30 June 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

BRIEF ON BEHALF OF APPELLANT

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 3
Airman (E-2) **JONATHAN M. MARTINEZ** United States Air Force, *Appellant*.	)	No. ACM 39973 30 June 2021

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

ISSUES PRESENTED

I.

WHETHER, 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?

II.

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

III.

WHETHER, 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?

IV.[1]

WHETHER EQUAL PROTECTION GUARANTEED APPELLANT A UNANIMOUS VERDICT AS TO THE TITLE 18 OFFENSES?

1. Raised pursuant to *United States* v. *Grostefon*, 12 M.J. 431 (C.M.A. 1982).

STATEMENT OF THE CASE

From 10 August 2020 to 13 August 2020, Appellant was tried before officer members at a general court-martial at Hurlburt Field, Florida.[2] R. at 1 [Record of Trial (ROT), Vol. 1 – Entry of Judgment (EOJ), dated 18 September 2020]. Contrary to his pleas, Appellant was convicted of one charge and one specification of wire fraud under 18 U.S.C. § 1343, in violation of Article 134, Uniform Code of Military Justice (UCMJ); one charge and one specification of wrongfully communicating a threat in violation of Article 115, UCMJ; one charge and two specifications of attempted wire fraud under 18 U.S.C. § 1343 in violation of Article 80, UCMJ; and one charge and one specification of wrongfully using marijuana in violation of Article 112a, UCMJ.[3] ROT at Vol. 1 – EOJ, dated 18 September 2020.

The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, total confinement for 36 months, and a dishonorable discharge. *Id*. Appellant was sentenced to 36 months' confinement for specification 2 of Charge I (wire fraud in violation of Article 134, UCMJ), 36 months confinement for Charge II and its specification (wrongfully communicating a threat in violation of Article 115, UCMJ), 6 months confinement for each specification of Charge III (attempted wire fraud in violation of Article 80, UCMJ), and no confinement for specification 2 of Charge IV

2. Appellant elected to be sentenced by the military judge rather than by the panel. R. at 619.

3. The panel acquitted Appellant of one specification of negligently discharging a firearm allegedly in violation of Article 134, UCMJ; and one specification of wrongfully using cocaine allegedly in violation of Article 112a, UCMJ.

(wrongful use of marijuana in violation of Article 112a, UCMJ). *Id*. All confinement was to run concurrently. *Id*. By memorandum dated 14 September 2020, the Convening Authority took no action in the case. ROT at Vol. 1 – Convening Authority Decision on Action, dated 14 September 2020.

STATEMENT OF FACTS

On 1 February 2019, AL received a text from an unknown phone number that purported to be her close friend, AW. R. at 212–13. AL and AW were both junior Airmen at the time who had attended technical school together and were assigned to the same squadron. R. at 212. The individual texting from this previously unknown phone number told AL she was AW and "got a new number." R. at 214. AL believed these assertions and "thought the messages were from [AW]." R. at 213. This individual proceeded to tell AL "[t]hat they found a side gig working for a magazine, sending in bra and panty pictures, nude pictures." R. at 214.

AL was told that if she too participated in this "side gig" by sending in pictures, she would be paid a "few thousand" dollars. R. at 215. At the encouragement of the individual she believed to be AW, AL agreed to provide sexually explicit photos in exchange for money and texted the person she believed to be AW her bank account information.[4] R. at 215. She also proceeded to text this individual digital photographs of herself in various states of undress including full nudity. R. at 216. After

4. AL later testified no money was ever taken out of her bank account. R. at 229.

electronically receiving these photos, the individual texting from the unknown number revealed to AL that it was not AW she had been texting with after all. R. at 216.

Instead, this individual expressly told AL that they intended to remain anonymous and that the sexually explicit pictures she had provided over text message were illegal in the military. R. at 216. This individual also instructed AL that if she told anyone about their text message conversation they would then expose AL's pictures to the base community. *Id.* However, this individual would *not* do so if AL abided by certain rules (e.g., referring to this individual in text messages as "daddy"). R. at 216–17. If AL failed to abide by these terms, this individual would impose a penalty of requiring her to text another sexually explicit picture. R. at 217.

After realizing what had just happened, but seemingly unbeknownst to the other individual texting from the unknown phone number, AL got in contact with the real AW, showed her the messages, and made a report to the Air Force Office of Special Investigations (AFOSI). *Id.* At AFOSI's instruction, AL continued to text back and forth with the unknown phone number until they could determine who it was. *Id.* At first, AL called this person "daddy" as had been requested, but later she started speaking in Spanish in an attempt to figure out who this individual was. R. at 231. Frustrated with AL's decision to use Spanish, the individual demanded that AL respond in English—thereby informing AL's understanding "that this person doesn't speak Spanish[.]" *Id.* Appellant was fluent in Spanish—a point the Defense emphasized in closing argument. R. at 491, 601. At some point thereafter, some of AL's sexually charged photographs

she had sent to the unknown number ended up on a fake Instagram account and elsewhere online. R. at 293, 407.

Initially, AL suspected that the individual texting her was another junior Airman named DC. R. at 76, 235–36. This was because DC had a Twitter account where women sent him photographs and called him "daddy." DC had also asked AL if she had ever been blackmailed, once requested pictures of AL wearing a red thong, and had called her a "thirst trap." R. at 236–237. AL provided this information to AFOSI and informed them of her suspicions that DC was behind this. R. at 238. AL did not suspect Appellant, and was "shocked" when AFOSI told her that it was him. R. at 235. But, as the Defense pointed out during cross-examination, AL was unaware that her photographs did not appear on Appellant's phone until 25 March 2019—nearly two months after they were sent. R. at 242, 406. And DC was never even interviewed by AFOSI. R. at 350.

AL was not, however, the only individual in the squadron to receive a similar message from an unknown phone number. R. at 251, 277. On 4 February 2019, an individual text messaged the real AW and this time claimed to be AL. R. at 251. As before, this individual proposed a similar "side gig" whereby AW would be paid for sending in sexually explicit photos to a magazine. *Id.* The real AW was already aware of what had happened to the real AL; therefore, she immediately suspected that the purported AL was fake. R. at 252. The real AW confirmed her suspicions by texting the real AL. *Id*. The real AW went along, however, in an attempt to play the role of "little detective." R. at 253. But she never sent any photographs to this number. R. at 254. A

similar attempt was made with GMV, but—like AW—GMV did not send any pictures. Pros. Ex. 6; R. at 276, 278.

AFOSI's Use of Federal District Court

Rather than rely upon search authority from a military magistrate or a pre-referral subpoena pursuant to Article 30a, UCMJ, the lead AFOSI Special Agent (SA) CC, availed herself of the benefits of going through a civilian U.S. district court in order to obtain evidence from the "TextNow" service provider—which would later be used to help secure Appellant's conviction. App. Ex. XVII at 15. Specifically, on 28 March 2019, SA CC met with Judge Elizabeth Timothy, the Chief U.S. Magistrate Judge for the Northern District of Florida in relation to this case. *Id*.

In her sworn affidavit to Chief Judge Timothy, SA CC averred that "[t]his Court has jurisdiction to issue the requested warrant because it is 'a court of competent jurisdiction' as defined by 18 U.S.C. § 2711. Specifically, the Court is 'a district court of the United States . . . that has jurisdiction over the offense being investigated." ROT at Vol. 5 – Preliminary Hearing Officer (PHO) Report, dated 9 March 2020 at Exhibit 4, pages 293–295. As SA CC described in her report, after Chief Judge Timothy "evaluat[ed] the facts and circumstances of this investigation, [she] provided a signed Federal Search Warrant, authorizing the search of the TextNow numbers" at issue in this case. App. Ex. XVII at 15.

However, SA CC never told Chief Judge Timothy that she was investigating an offense under the UCMJ (or, for that matter, an offense under the federal wire fraud statute); instead, her affidavit stated that she sought a warrant because

"[t]his investigation concerns alleged violations of 18 U.S.C. § 2261A(2)(B), relating to stalking." ROT at Vol. 5 – PHO Report, dated 9 March 2020 at Exhibit 4, pages 293-295. Indeed, SA CC told Chief Judge Timothy that, "[b]ased on [her] training and experience and the facts as set forth in this affidavit, there is probable cause to believe that violations of 18 U.S.C. § 2261A(2)(B) have been committed by an unknown person(s)." *Id.* at 294; *see also id.* at 286 (showing that the only crime identified which served as the basis for a search was "18 U.S.C. § 2261A(2)(B)" for "Stalking"). SA CC did *not* seek search authorization for a violation of Article 130, UCMJ, 10 U.S.C. § 930—an enumerated punitive article set forth by Congress which, according to its caption, expressly criminalizes "Stalking." *MCM*, pt. IV,¶ 80 (2019 ed.). Appellant was never charged with stalking under either Article 130, UCMJ or 18 U.S.C. § 2261A(2)(B). *See* ROT at Vol. 1 – DD Form 458, referred on 30 March 2020.

The Originally Preferred Charges and the PHO Report

The originally preferred charges included not only the three wire fraud/attempted wire fraud allegations for which Appellant would be convicted at trial, but also three larceny specifications alleging violations of Articles 80 and 121, UCMJ.[5] ROT at Vol. 4 – PHO Report, dated 9 March 2020 at Exhibit 1. The following presents a side-by-side comparison of the wire fraud allegations against their corresponding larceny allegations:

5. One of the theft allegations was charged under Article 121; the other two were charged as attempted larceny pursuant to Article 80, UCMJ. ROT at Vol 1 – DD Form 458, referred on 30 March 2020.

Larceny Specifications		Wire Fraud Specifications
"In that [Appellant] . . . did, within the continental United States, on or about 1 February 2019, steal nude photographs of [AL], of some value, the property of [AL]."		In that [Appellant] . . . did, within the continental United States, between on or about 1 February 2019 and on or about 29 March 2019, devise a scheme to defraud [AL] to obtain property, to wit: impersonating [AW] to obtain nude photographs by means of materially false and fraudulent pretenses and representations, and that [Appellant] transmitted a writing, signal or sound by means of a wire communication in interstate commerce in violation of 18 U.S. Code Section 1343, an offense not capital."
"In that [Appellant] . . . did, within the continental United States, on or about 1 February 2019 and on or about 4 February 2019, attempt to steal nude photographs of [AW], of some value, the property of [AW]."		"In that [Appellant] . . . did, within the continental United States, between on or about 1 February 2019 and on or about 4 February 2019, attempt to devise a scheme to defraud [AW] to obtain property, to wit: impersonating [AL] to obtain nude photographs by means of materially false and fraudulent pretenses and representations, and that [Appellant] did act with intent to defraud, and in advancing, furthering, or carrying out the scheme, [Appellant] transmitted a writing, signal, or sound by means of a wire communication in interstate commerce in violation of 18 U.S. Code Section 1343, an offense not capital."
"In that [Appellant] . . . did, within the continental United States, on or about 2 February 2019 and on or about 25 March 2019, attempt to steal nude photographs of [GMV], of some value, the property of [GMV]."		"In that [Appellant] . . . did, within the continental United States, between on or about 1 February 2019 and on or about 25 March 2019, attempt to devise a scheme to defraud [GMV] to obtain property, to wit: impersonating [AL] to obtain nude photographs by means of materially false and fraudulent pretenses and representations, and that [Appellant] did act with intent to defraud, and in advancing, furthering, or carrying out the scheme, [Appellant] transmitted a writing, signal, or sound by means of a wire communication in interstate commerce in violation of 18 U.S. Code Section 1343, an offense not capital."

See ROT at Vol. 1 – DD Form 458, referred on 30 March 2020.

As the PHO noted in her report, the three wire fraud/attempted wire fraud specifications and the three larceny/attempted larceny specifications—as preferred—"capture the exact same conduct, and while I understand the elements are different, you are not capturing any different misconduct by charging it in two different ways." ROT at Vol. 4 – PHO Report, dated 9 March 2020, Continuation of Item 13a at 15. She continued:

> While I believe that the evidence meets the probable cause standard for both the Article 134 and Article 121 charges (and the corresponding attempt charges), the elements of the Article 134 offense that I laid out above seem to better capture the misconduct of the accused. The elements of Article 121 don't explicitly lay out false pretenses and that will have to come in through instructions from the judge. The elements required to prove the Article 134 (Wire Fraud) offense clearly state that the false pretenses were used to obtain the property. In my opinion the Article 134 offense does not allow for as much room to question the actions of the victims (i.e.: why they were giving out nude photos and banking information to unknown numbers). I would recommend going forward with only the Article 134 *or* Article 121 charges; however, if the Government decides to move forward with *both* the Article 121 and Article 134 charges for the same misconduct there will inevitably be motions for unreasonable multiplication of charges.

Id. Consistent with the PHO's recommendation, the three larceny/attempted larceny specifications were withdrawn and dismissed on 30 March 2020. ROT at Vol. 1 – DD Form 458, referred on 30 March 2020. Save for a renumbering, the wire fraud specifications remained as originally preferred. *See id*.

Forum Choice and the Defense's Unanimous Verdict Motion

Appellant pled not guilty to all charges and specifications and further elected to be tried before a panel of officer members. R. at 11, 16. Prior to arraignment, the Defense submitted a 19-page motion arguing that, in light of the Supreme Court's

recent decision in *Ramos* v. *Louisiana*, 140 S. Ct. 1390 (2020), Appellant was entitled to a unanimous verdict as to guilt for three distinct reasons: (1) pursuant to the Fifth Amendment's Due Process Clause, (2) consistent with the constitutional guarantee to equal protection, and (3) in accordance with the Sixth Amendment right to a unanimous verdict. App. Ex. V at 11. The Government responded, in kind, with an 18-page brief of its own in opposition to requiring unanimity. App. Ex. VI. The military judge ultimately denied the Defense's motion in a written ruling. App. Ex. VII.

Appellant's Conviction and Punitive Exposure

Of the five specifications of which Appellant was found guilty at trial, three of them alleged violations of 18 U.S.C. § 1343 (the "Wire Fraud Act"). *See* ROT at Vol. 1 – EOJ, dated 18 September 2020. There is no reference to this specific federal criminal offense anywhere in UCMJ, let alone the *MCM*. Nor is there any mention of the phrase "wire fraud" in either of these authorities. But because Appellant was charged with wire fraud and attempted wire fraud in violation of 18 U.S.C. § 1343, each specification carried the potential for 20 years' confinement. R. at 625.

By contrast, if the Government had elected to proceed with the Article 121, UCMJ, violations it had preferred instead of the wire fraud specifications, Appellant's punitive exposure would have been significantly limited—to a maximum of one year in confinement for each specification. *MCM*, pt. IV, ¶ 64.d.(1)(a) (2019 ed.). The 36-month confinement imposed by the military judge for Specification 2 of Charge I alone is in excess of the maximum authorized punishment that could

permissibly have been adjudged if charged as a larceny under Article 121, UCMJ by 24 full months.[6]

Appellant's Involuntary Extension on Active Duty

During the presentencing proceedings, the military judge inquired as to why Appellant was still on active duty when his personal data sheet said that he had enlisted on 13 August 2013 for a six-year term. R. at 623. Appellant told the military judge he did not extend willingly; he had been involuntarily extended on active duty for over a year. R. at 624. No party disputed this assertion. *See id*.

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.

Standard of Review

"The adequacy of a military judge's instructions is reviewed de novo." *United States* v. *MacDonald*, 73 M.J. 426, 434 (C.A.A.F. 2014). Likewise, "[t]he constitutionality of a statute is a question of law; therefore, the standard of review is

6. Even if the Government had amended these Article 121, UCMJ, specifications to allege that these photographs were not just of "some value" but that their value was in excess of $1,000 (a matter which would seemingly be difficult to prove both as a matter of fact and public policy in that it would reflect the Government of the United States ascribing a dollar amount to photographs of a nude junior Airman who, in some pictures, was partially clad in her Air Force uniform), the maximum authorized punishment for each specification would still only have been three years confinement. *MCM*, pt. IV, ¶ 64.d.(1)(c) (2019 ed.).

de novo." *United States* v. *Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000). "If instructional error is found, because there are constitutional dimensions at play, [the appellant's] claims must be tested for prejudice under the standard of harmless beyond a reasonable doubt." *United States* v. *Dearing*, 63 M.J. 478, 482 (C.A.A.F. 2006) (alteration in original).

Law & Analysis

In *Ramos* v. *Louisiana*, 140 S. Ct. 1390 (2020), the Supreme Court "repudiated [its] 1972 decision in *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), which had allowed non-unanimous juries in state criminal trials." *Edwards* v. *Vannoy*, 141 S. Ct. 1547, 1551 (2021). Instead, *Ramos* held that the Due Process Clause of the Fourteenth Amendment required applying the same jury-unanimity rule to state convictions for criminal offenses that already applied to federal (civilian) convictions under the Jury Trial Clause of the Sixth Amendment. 140 S. Ct. at 1397. As the Supreme Court reiterated this May, in so holding, *Ramos* unequivocally broke "momentous and consequential" new ground. *See Edwards*, 141 S. Ct. at 1559; *see also id.* at 1555–56 (noting that "[t]he jury-unanimity requirement announced in *Ramos* was not dictated by precedent or apparent to all reasonable jurists" beforehand). Indeed, the *Edwards* majority recognized that *Ramos* was on par with other "landmark" cases of criminal procedure "like *Mapp, Miranda, Duncan, Batson,* [and] *Crawford* . . . ." *Id.* at 1559.

For decades, the prevailing assumption has been that, as was true for state courts until last year, the Constitution does not require unanimous verdicts for non-

capital courts-martial.[7] *See, e.g.*, *United States* v. *Lebron*, 46 C.M.R. 1062, 1068–69 (A.F.C.M.R. 1973). As this Court's predecessor explained in 1973, this purportedly followed from the Supreme Court's recognition in cases such as *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), and *Ex parte Quirin*, 317 U.S. 1 (1942), that the Sixth Amendment's jury-trial right does not extend to military tribunals. *See Lebron*, 46 C.M.R. at 1068–69; *see also United States* v. *McClain*, 22 M.J. 124, 128 (C.M.A. 1986) ("[C]ourts-martial have never been considered subject to the jury-trial demands of the Constitution.").[8]

Ramos turns that assumption on its head. It does this not by applying the Sixth Amendment Jury Trial Clause to courts-martial, but by emphasizing two features of the unanimity requirement that *do* apply to military trials, whether through the Sixth Amendment or the Due Process Clause of the Fifth Amendment: First, *Ramos* makes clear that the right to a unanimous verdict is an essential aspect of the Sixth Amendment right to an *impartial* jury—a right that, as CAAF has recognized, both the

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7. The UCMJ and the Constitution both require unanimous verdicts as to the conviction and sentence in capital cases. *See* 10 U.S.C. § 852(b)(2); *United States* v. *Gray*, 51 M.J. 1, 61 (C.A.A.F. 1999).

8. In fact, the Supreme Court has never squarely *held* that the Sixth Amendment Jury Trial Clause is inapplicable to courts-martial. The oft-quoted statements to that effect in *Milligan* and *Quirin*, both cases about military *commissions* rather than courts-martial, were dicta at best. *Cf. Ortiz* v. *United States*, 138 S. Ct. 2165, 2179 ("[N]ot every military tribunal is alike."). But the Court of Appeals for the Armed Forces *has* repeatedly held that there is no constitutional right to jury trial in a court-martial. This Court is, of course, bound by those rulings. Thus, Appellant assumes, solely for the sake of proceedings before this Court, that he did not have a constitutional right to trial by jury in his court-martial. Appellant reserves the right to argue on appeal, however, that those decisions should be overruled.

UCMJ and the Constitution provide to the accused in a court-martial. *See, e.g.*, *United States* v. *Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005).

Second, *Ramos* recognizes that unanimity is central to the fundamental *fairness* of a jury verdict—as opposed to a verdict rendered by a judge. Under *Milligan* and *Quirin*, Congress may not have been under a constitutional obligation to provide Appellant with the right to be tried by a panel in the first place. But as CAAF has long held, "[a]s a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States* v. *Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001). Thus, whether under the Sixth Amendment or the Fifth, Congress's choice to provide a statutory right to trial by a panel necessarily triggered constitutional requirements of fairness and impartiality—requirements that, after *Ramos*, can no longer be satisfied by non-unanimous convictions for the offenses for which Appellant was tried.

At trial in this case, citing *Ramos*, Appellant specifically requested that the trial judge instruct the members that they had to reach a unanimous verdict to return a conviction. In a written opinion, the trial judge refused to so instruct the panel. App. Ex. VII. But because no one can dispute that Appellant has constitutional rights to both an impartial panel and a fair verdict, or that he preserved those rights by timely seeking a unanimity instruction below, the trial court's refusal to instruct the panel on unanimity was reversible error.

a. *Ramos* Unequivocally Holds That Unanimous Verdicts are Central to a Defendant's Right Not Just to a Trial by Jury, But to a Jury That is Itself Impartial

The Supreme Court's landmark decision in *Ramos* was not just a technical interpretation of the Sixth Amendment's Jury Trial Clause. Rather, both the holding and the result in *Ramos* were based upon "a fundamental change in the rules thought necessary to ensure *fair criminal process*." *Edwards*, 141 S. Ct. at 1574 (Kagan, J., dissenting) (emphasis added). Indeed, Part I of Justice Gorsuch's opinion for the *Ramos* Court opens with three pages on the extent to which it was understood at the Founding that unanimity was central not just to the right to *a* petit jury in a criminal case, but to the right to an *impartial* jury—which, unlike unanimity, the text of the Sixth Amendment expressly requires. *See Ramos*, 140 S. Ct. at 1395–97. As he explained, "[w]herever we might look to determine what the term 'trial by an *impartial* jury' meant at the time of the Sixth Amendment's adoption—whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict." *Id*. at 1395 (emphasis added).

This analysis was more than just a frolic or detour. As Justice Gorsuch repeatedly stressed, the proposition that the Sixth Amendment Jury Trial Clause requires unanimous verdicts had long been settled by the Supreme Court. Likewise, the Court has also long made clear that constitutional provisions that have been incorporated against the states through the Fourteenth Amendment's Due Process Clause, *including* the Sixth Amendment Jury Trial Clause (which was incorporated in

Duncan v. *Louisiana*, 391 U.S. 145 (1968)), necessarily have the same scope and meaning as applied to states as they do directly against the federal government. Neither of these principles was in dispute. *See Ramos*, 140 S. Ct. at 1397. Rather, the question was whether, taken together, they justified overruling *Apodaca*—in which Justice Powell's enigmatic solo concurring opinion had attempted to split the difference. And the Court's central justification for relegating *Apodaca* "to the dustbin of history," *id*. at 1410 (Sotomayor, J., concurring in part), was the extent to which it was inconsistent with fundamental (and Founding-era) understandings of procedural fairness.

In her concurring opinion, Justice Sotomayor reinforced the connection between unanimity and fairness. As she wrote, non-unanimous verdicts can give rise to at least a "perception of unfairness," especially when there are racial disparities in the pool of defendants and/or the composition of the jury. *See id*. at 1418 (Sotomayor, J., concurring in part).[9] In that respect, *Ramos* did more than just overrule *Apodaca* and incorporate the unanimous jury requirement against the states; it reinforced that

9. The historical origins of non-unanimous verdicts in courts-martial do not share the troubled, racially motivated underpinnings behind the Louisiana and Oregon statutes that *Ramos* struck down. *See* Murl A. Larkin, *Should the Military Less-Than-Unanimous Verdict of Guilt Be Retained?*, 22 HASTINGS L.J. 237, 239 & n.13 (1971). That said, many of the concerns about racial disparities to which Justice Sotomayor adverted in her *Ramos* concurrence are undeniably present in contemporary courts-martial—including in the Air Force. *See* Air Force Inspector General, Report of Racial Inquiry, Independent Racial Disparity Review, December 2020. In any event, Justice Gorsuch's majority opinion in *Ramos* made explicit that "a jurisdiction adopting a nonunanimous jury rule, *even for benign reasons*, would still violate the Sixth Amendment." *Ramos*, 140 S. Ct. at 1440 n.44 (emphasis added).

unanimous juries are part-and-parcel of the Constitution's *separate* requirements to *impartial* juries and *fair* verdicts. *See, e.g.*, *Edwards*, 141 S. Ct. at 1575 (Kagan, J., dissenting) ("[T]he [*Ramos*] Court took the unusual step of overruling precedent for the most fundamental of reasons: the need to ensure, in keeping with the Nation's oldest traditions, fair and dependable adjudications of a defendant's guilt."). That distinction is critical here, for it underscores why, even if Appellant had no constitutional right to a trial by petit jury in his court-martial, the Constitution nevertheless required that, once he was tried by a jury that Congress chose to provide, his convictions had to be unanimous. *See, e.g.*, *Evitts* v. *Lucey*, 469 U.S. 387, 393 (1985) (explaining why, even if a criminal defendant has only a statutory—rather than a constitutional—right to appeal a conviction, "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution").

b. As CAAF Has Repeatedly Recognized, the UCMJ and the RCM Create Both Statutory *and* Constitutional Rights for the Accused Vis-à-Vis the Panel

In the abstract, the argument that the Constitution protects rights to an impartial panel and a fair verdict even in cases in which there is no constitutional right to a trial by petit jury in the first place may seem unorthodox. But CAAF's jurisprudence unequivocally establishes that proposition—and has reflected it for decades. Thus, it is the combination of the Supreme Court's decision in *Ramos* and the line of CAAF decisions recognizing constitutional rights to both an impartial decision maker and a fair verdict that required the panel in this case to return unanimous convictions for Appellant's offenses.

As far back as 1964, CAAF's predecessor explicitly recognized that, even if servicemembers do not have a constitutional right to trial by petit jury, "[c]onstitutional due process includes the right to be treated equally with all other accused in the selection of *impartial* triers of the facts." *United States* v. *Crawford*, 35 C.M.R. 3, 6 (C.M.A. 1964) (emphasis added); *see also United States* v. *Deain*, 17 C.M.R. 44, 49 (C.M.A. 1954) ("Fairness and impartiality on the part of the triers of fact constitute a cornerstone of American justice."). More recently, CAAF has suggested that the right to an impartial court-martial panel comes not only from the Due Process Clause of the Fifth Amendment, as in *Crawford*, but from the Sixth Amendment *itself*. *See, e.g.*, *United States* v. *Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001) ("[T]he *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." (emphasis added)).

Lambert is hardly the only case in which CAAF has extended Sixth Amendment protections to courts-martial. To the contrary, CAAF has also held that court-martial accused are entitled under the Sixth Amendment—and not just the UCMJ—to (1) a speedy trial, *see United States* v. *Danylo*, 73 M.J. 183, 186 (C.A.A.F. 2014); (2) a public trial, *see United States* v. *Hershey*, 20 M.J. 433, 435 (C.M.A. 1985); (3) the ability to confront witnesses, *see United States* v. *Blazier*, 69 M.J. 218 (C.A.A.F. 2010); (4) notice of the factual and legal bases for the charges, *see United States* v. *Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011); (5) the ability to compel testimony that is material and favorable to the defense, *see United States* v. *Bess*, 75 M.J. 70, 75 (C.A.A.F. 2016); (6) counsel, *see*

United States v. *Wattenbarger*, 21 M.J. 41, 43 (C.M.A. 1985); and (7) the effective assistance thereof, *see United States* v. *Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011). *Lambert*'s reasoning—that the Sixth Amendment right to an *impartial* jury also applies to court-martial panels—is deeply consistent with this large body of case law. *See also United States* v. *Castellano*, 72 M.J. 217, 219 (C.A.A.F. 2013) (holding that, by finding a *Marcum* factor by himself rather than having it found by the panel, the judge violated "Appellant's due process rights under the Fifth and Sixth Amendments").[10]

Thus, once an accused elects to be tried by a panel, *Lambert* establishes that he has a *constitutional* right to impartiality under the Sixth Amendment with respect to both how the panel members are selected and how they deliberate their verdict. If, as *Ramos* suggested, unanimous convictions are necessary to impartiality, then it follows that an accused in a court-martial who elects to be tried by a panel has a Sixth Amendment right to a unanimous guilty verdict.

c. Even if the Sixth Amendment Does Not Require Unanimous Verdicts for Serious Offenses Tried By Court-Martial, the Due Process Clause of the Fifth Amendment Does

The above analysis demonstrates why Appellant had a right to a unanimous guilty verdict as part of his right to an impartial panel under the Sixth Amendment. But he also had a right to a unanimous guilty verdict as part of his right to due process

10. One of the cases that CAAF cited in *Castellano* for the proposition that *Marcum* factors must be found by the panel is *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000)—in which the Court held that the Sixth Amendment Jury Trial Clause, not the Fifth Amendment Due Process Clause, requires that any facts that increase the penalty for a crime beyond the prescribed statutory maximum be submitted to the jury and proved beyond a reasonable doubt. *See* 72 M.J. at 219 (citing *Apprendi*, 530 U.S. at 490).

under the Fifth Amendment—because "[i]mpartial court-members are a *sine qua non* for a fair court-martial." *United States* v. *Modesto*, 43 M.J. 315, 318 (C.A.A.F. 1995); *see also United States* v. *Witham*, 47 M.J. 297, 301 (C.A.A.F. 1997) ("[A] military accused has no right to a trial by jury under the Sixth Amendment. He does, however, have a right to due process of law under the Fifth Amendment, and Congress has provided for trial by members at a court-martial." (citations omitted)). This Court's superior has also recognized that when a right applies by virtue of due process "it applies to courts-martial, just as it does to civilian juries." *United States* v. *Santiago-Davilla*, 26 M.J. 380, 390 (C.M.A. 1988) (holding that the Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), applied to courts-martial).[11]

As with any number of other due process contexts, Congress may not have been obliged to offer Appellant the option of being tried by a panel, but once it chose to provide that option, it had to do so in a manner consistent with fundamental notions of procedural fairness—because criminal trials necessarily implicate the accused's liberty. *See, e.g.*, *Wilkinson* v. *Austin*, 545 U.S. 209, 221–24 (2005). Put another way, Congress could hardly rely upon an accused's lack of a constitutional right to a trial by jury to provide a panel that reaches its verdict by flipping a coin. *See Evitts*, 469 U.S. at 393.

11. Since *Santiago-Davilla* was decided, CAAF "has repeatedly held that the *Batson* line of cases . . . applies to the military justice system." *United States v. Witham*, 47 M.J. 297, 300 (C.A.A.F. 1997).

As the Supreme Court made clear in *Weiss* v. *United States*, 510 U.S. 163 (1994), when it comes to an accused's procedural rights in a court-martial, the relevant question under the Due Process Clause is "'whether the factors militating in favor of [the right] are so extraordinarily weighty as to overcome the balance struck by Congress.'" *Id.* at 177–78 (quoting *Middendorf* v. *Henry*, 425 U.S. 25, 44 (1976)). 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.

Ramos, in contrast, establishes the precise connection that the *Weiss* Petitioners could not. Indeed, it is impossible to read *Ramos*—or the Court's subsequent discussion of it in *Edwards*—and *not* come away with the conclusion that "the factors militating in favor of [unanimous verdicts] are . . . extraordinarily weighty." *Weiss*, 510 U.S. at 177. If unanimous verdicts are necessary in the civilian criminal justice system "to ensure impartiality," as *Ramos* held, it ought to follow that they are equally necessary in a court-martial.[12]

12. Notably, in *Middendorf*, the Court recognized that "the Sixth Amendment makes absolutely no distinction between the right to jury trial and the right to counsel." 425 U.S. at 32 n.13. Although *Middendorf* itself did not settle that issue, CAAF now has—in favor of a right to counsel. *See, e.g.*, *Gooch*, 69 M.J. at 361. If *Middendorf* meant what it said, then that only further underscores why Appellant should prevail under *Ramos*.

What's more, unanimity is also central to a distinct due process right possessed by courts-martial accused: the right to have the government prove its case beyond a reasonable doubt. *See United States* v. *Gay*, 16 M.J. 475, 477 (C.M.A. 1983) ("Due process requires proof beyond a reasonable doubt for conviction of a crime." (citing *In re Winship*, 397 U.S. 358 (1970))). *See generally United States* v. *Hills*, 75 M.J. 350, 356 (C.A.A.F. 2015). For decades, federal civilian courts have recognized a direct connection between this right and the requirement of jury unanimity as to guilt. As Judge Prettyman wrote in *Billeci* v. *United States*, 184 F.2d 394 (D.C. Cir. 1950),

> An accused is presumed to be innocent. Guilt must be established beyond a reasonable doubt. All twelve jurors must be convinced beyond that doubt; if only a verdict of guilty cannot be returned. These principles are not pious platitudes recited to placate the shares of venerated legal ancients. They are working rules of law binding upon the court. Startling though the concept is when fully appreciated, those rules mean that the prosecutor in a criminal case must actually overcome the presumption of innocence, all reasonable doubts as to guilt, and the unanimous verdict requirement.

Id. at 403; *see also Hibdon* v. *United States*, 204 F.2d 834, 838 (6th Cir. 1953) ("The unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof. To sustain the validity of a verdict by less than all of the jurors is to destroy this test of proof for there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt. It would be a contradiction in terms.").

More recently, the three dissenting Justices in *Edwards* recognized the interplay between a unanimous guilty verdict and the right to have one's guilt proven beyond a reasonable doubt. Repeatedly citing to *Winship*, Justice Kagan observed that

unanimity was "similarly integral" to the jury-trial right that requires proof beyond a reasonable doubt. *Edwards*, 141 S. Ct. at 1576–77 (Kagan, J., dissenting). As she elaborated,

> Allowing conviction by a non-unanimous jury "impair[s]" the "purpose and functioning of the jury," undermining the Sixth Amendment's very "essence." It "raises serious doubts about the fairness of [a] trial." And it fails to "assure the reliability of [a guilty] verdict." So when a jury has divided, as when it has failed to apply the reasonable-doubt standard, "there has been no jury verdict within the meaning of the Sixth Amendment."

Id. at 1577 (alterations in original; citations omitted).

So long as *Apodaca* was the law of the land, there was at least a plausible argument that this understanding applied only in federal civilian courts—because the gravamen of Justice Powell's solo opinion (filed in the companion case, *Johnson* v. *Louisiana*, 406 U.S. 366 (1972)), was that the unanimity right did *not* have the same valence in all courts—and that other tribunals retained "freedom to experiment with variations in jury trial procedure." *Id*. at 376 (Powell, J., concurring in the judgment); *see also Mendrano* v. *Smith*, 797 F.2d 1538, 1547 (10th Cir. 1986) (rejecting the "close and troubling question[]" of whether non-unanimous court-martial convictions violate due process). It is this exact functional approach that *Ramos* rejected. *See* 140 S. Ct. at 1398–1400. As Justice Gorsuch put it,

> The deeper problem is that [*Apodaca*] subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment in the first place. . . . As judges, it is not our role to reassess whether the right to a unanimous jury is 'important enough' to retain. With humility, we must accept that this right may serve purposes evading our current notice. We are entrusted to preserve and protect that liberty, not balance it away aided by no more than social statistics."

Id. at 1401–02. Because *Ramos* thus makes clear that unanimity is central to the underlying *fairness* of a criminal proceeding in *any* U.S. forum, it likewise makes clear that military accused such as Appellant have a due process right to a unanimous guilty verdict.[13] If anything, the unanimity requirement is even *more* important in trial courts, such as courts-martial, that utilize panels with fewer than twelve members. *See Ballew v. Georgia,* 435 U.S. 223, 234 (1978) ("Statistical studies suggest that the risk of convicting an innocent person . . . rises as the size of the jury diminishes."). Appellant's panel in this case, consistent with Article 52(a)(3), UCMJ, had eight members. R. at 191-92.

d. At a Minimum, Unanimous Verdicts Are Required for Civilian Offenses Such as Those At Issue Here

The above evinces why, after *Ramos*, military accused who elect to be tried by a panel have a constitutional right to have any guilty verdict be unanimous. But there is a narrower ground on which this Court could recognize such a right in this case: the fact that Appellant was convicted of offenses that, at the Founding, would only have been subject to trial in a federal civilian court.

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13. Because the right to a unanimous verdict is an individual right held by the accused, it does not require that *acquittals* be unanimous. As the Oregon Supreme Court explained earlier this year, "*Ramos* does not imply that the Sixth Amendment prohibits *acquittals* based on nonunanimous verdicts or that any other constitutional provision bars Oregon courts from accepting such acquittals." *State* v. *Ross*, 481 P.3d 1286, 1293 (Or. 2021) (emphasis added). Thus, recognizing that the Constitution requires a panel to return a unanimous verdict to *convict* is not akin to invalidating all non-unanimous verdicts. Even if Article 52(a)(3), UCMJ, is unconstitutional to the extent that it authorizes less than unanimous guilty verdicts, *Ross* makes clear that is very much constitutional to the extent that it authorizes 5-3 acquittals.

As is familiar sledding by now, the Articles of War in effect at the Founding authorized trial by court-martial of only a limited array of military or military-related offenses. *See* Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice* (pt. I), 72 HARV. L. REV. 1, 11–12 (1958). Congress first authorized courts-martial for common-law felonies in wartime during the Civil War, but did not extend that jurisdiction to encompass peacetime offenses until 1916. *See id.* Even then, the military could not try such offenses if civilian authorities asserted jurisdiction. *See id*. It was only in the UCMJ that Congress for the first time generally authorized the trial by court-martial of civilian offenses without regard to the availability of a civilian forum or the preferences of civilian authorities. *See id.*; *see also Reid* v. *Covert*, 354 U.S. 1, 23 & n.42 (1957) (plurality opinion).

This history matters because several of the *specific* offenses for which Appellant was convicted were clearly *not* triable by court-martial at the time the Fifth and Sixth Amendment were ratified in 1791. As noted above, three of the specifications for which Appellant was convicted were for violations of 18 U.S.C. § 1343—the federal civilian wire fraud statute, first enacted in 1952. *See Pasquatino* v. *United States*, 544 U.S. 349, 360 (2005).[14] Thus, at least some of the offenses for which Appellant was convicted were offenses that, at the Founding (and long thereafter), he could have been convicted of only by a unanimous verdict—if at all. Even if the Constitution preserves an exception

14. Even the civilian *mail* fraud statute—"the predecessor of the modern-day mail- and wire-fraud laws"—was not enacted until 1872. *Skilling* v. *United States*, 561 U.S. 358, 399 (2010).

to the unanimity requirement for offenses that were triable by court-martial (and subject to non-unanimous verdicts) at the time the Fifth and Sixth Amendments were adopted, that exception would therefore not encompass all of Appellant's convictions.

This case is also unique in that, while *Appellant* was not provided with the constitutional protections inherent to a prosecution in an Article III court, the *Government* plainly benefitted from an Article III court during the course of its investigation. Indeed, the primary evidence used to convict Appellant (the TextNow data), was only secured because an AFOSI agent met with a federal magistrate judge, and—based upon a finding of probable cause for a civilian crime with which Appellant was never even charged—secured a search warrant.

To be sure, Congress devised various means by which military law enforcement can attempt to secure such information within the confines of the UCMJ. The law recognizes the authority of military magistrates, and Article 30a, UCMJ, was recently added to allow for a means of obtaining electronic communication data prior to referral. *See generally* 10 U.S.C. § 830a(1)(B). But rather than confine herself to what the code provided, SA CC went to federal district court and sought a search warrant based *solely* upon an alleged stalking offense in violation of 18 U.S.C. § 2261A(2)(B) (*not* stalking in violation of 10 U.S.C. § 930), and then the Government successfully used this evidence to secure Appellant's *military* conviction on completely unrelated offenses in violation of both civilian and military federal law.

None of SA CC's conduct was unlawful; the point, rather, is the incongruity and lack of fundamental fairness inherent in the present system. That the Government can

avail itself of the benefits of an Article III criminal process without bearing the burdens further underscores why the lack of unanimity in courts-martial cannot be squared with due process. And the fact that Appellant was *involuntarily* extended on active duty for *over a year* in order to bring him before a court-martial and try him on offenses which could have been brought in federal district court after he was discharged, further undermines any countervailing interest the Government may proffer as to its need for non-unanimity. It was only three years ago that the Supreme Court claimed that "[t]he procedural protections afforded to a service member are 'virtually the same' as those given in a civilian criminal proceeding, whether state or federal." *Ortiz*, 138 S. Ct. at 2174. But as this case illustrates, until the right to a unanimous conviction is guaranteed at courts-martial, that pronouncement will ring more than a little hollow.

e. Appellant Properly Preserved His Unanimity Objection

As noted above, Appellant specifically moved the trial judge to instruct the members that any conviction must be unanimous—basing his motion on "the Due Process Clause of the Fifth Amendment to the United States Constitution, the Sixth Amendment to the United States Constitution, [R.C.M.] 906, 920, and 921, and applicable case law." App. Ex. V at 1. The trial judge denied the motion. If Appellant is correct that the Constitution required any guilty verdict to be unanimous, then the trial court's refusal to so instruct the members was reversible error.

Because the trial court did not instruct the members that they had to return a unanimous guilty verdict, it is impossible to tell whether, in fact, they did. That's not because Appellant forfeited his right to poll them; it's because Rule 922(e) of the Rules

for Courts-Martial specifically prohibits polling the members with respect to the vote for conviction in non-capital cases, and Rule 1007(c) likewise prohibits polling the members as to the vote for non-capital sentencing (although Appellant in this case agreed to be sentenced by the trial judge). "It is long-settled that a panel member cannot be questioned about his or her verdict . . . ." *Lambert*, 55 M.J. at 295. As CAAF explained in *United States* v. *Loving*, 41 M.J. 213 (C.A.A.F. 1994), "[w]here a less than unanimous vote is involved, we share the concerns of the drafters [of those rules] about potential command influence on junior members who would be compelled to reveal their votes if polling were permitted." *Id*. at 296; *see also id*. ("The drafters believed that polling would be contrary to Article[s] 39(b) and 51(a), which protect the secrecy of deliberations and provide for voting by secret written ballot." (citations omitted)).[15]

That Appellant was specifically prohibited from polling the members makes it impossible to prove that the guilty verdicts in his case were not unanimous. That said, there is significant record evidence in support of that conclusion. For instance, the members asked over 60 questions during the course of the court-martial (*see* App. Ex. XV, XVI, XIX—XXVII, XXX—XLVIII, and LI), and ultimately acquitted Appellant on two of the specifications that were tried. Moreover, as noted below, Appellant has a plausible (and, in his view, meritorious) argument that his convictions for wire fraud and attempted wire fraud were factually insufficient. Given that there can never be a court-martial in which the non-unanimity of a guilty verdict can be proven, this case is

15. But, as CAAF also observed, "[w]here the vote is unanimous, those concerns about command influence would appear to be unfounded." *Id*.

therefore an appropriate vehicle in which this Court can—and therefore must—reach Appellant's constitutional claims. Indeed, given the offenses for which Appellant was convicted and his efforts to preserve this issue at trial, it is as good a vehicle as this Court is likely to encounter.

II.

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

Additional Facts

a. The Defense's R.C.M. 917 Motion

After the Government rested, the Defense raised an R.C.M. 917 motion and argued that "there is no evidence that [Appellant] ever deprived [the victims] of any property or even had the intent to deprive them of property because they still had that property." R. at 545. And it was for this reason, the Defense argued, that the Government could not "prove a scheme to defraud." *Id.* In response, circuit trial counsel argued that "I think there is a plethora of evidence that supports the value in those photos, the photos themselves, the viewing of the photos is a property right. He offered them money for them and talked about the value in those photos." *Id.* Circuit trial counsel proceed to argue that "there is [an] enormous property right in those photos, in the content of those photos and it is demonstrated in the evidence in the actual messages themselves." R. at 546. The military judge ultimately denied the motion, reasoning that:

> The three women victims in this matter were wronged in their property rights by dishonest methods or schemes, they were deprived of something of value by trick, deceit, chicanery or overreaching. Their reputations are something of value, whatever their work reputations were. It is common for individuals to sue for libel or slanders because of something falsely said about him or her. Damages and harm to the reputation of the person harmed are determinable so clearly a reputation is worth something. It is the same with the value of the photos that were gotten and tried to be gotten by the accused. People do pay for photographs and at the very least those photographs are worth less to maybe in fact nothing if they are already posted somewhere online.

R. at 550.

b. The Military Judge's Instructions

The military judge provided the following instructions to the members with respect to Specification 2 of Charge I—which alleged wire fraud in violation of 18 U.S.C. § 1343:

> To find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt: (1) That, within the continental United States, between on or about 1 February 2019 and on or about 29 March 2019, the accused devised a scheme to defraud or to obtain property by materially false or fraudulent pretenses or representations or promises; (2) That the accused acted with the intent to defraud; (3) That in advancing, furthering, or carrying out the scheme, the accused transmitted any writing, signal, or sound by means of a wire communication in interstate commerce.

R. at 561; App. Ex. LV at 2.[16]

The military judge proceeded to instruct the members that the term "'[i]ntent to defraud' means to act knowingly and with the specific intent to deceive for the purpose

16. The military judge provided substantially similar instructions for Specifications 1 and 2 of Charge III which alleged attempted wire fraud in violation of 18 U.S.C. § 1343. R. at 566-569; App. Ex. LV at 6-9.

of causing some financial or property loss or injury to another." R. at 564; App. Ex. LV at 4. He further instructed the members that "a scheme to defraud is any plan, device, or course of action to obtain money or property by means of false or fraudulent pretenses, representations, or promises reasonably calculated to deceive persons of average prudence." *Id*. It "is merely a plan to deprive another of money or property by trick, deceit, deception, or swindle." R. at 562; App. Ex. LV at 3.

c. The Government's Closing Argument

During his summation before the members, circuit trial counsel noted that AL "understood that she was going to receive money for these pictures. So there's some monetary value that she's placed in doing what she thinks she is going to be doing with her friend [AW]." R. at 582. Later on, he told the members:

> [W]ith regard to the value of the property that he has taken from her, number one, the photos themselves are property in and of themselves; number two, her reputation and the damage done to her reputation, the concern for that damage done to her reputation; number three, the ability of that property, that digital—I'm sorry that privacy right, that's another property right, and the digital copy of the photo itself is property.

R. at 589.

Standard of Review

Under Article 66, UCMJ, this Court can only approve findings of guilty that it determines to be correct in both law and fact. Issues of legal and factual sufficiency are reviewed de novo. *United States* v. *Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

a. Legal and Factual Sufficiency

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [the Court is] convinced of [the appellant's] guilt beyond a reasonable doubt." *United States* v. *Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (quoting *United States* v. *Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). In weighing factual sufficiency, this Court takes "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Wheeler*, 76 M.J. at 568 (quoting *Washington*, 57 M.J. at 399).

The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *Wheeler*, 76 M.J. at 568 (quoting *United States* v. *Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002)). This Court's assessments of legal and factual sufficiency are limited to the evidence produced at trial. *Wheeler*, 76 M.J. at 568 (quoting *United States v. Dykes*, 58 M.J. 270, 272 (C.M.A. 1993)).

b. The meaning of "property" within 18 U.S.C. § 1343

"[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." *United States* v. *Henry*, 29 F.3d 112, 115 (3d Cir. 1994). "[T]he mail and wire fraud statutes do not protect against fraudulent schemes involving

intangible, non-property, non-monetary rights. *Belt* v. *United States*, 868 F.2d 1208, 1212–13 (11th Cir. 1989). "[C]onvictions which rest solely on an intangible non-property rights theory should be vacated. However, when the court finds a loss of property or money resulted from the fraudulent scheme, the conviction should be sustained, despite a partial reliance on the intangible rights theory." *Id*. at 1213 (emphasis added).

c. The limited compass of 18 U.S.C. § 1343

As Justice Kagan recently explained for a unanimous Court in a case involving federal wire fraud convictions, "a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme." *Kelly* v. *United States*, 140 S. Ct. 1565, 1573 (2020). Citing to a hypothetical example Judge Easterbrook raised in a different case, she explained:

> Without that rule . . . even a practical joke could be a federal felony. His example goes: A e-mails B an invitation to a surprise party for their mutual friend C. B drives his car to the place named in the invitation, thus expending the cost of gasoline. But there is no party; the address is a vacant lot; B is the butt of a joke. Wire fraud? No. And for the reason Judge Easterbrook gave: The victim's loss must be an objective of the deceitful scheme rather than a byproduct of it.

Id. at 1573 n.2 (alterations, citations, and internal quotation marks omitted).

In *Kelly* (the "Bridgegate" case), the Supreme Court considered whether a wire fraud conviction was legally sufficient where there was an admittedly deceptive scheme in place, but where the object of that scheme was political retribution (by realigning traffic lanes) using government officials. *Id*. at 1568. Specifically, the Government had

argued that the Petitioners were guilty of wire fraud given that the supposed object of their scheme "was to obtain the Port Authority's money or property"—because they "sought both to 'commandeer' the Bridge's access lanes and divert the wage labor of the Port Authority employees used in that effort." *Id*. The Supreme Court, however, overturned the convictions and rejected the Government's theory of liability under the wire fraud statute because "the employees' labor was just the incidental cost [of regulatory power], rather than itself an object of the [Petitioners'] scheme." *Id*. at 1569.

Analysis

The military judge's R.C.M. 917 ruling explained that, in his view of the law, 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. R. at 550. But this understanding of the law—at least as applied to the facts of this case—is incorrect because "a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme." *Kelly*, 140 S. Ct. at 1573.

a. Any theoretical monetary loss was only incidental to the scheme

As the Supreme Court pointed out in *Kelly*, "a scheme to usurp a public employee's paid time is one to take the government's property. But [Petitioners'] plan never had that as an object. The use of Port Authority employees was incidental to—the mere cost of implementing—the sought-after regulation of the Bridge's toll lanes." 140 S. Ct. at 1572. The same principle is at play in this case.

The object of Appellant's putative scheme (as corroborated by the Government's successful Article 115, UCMJ, conviction), was to obtain *copies* of photographs (not the original property itself) which could be used as non-pecuniary leverage.[17] No allegation was made, much less proven, that Appellant ever sold these photographs (or was even the individual who uploaded them to the internet). And no evidence was introduced that Appellant did, in fact, sell or otherwise recoup any financial benefit from his receipt of these pictures, thereby further undercutting any argument that the object of Appellant's scheme was to deprive AL, AW, or GMV of the full use and enjoyment of these photographs—for the simple reason that they would have continued to retain them at all times.

As the Defense argued during their R.C.M. 917 motion, AL "still had the picture. She still even had the copy of the picture that she sent to [Appellant]. And so in this case there is no evidence that he ever deprived them of any property or even had the intent to deprive them of property because they still had that property." R. at 545. That is to say, the sender at all times retained the original "property" at issue. Circuit trial counsel's response to the R.C.M. 917 motion was that Appellant was "depriving [AL] of the ability to sell the photos *but he has not deprived her of the photos*. That is our argument." R. at 546 (emphasis added). However, as the Defense correctly countered,

17. *See, e.g.,* R. at 216 ("After I sent the photos I received a long text message saying that this isn't [AW] . . . and that *if I tell anybody or if I show anybody these text messages that they will show my pictures to the entire base community and my command* and all they wanted was to talk and pictures when they asked.") (emphasis added).

Appellant had not "deprived [AL] of the ability to sell the photos. She still has the photos so she could still sell those photos if she wanted to." *Id.*

In effect, the Government conceded that Appellant had not actually taken anything from AL which she did not concurrently possess. Its argument was that, in a hypothetical scenario in which AL wanted to sell these photographs, Appellant's concurrent possession of them potentially reduced their monetary value if he sold them first or otherwise flooded the market with them. But no evidence was ever introduced that AL planned on entering the pornography industry either before or after she was contacted on 1 February 2019; any theoretical deprivation of her ability to sell these pictures was just that—theoretical.

Moreover, the notion that Appellant had somehow deprived AL of the pecuniary value in her photographs presupposes that there was, in fact, a true willing buyer in the first place. While this is certainly possible, the Government provided no such evidence in this case, nor did AL express at trial that, but for these photographs being posted to the internet, they would have been worth more. There was also nothing stopping AL, AW, and GMV from simultaneously selling these photographs despite their concurrent possession by another. The best the Government could offer was a speculative theory that the photographs were just somehow worth less at that point. *Kelly* requires more. At most, the Government established Appellant's intent to use copies of the photographs to extort; any theoretical loss to the *value* of this property would only have been "an incidental byproduct of the scheme." *Kelly*, 140 S. Ct. at 1573.

b. Mere theoretical reputational value alone, without more, is insufficient to support a wire fraud conviction

Apart from the fact that the charge sheet provided Appellant with no notice that he would be defending against a theory that his receipt of these photos would have somehow deprived the named victims of the value these pictures posed to their reputations, the military judge's rationale stands in conflict with fundamental tenets of tort and property law. For instance, the trial court relied upon the fact that "[i]t is common for individuals to sue for libel or slander because of something falsely said about him or her. Damages and harm to reputation of the person harmed are determinable so clearly a reputation is worth something." R. at 550. But civil actions like libel and slander—subsets of defamation—generally sound in tort, *not* property law. And as all nine Justices of the Supreme Court plainly recognized just last year in *Kelly*, "[t]he Government in this case needed to prove *property* fraud." *Id*. at 1571.[18]

While it is true that in the years preceding *McNally* v. *United States*, 483 U.S. 350 (1987), federal courts engaged in "judicial excesses" under expansive readings of the wire fraud statute, those cases have since been criticized and abandoned. For instance, in *United States* v. *Condolon*, 600 F.2d 7 (4th Cir. 1979), the defendant was "found guilty of wire fraud for using a telephone in connection with his bogus talent agency which he established to meet and seduce young women." *Ingber* v. *Enzor*, 664 F. Supp. 814, 816 (S.D.N.Y. 1987). But, as the Southern District observed, *Condolon*

18. *See e.g.*, *Brooks* v. *Jackson*, 813 P.2d 847, 848 (Colo. App. 1991) ("defamation is a personal injury and not an injury to property").

was such an example of a pre-*McNally* "judicial excess." *Id*.; *see also United States* v. *Herron*, 825 F.2d 50, 60 (5th Cir. 1987) (citing *Condolon* as a decision in which a conviction was affirmed "under an expansive reading of the wire fraud statute" and emphasizing that cases like it "must now be understood as limited by *McNally*").

As noted above, in determining "whether a particular interest is property for purposes of the fraud statute, we look to whether the law traditionally has recognized and enforced it as a property right." *Henry*, 29 F.3d at 115. And when the sole basis of a conviction rests upon "an intangible non-property rights theory," the conviction should be vacated. *Belt*, 868 F.2d at 1212–13. That is precisely what we have here—under a theory of liability contingent upon the supposed reputational value intrinsic to the named victims themselves, *not* the value associated with the copies of the property Appellant was charged with, and convicted of, attempting to obtain and obtaining.

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.

Standard of Review

Whether an offense is preempted depends upon statutory interpretation, which is a question of law reviewed *de novo*. *United States* v. *Wheeler*, 77 M.J. 289, 291 (C.A.A.F. 2018). Questions of preemption relate to subject-matter jurisdiction; thus, they are non-waivable. *See United States* v. *Robbins*, 52 M.J.159, 160 (C.A.A.F. 1999).

Law

a. Preemption

"The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 to 132 . . . and as the President's guidance makes clear, is designed to prevent the government from eliminating elements from congressionally established offenses under the UCMJ, in order to ease their evidentiary burden at trial." *Wheeler*, 77 M.J. at 293 (citations and internal quotation marks omitted); *see also MCM*, pt. IV, ¶ 91.c.(5) (2019 ed.). The *MCM* provides the following illustration to explain this principle: "For example, larceny is covered in Article 121, and if an element of that offense is lacking—for example, intent—there can be no larceny or larceny type offense, either under Article 121 or, because of preemption, under Article 134." *Id*. The Discussion section which follows further explains:

> Although the preemption doctrine generally does not preclude charging Article 134, clause 3 offenses (crimes or offenses, not capital) the preemption doctrine does preclude charging a federal "crime or offense, not capital" under Article 134 clause 3 where direct legislative language or direct legislative history demonstrate that Congress intended a factually similar UCMJ punitive article to cover a class of offenses in a complete way.

Id., Discussion.

An offense enumerated between Articles 80 and 132, UCMJ, preempts an Article 134, UCMJ offense if two criteria are met: "(1) Congress intended to limit prosecution for . . . a particular area of misconduct to offenses defined in [those] specific articles of the Code, and (2) the offense charged is composed of a residuum of elements of a specific offense." *United States* v. *Avery*, 79 M.J. 363, 366 (C.A.A.F. 2020) (alteration in original;

internal quotations omitted). "In determining whether . . . alleged conduct already falls under a listed offense, the focus is on the specific conduct committed under specific circumstances." *United States* v. *Gleason*, 78 M.J. 473, 475 (C.A.A.F. 2019). "Thus, we need not confine ourselves to an element-by-element comparison between the drafted offense and the offense listed in the *MCM*." *Id*. at 475–76.

In *Wheeler*, the CAAF acknowledged that "it is indeed permissible to incorporate violations of noncapital federal crimes through clause three of Article 134, UCMJ." 77 M.J. at 293. However, it expressly and carefully caveated this proposition by stating the following: "*Unless*, and herein lies the basis for our decision, the Government turned to a hypothetical noncapital crime that lessened its evidentiary burden at trial by circumventing the mens rea element or removing a specific vital element from an enumerated UCMJ offense." *Id*. (emphasis in original). "This concern—that the government would take an extant UCMJ offense and remove a vital element to create a diluted crime under Article 134, UCMJ—is the very impetus for the preemption doctrine." *Avery*, 79 M.J. at 367.

b. Article 121, UCMJ

Article 121(a), UCMJ, 10 U.S.C. § 921(a) provides:

> Any person subject to this chapter who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind—(1) with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, steals that property and is guilty of larceny; or (2) with intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate it to his own

> use or the use of any person other than the owner, is guilty of wrongful appropriation.

"As used in Article 121, UCMJ, the single term 'larceny' encompasses and consolidates what in the past were separate crimes, i.e., larceny, larceny by trick, embezzlement, and obtaining property by false pretenses." *United States* v. *Lubasky*, 68 M.J. 260, 263 (C.A.A.F. 2010). "An 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." *United States* v. *Antonelli*, 35 M.J. 122, 124 (C.M.A. 1992) (quoting *United States* v. *Aldridge*, 8 C.M.R. 131–32 (C.M.A. 1953)); *see also United States* v. *Williams*, 75 M.J. 129, 131-32 (C.A.A.F. 2016) ("Article 121, UCMJ, sought to consolidate the various means of stealing—by larceny, false pretense, and embezzlement—under the single rubric of 'larceny.'"). "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).[19] For purposes of Article 121,

19. Appellant notes that *United States* v. *Herndon*, 36 C.M.R. 8 (C.M.A. 1965), dealt with a situation in which the appellant unsuccessfully argued that the Government's use of Article 134, UCMJ, to allege fraudulent theft of telephone services was preempted by Article 121, UCMJ. *Id.* at 11. However, as explained below, *Herndon* is distinguishable because the Government's decision to charge Appellant here with wire fraud—as opposed to larceny—permitted the Government to obtain a sentence in excess of one year in confinement *without* having to establish that the property at issue in this case was valued in excess of $1,000.

UCMJ, "[t]he taking, obtaining, or withholding must be of specific property." *United States* v. *Mervine*, 26 M.J. 482, 484 (C.M.A. 1988).

c. A Comparison of Elements

The chart below contains a side-by-side comparison of the elements of Article 121, UCMJ and 18 U.S.C. § 1343—illustrating the differences as to what the members were instructed with respect to the offenses in this case:

Elements of Article 121, UCMJ		Elements of 18 U.S.C. § 1343
(1) That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;		**(1)** That the accused devised a scheme to defraud or to obtain property by materially false or fraudulent pretenses or representations or promises;
(2) That the property belonged to a certain person;		**(2)** That the accused acted with the intent to defraud; and
(3) That the property was of a certain value, or of some value;		**(3)** That in advancing, furthering, or carrying out the scheme, the accused transmitted by any writing, signal, or sound by means of a wire communication in interstate commerce.
(4) That the taking, obtaining, or withholding by the accused was with the intent [permanently or temporarily] to deprive or defraud another person of the use and benefit of the property or [permanently or temporarily] to appropriate the property for the use of the accused or for any person other than the owner.		

Compare MCM, pt. IV, ¶ 64.b.(1) (2019 ed.) *with* App. Ex. LV at 2-5. In addition, where the Government seeks to establish a specific dollar amount for purposes of enhancing the potential sentence, it must also prove that it is of such value as a matter of fact. *See MCM*, pt. IV, ¶ 64.c.(1)(g)(i) (2019 ed.).

d. Article 106, UCMJ

Article 106(a), UCMJ, 10 U.S.C. § 906(a) provides:

> Any person subject to this chapter who, wrongfully and willfully, impersonates—(1) an officer, a noncommissioned officer, or a petty officers; (2) an agent of superior authority of one of the armed forces; or (3) an official of a government; shall be punished as a court-martial may direct.[20]

Article 106(b), UCMJ, separately proscribes impersonation "with intent to defraud." 10 U.S.C. § 906(b). It provides: "Any person subject to this chapter who, wrongfully, willfully, and with intent to defraud, impersonates any person referred to in paragraph (1), (2), or (3) of subsection (a) shall be punished as a court-martial may direct." *Id*. For purposes of Article 106(b), UCMJ, the phrase "intent to defraud" means "an intent to obtain, through a misrepresentation, an article or thing of value and to apply it to one's own use and benefit or to the use and benefit of another, either permanently or temporarily." *MCM*, pt. IV, ¶ 39.c.(4); ¶ 70.c.(14) (2019 ed.).

Analysis

Through different statutes enacted at different times, Congress explicitly provided two avenues by which the Government can prosecute servicemembers who seek to defraud others of property by wrongful impersonation. The first of these is set forth in Article 106, UCMJ, and would have required the Government to prove

20. The substance of this offense was previously captured in Article 134, UCMJ; however, it was "relocated to Article 106 pursuant to Section 5417 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016)." *MCM*, App'x 17, ¶ 39 (2019 ed.).

as a fundamental element of the offense that Appellant was impersonating an officer, NCO, petty officer, or government official. The second option would have been for the Government to pursue a theft by false pretenses theory consistent with Article 121, UCMJ. In fact, the Government originally pursued this very argument until the PHO advised dropping the Article 121, UCMJ, allegations because—even though she believed that offense *was* legally sufficient—"the elements of the Article 134 offense . . . seem to better capture the misconduct of the accused" and provided a strategic advantage to the Government because "the Article 134 offense does not allow for as much room to question the actions of the victims . . . ." ROT at Vol. 4 – PHO Report, dated 9 March 2020, Continuation of Item 13a at 15.

Ultimately, the Government did not to pursue either of these enumerated punitive articles. It was legally impossible for Appellant to commit an Article 106, UCMJ, violation,[21] and an Article 121, UCMJ, prosecution would not have been legally impossible but would have: (1) been strategically disadvantageous and more

21. The Government could not have proven that Appellant met each of the elements of Article 106, UCMJ, because neither AL nor AW were officers, noncommissioned officers, petty officers, or government officials (as the scope of that term is understood within the context of this punitive article). Therefore, even though Congress saw fit to quite recently move this offense out of Article 134, UCMJ, and statutorily codify it within those classes of offenses existing between Articles 80 and 132, UCMJ, for whatever reason, it did *not* see fit to expand the scope of this punitive article to include impersonation of junior airmen—like AL and AW—with the intent to defraud. Had AL and AW been NCOs, this enumerated article would have been directly on point. Because they were not, the text of Article 106 clearly does not encompass Appellant's the conduct for which Appellant was convicted.

difficult to pursue, and (2) likely foreclosed the amount of confinement it both sought *and* obtained.

Instead, the Government relied upon clause three of Article 134, UCMJ, thereby circumventing requirements attendant to an Article 121, UCMJ, prosecution and falling squarely falling within what the CAAF warned against in *Wheeler*: "*Unless*, and herein lies the basis for our decision, the Government turned to a hypothetical noncapital crime that lessened its evidentiary burden at trial by circumventing the mens rea element or removing a specific vital element from an enumerated UCMJ offense." 77 M.J. at 293. Because Congress already occupied this field of criminal liability through the express terms of Article 121, UCMJ, Appellant's wire fraud and attempted wire fraud offenses were preempted.[22]

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22. Technically, 18 U.S.C. § 1343 includes one element that the UCMJ does not—the jurisdictional, interstate commerce element that allows Congress constitutionally to regulate this behavior in the first place. For two reasons, however, this apparent mismatch is immaterial. First, as the CAAF took care to note in *Wheeler*, the relevant elements for preemption analysis involved whether the Government had circumvented a more stringent *mens rea* or a vital element of an enumerated punitive article by turning to a non-capital civilian crime. The presence of jurisdictional elements in civilian offenses do not alter that analysis, because they "do not describe the 'evil Congress seeks to prevent,' but instead simply ensure that the Federal Government has the constitutional authority to regulate the defendant's conduct . . . ." *Rehaif* v. *United States*, 139 S. Ct. 2191, 2196 (2019).

Second, the CAAF recently held that an Article 134, UCMJ, offense *is* the "same offense" as its civilian counterpart for double jeopardy purposes even though the latter required proof of transmission in interstate commerce whereas the former did not—explaining that "there is a distinction between substantive elements and jurisdictional elements." *United States v. Rice*, 80 M.J. 36, 43 (C.A.A.F. 2020).

a. Congress Intended to Limit this Misconduct to Article 121, UCMJ

As noted above, Congress intended to limit theft by false pretenses under Article 121, UCMJ, as illustrated military appellate court decisions shortly following enactment of the UCMJ. *See e.g.*, *Norris*, 8 C.M.R. at 39 ("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"); *see also Antonelli*, 35 M.J. at 124 ("An 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"); *Williams*, 75 M.J. at 131-32 ("Article 121, UCMJ, sought to consolidate the various means of stealing—by larceny, false pretense, and embezzlement – under the single rubric of 'larceny'"). Accordingly, the first prong of the preemption test is satisfied.

b. Article 134, UCMJ, presented a strategic benefit to the Government and allowed it to circumvent its obligation to prove the photographs were worth more than $1,000 in order to secure the sentence it ultimately obtained

Charging civilian wire fraud allowed the Government to argue for 36 months of confinement[23] (the precise sentence that Appellant received for Specification 2 of Charge I), which would have been unavailable if the Government had charged larceny without expressly alleging that AL's photographs were worth more than

23. R. at 632.

$1,000.[24] The maximum allowable punishment for non-military property valued at $1,000 or less is only a bad-conduct discharge, total forfeitures, and confinement for one year. *MCM*, pt. IV, ¶ 64.d.(1)(a) (2019 ed.). Had the Government wanted more than one year in confinement (and a Dishonorable Discharge) for these allegations under Article 121, UCMJ, it would have needed to prove that these pictures were not just of "some value" but of a value greater than $1,000. *MCM*, pt. IV, ¶ 64.d.(1)(c) (2019 ed.). The Government neither pled nor proved that fact, and the members were never instructed that they had to find as such. Yet, Appellant was still sentenced to 36 months in confinement for a single completed wire fraud specification.

The misconduct that Appellant was alleged to have committed was appropriately captured within the confines of Article 121, UCMJ, but under the *MCM* larceny carries with it certain punitive exposure protections for accused servicemembers by specifically tying the offense to the value of the property. Yet, the Government was able to escape this constraint (i.e., circumvent a vital element it otherwise would have needed to prove), by relying upon clause three of Article 134, UCMJ, so as to allege a crime that has never been part of the UCMJ and bears such little military nexus that it is not even tangentially referenced in the current version of the *MCM*. And in so doing, the Government relieved itself of the burden to prove the monetary value of this property so as to secure a sentence in excess of one year confinement. This is precisely what the CAAF warned against in both *Wheeler* and

24. The originally preferred larceny specifications alleged only that the photographs were of "some value." ROT at Vol. 1 – DD Form 458, referred on 30 March 2020.

Avery; therefore, Appellant's convictions for wire fraud and attempted wire fraud should be dismissed because they were preempted.

PRAYER FOR RELIEF

WHEREFORE, for the reasons set forth in his first assignment of error, Appellant respectfully requests that this Honorable Court set aside his convictions and sentence as to all charges and specifications. In the alternative, and for those reasons set forth in his second and third assignment of error, Appellant respectfully request that this Honorable Court set aside his convictions as to Charge I and III and their specifications and that this Court further set aside his segmented sentence to confinement relating to those specifications, his rank reduction, his reprimand, and his Dishonorable Discharge.

Very respectfully submitted,

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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 30 June 2021.

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APPENDIX A

Pursuant to *United States* v. *Grostefon*, 12 M.J. 431 (C.M.A. 1982), Amn Martinez, through appellate defense counsel, personally requests that this Court consider the following matters.

IV.

EQUAL PROTECTION GUARANTEED APPELLANT A UNANIMOUS VERDICT AS TO THE TITLE 18 OFFENSES.

Standard of Review

The standard of review is the same as set forth in Appellant's first assignment of error raised by counsel. *See* Brief on Behalf of Appellant at 11-12.

Law & Analysis

In addition to the arguments raised by his counsel and the authority upon which they rely, Appellant further asserts that the military judge's failure to instruct the panel that a finding of guilty required unanimity deprived him of his constitutional guarantee to equal protection—at least insofar as the alleged Title 18 offenses for wire fraud and attempted wire fraud were concerned. This is because Appellant was not just similarly situated to a civilian being tried on these offenses in an Article III court, but was similarly situated to fellow *active duty military members* who enjoyed the right to a unanimous verdict—irrespective of their military status—because they were tried on substantially similar offenses in an Article III court. *See e.g.*, *United States* v. *F.J. Vollmer & Co.*, 1 F.3d 1511, 1513 (7th Cir. 1993) (noting the appellant was "a Captain on full-time active duty" and had been "charged by

indictment with conspiracy to defraud the United States . . . in violation of 18 U.S.C. § 1341").[1]

a. Appellant is not just similarly situated to civilians facing conviction for 18 U.S.C. § 1343; he is similarly situated to other active duty members of the military tried on federal fraud offenses in federal court where a unanimous verdict is guaranteed

Quite recently, in *United States* v. *Begani*, CAAF reiterated that "[t]he federal government is prohibited from violating a person's due process rights by denying him the equal protection of the laws." ___ M.J. ___, Nos. 20-0217 & 20-0327, slip op. at 10. citing *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). "That is, the Government must treat 'similar persons in a similar manner.'" *Begani*, ___ M.J. ___, Nos. 20-0127 & 20-0327, slip op. at 10-11 (quoting *United States v. Gray*, 51 M.J. 1, 22 (C.A.A.F. 1999)). This inquiry focuses upon whether the groups are "in all relevant aspects alike." *Nordlinger* v. *Hahn*, 505 U.S. 1, 10 (1992).

As *F.J. Vollmer & Co.* illustrates, the federal government has indicted full-time active duty military members—like Appellant—for violating a federal fraud statute; but because a different arm within the same branch of the same sovereign (i.e., the Department of Justice vice the Department of Defense), exercised its will to prosecute the accused in that case, the Captain in that case would have been entitled

1. There is no material difference between 18 U.S.C. § 1341 and 18 U.S.C. § 1343 for purposes of this analysis. "The mail- and wire-fraud statutes criminalize the use of the mails or wires in furtherance of 'any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.' 18 U.S.C. § 1341 (mail fraud); § 1343 (wire fraud)." *Skilling* v. *United States*, 561 U.S. 358, 464 n.1 (2010).

to a unanimous verdict. Even though the same underlying offense was at issue, Appellant was not afforded this fundamental right. Instead, he was left to defend himself against the "dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 22 (1955).

Whereas in *Begani*, CAAF drew a distinction between members of the Fleet Reserve and Retired reservists based upon the fact that they served a different role in preserving national security and the attendant benefits to each group differed, no relevant distinction exists here. An active duty military member who is alleged to have committed fraud in violation of Title 18 is similarly situated to another active duty military member who is alleged to have done the same; the fact that the federal government gets to pick which one of them will receive fundamental rights like the unanimous verdict while the other one will be subjected to nonunanimity at court-martial *post hoc* is what makes the discrimination invidious. The Government cannot claim that one active duty servicemember is dissimilar from the other only because the very same Government made it that way. Equal protection of the laws—especially within the context of a fundamental right like the unanimous verdict—does not turn upon the arbitrary brokering between the Department of Justice and the Department of Defense.

b. Because a fundamental right is at issue, strict scrutiny applies

Within the equal protection framework, strict scrutiny is triggered not only when a historically suspect classification (e.g., race) has been made, but *also* when "there

is an encroachment on fundamental constitutional rights . . . ." *United States* v. *Means*, 10 M.J. 162, 165 (C.M.A. 1981); *see also United Stated States* v. *Hennis*, 77 M.J. 7, 10 (C.A.A.F. 2017) (recognizing that rational basis scrutiny applies unless there is "a suspect classification or interference with a fundamental right"). As the Supreme Court has now made clear, the right to a unanimous verdict is recognized as such a fundamental right within the American scheme of criminal justice. *Ramos*, 140 S. Ct. at 1397; *see also Edwards*, 141 S. Ct. at 1573 (Kagan, J., dissenting) ("Citing centuries of history, the Court in *Ramos* termed the Sixth Amendment right to a unanimous jury 'vital,' 'essential,' 'indispensable,' and 'fundamental' to the American legal system").

Accordingly, because Appellant is similarly situated to other military members accused to have violated a federal fraud statute in federal court where this fundamental right is guaranteed, strict scrutiny applies. For the Government to overcome this onerous burden, it would need to show that it not only has a "compelling state interest" in differentiating between active duty servicemembers tried for violations of Title 18 fraud offenses in federal court with a unanimous verdict, and active duty servicemembers tried for the same offense at court-martial without this fundamental protection. It would also need to show that its means of doing so were "narrowly tailored" to achieve that end. *See generally*, *Johnson* v. *California*, 543 U.S. 499, 514 (2005).

Put another way, the Supreme Court has explained that even if the government can provide a "compelling state interest" it is "still constrained in how it may pursue

that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Grutter* v. *Bollinger*, 549 U.S. 306, 333 (2003) (internal citations omitted). Even if the Government could provide a compelling interest to justify nonunanimous verdicts in courts-martial, the current system set forth by Congress is not narrowly tailored. Specifically, the UCMJ is "under inclusive" because it does nothing whatsoever to further such a government interest within the context of our most serious cases—those which are referred as capital.

To suggest that the military justice system does not implicitly acknowledge the benefit conferred upon those facing courts-martial by the unanimous verdict would be to patently ignore the fact that a death sentence may only be adjudged in a capital case tried before members if the "accused was convicted of such an offense by . . . the unanimous vote of all twelve members of the court-martial[.]" R.C.M. 1004(a)(2)(A); *see also* 10 U.S.C. § 852(b)(2). In such situations, "if a finding of guilty is unanimous with respect to a capital offense, the president shall so state." R.C.M. 922(b). Similarly, "[a] sentence may include death only if the members unanimously vote for the sentence to include death." R.C.M. 1006(d)(4)(A). Congress has already determined, pursuant to 10 U.S.C. § 852(b)(2), that an accused whose case has been referred as capital is entitled to a unanimous verdict in spite of any countervailing interest the Government may proffer in favor of nonunanimity. Thus—even if this Court were persuaded that the Government had a compelling interest in retaining

non-unanimity under such circumstances, it cannot meet the tailoring necessary to satisfy strict scrutiny.

c. This distinction cannot pass rational basis review either

Even under rational basis review the dichotomy presented in this case fails to satisfy equal protection. Congress did not see fit to criminalize wire fraud in the text of the UCMJ; nor has the President deemed it appropriate to enumerate a like offense under Article 134, UCMJ. The only means of charging this offense is to rely upon clause three of Article 134, UCMJ, so as to incorporate a crime for which civilians may be prosecuted in Article III courts. At all times the federal government remained perfectly capable of prosecuting Appellant for these exact same offenses in an Article III court irrespective of his military status. While military members may not be similarly situated to civilians tried in federal court generally speaking, that is based upon the dichotomy between the distinct societies inherent to the two. But wire fraud is *strictly* a civilian offense with no military analogue; the military is playing upon the civilian sector's turf in this sphere.

With respect to the classification at issue, the question is *not* whether the Government has a rationally based interest in nonunanimous verdicts at courts-martial generally speaking. Rather, the question is whether the Government (i.e., the entire federal government writ large), has an interest in depriving some active duty servicemembers of unanimous verdicts when being tried on Title 18 offenses at courts-martial while allowing other active duty servicemembers to retain this right when being tried on identical or near-identical offenses in Article III courts. It does

not. And the unique facts of this case further undermine that interest and the reasonable relation of the current system it utilizes in furtherance of such an interest.

d. When Title 18 offenses are at issue, once the federal government avails itself of and relies upon the authority of an Article III court during the course of a federal investigation, an accused servicemember should be entitled to rely upon the fundamental rights that same Article III court would have afforded him at trial.

As noted in the brief submitted by Appellant's counsel, the Government involuntarily retained Appellant on active duty *for over a year* in order to try him on these offenses at court-martial. There is nothing to suggest the Government was precluded from discharging him and then have him tried on these federal offenses. It is also difficult to see how involuntarily keeping Appellant in the military for this significant length of time only to court-martial him on a number of offenses which he could have been prosecuted for in federal court was consistent with maintaining good order and discipline in the armed forces.

The Government went to federal district court itself in order to secure the evidence it used to convict Appellant; but it deprived him of the benefits he would have been entitled to in that very same court. To be sure, Appellant does not facially attack the constitutionality of utilizing clause three of Article 134, UCMJ, in this appeal; but—as applied to this case and on these facts—Appellant's convictions on the Title 18 offenses without the attendant protection of a unanimous verdict that other similarly situated active duty servicemembers would be entitled to for this offense in federal court deprived him of his constitutional right to equal protection of the law. To the extent that military law enforcement agents (and by extension

military commanders and military trial counsel) may take advantage of the benefits available to them by the authority of an Article III court when investigating Title 18 offenses, a military accused should be at least entitled to rely upon the same fundamental, procedural rights which cut at the very fairness and reliability of a verdict that would be guaranteed to him in the very same court the Government went to in the first place.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside his convictions as to Charge I and III and their corresponding specifications and that this Court further set aside his segmented sentence to confinement relating to those specifications, his rank reduction, his reprimand, and his Dishonorable Discharge.