposes of a preemption analysis. *See id*. at 475. Under this approach it is clear that — like *Gleason* — the Government could have charged Appellant with an enumerated offense set forth in the *MCM*. But by foregoing this approach it was able to circumvent the unenviable position of having to go before the members and argue that a nude, junior Airman's pictures were worth a particular dollar amount. And even more importantly, because it did not have to do this, the Government was able to secure an otherwise unauthorized term of confinement which exceeded the maximum amount allowable under Article 121, UCMJ, by no less than 24 months.

PRAYER FOR RELIEF

WHEREFORE, for the reasons set forth in his filings before this Court, Appellant respectfully requests that this Honorable Court grant the relief he requested in his opening brief dated 30 June 2021. As noted in separate filings submitted to this Court, Appellant likewise respectfully suggests that this Honorable Court consider his case en banc and that it hold oral argument on his first assignment of error.

Government to prove a dollar amount in excess of $1,000 with respect to AW and GM-V given that no pictures of them actually exist. That would be like auctioning off a fictional piece of artwork Picasso never painted by asking potential buyers to just use their imagination of what he may have drawn.

Very respectfully submitted,

STEPHEN I. VLADECK
Civilian Appellate Defense Counsel
727 East Dean Keeton Street
Austin, TX 78705
(512) 475-9198

RYAN S. CRNKOVICH, Capt, USAF
Appellate Defense Counsel
DAF/JAJA
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 Appellate Government Division on 6 August 2021.

RYAN S. CRNKOVICH, Capt, USAF
Appellate Defense Counsel
DAF/JAJA
United States Air Force
(240) 612-4770