APPENDIX

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CORRECTED COPY

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before the Court Sitting *En Banc*

UNITED STATES, Appellee

v.

Sergeant ERIC F. KELLY
United States Army, Appellant

ARMY 20150725

Headquarters, 21st Theater Sustainment Command
David H. Robertson, Military Judge
Major Michael P. Baileys, Acting Staff Judge Advocate (pretrial)
Colonel Paula I. Schasberger, Staff Judge Advocate (post-trial)

For Appellant: Zachary D. Spilman, Esquire (argued); Captain Matthew L. Jalandoni, JA; Zachary D. Spilman, Esquire (on brief); Captain Katherine L. DePaul, JA; Captain Matthew D. Bernstein, JA (on reply brief).

For Appellee: Captain Jennifer A. Donahue, JA (argued); Colonel Mark H. Sydenham, JA; Lieutenant Colonel A.G. Courie III, JA; Major Melissa Dasgupta Smith, JA; Captain Jennifer A. Donahue, JA (on brief).

5 July 2017

OPINION OF THE COURT

WOLFE, Judge:

After a contested trial of the facts, a court-martial with enlisted representation convicted appellant, Sergeant (SGT) Eric F. Kelly, of abusive sexual contact and sexual assault in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2012 & Supp. I 2014) [hereinafter UCMJ]. Appellant brings numerous claims of error to our attention, seven of which we discuss below.[1] The panel sentenced appellant to be dishonorably discharged from the Army, to be confined for one year, to forfeit all pay and allowances, and to be reduced to the grade of E-1.

In December 2014, SGT RK had just returned from a deployment in Afghanistan where she had served as a crew member of a rotary wing medical evacuation unit. Appellant and SGT RK previously served together. Appellant invited SGT RK over to his house where, along with appellant's wife and other friends,

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[1] We do not address in depth appellant's contention that the military judge's deviation from the standard instructions from Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook [hereinafter Benchbook] (10 Sep. 2014) was error. As appellant did not object to the instructions we test for plain error. Rule for Courts-Martial [hereinafter R.C.M.] 920(f); *United States v. Davis*, 76 M.J. 224 (C.A.A.F. 2017). Having reviewed the instructions, we do not find error let alone plain and obvious error.

While the instructions were non-standard, they were not wrong. For example, when the sexual assault by bodily harm is the penetrative act itself, the Benchbook provides as a third element to the offense: that the victim did not "consent" to the touching. See Benchbook, para. 3-45-14(c) n.2. The military judge in this case did not instruct on that element. However, he included identical language into the definition of bodily harm instructing that "in order to find the sexual act was offensive and nonconsensual, you must be convinced beyond a reasonable doubt that Sergeant [RK] did not consent to having her vulva penetrated by the accused's penis."

they played board games and drank alcohol. Both appellant and SGT RK testified but gave starkly different versions of what happened next.

Sergeant RK testified that after falling asleep on appellant's couch, she awoke to appellant touching her breast. After pushing his hand away and telling him to stop, she went to the guest bedroom and fell back asleep. Sergeant RK again woke up to appellant touching her, this time as he was removing her pants. She then testified appellant had sex with her as she tried to resist. She reported the assault to a mutual friend the next day.

Appellant, by contrast, testified the sexual encounter was entirely consensual. Appellant claimed he and SGT RK had a deeply personal conversation about her difficult experiences in Afghanistan, which included airlifting dead children. He said the conversation turned sexual when SGT RK kissed him. He conceded touching SGT RK's breast but stated it was only upon her invitation after he tried to guess her breast size. Appellant also agreed he tried to have sexual intercourse with SGT RK, but could not recall whether there had been actual penetration.

I. The Numbers Game

During voir dire, the senior member of the panel, Colonel (COL) F, stated he did not believe a person who was black-out drunk was capable of consenting. Appellant challenged the member, but the military judge denied the challenge. Appellant then waived any appellate issue by not exercising a peremptory[2] challenge. R.C.M. 912(f)(4).

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[2] Corrected.

Appellant now asserts defense counsel was ineffective in failing to exercise a peremptory[3] challenge. To succeed, appellant must demonstrate that not using a peremptory[4] challenge was deficient, and that the military judge erred in denying the defense challenge for cause (i.e. prejudice).[5] Nonetheless, we will address appellant's claim that his counsel's performance was deficient.

In determining whether appellant's counsel at trial was ineffective we apply the well-settled two prong test in *Strickland v. Washington*, 466 U.S. 668, 697 (1984).

Appellant claims his counsel was deficient for admittedly engaging in the "numbers game." The "numbers game" is when a party tactically exercises a peremptory[6] challenge to obtain a favorable number of members. As a guilty verdict requires the concurrence of two-thirds of members, under the

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[3] Corrected.

[4] Corrected.

[5] If the military judge did not abuse his discretion in denying the challenge for cause to COL F, then even if the defense counsel were deficient in not exercising a peremptory* challenge, appellant cannot show prejudice from a qualified member continuing to serve on the court-martial. Appellant's burden to establish the claim of ineffective assistance of trial is more critical in cases (such as this one) where the allegation involves affidavits from outside the record of trial which are not part of our normal Article 66(c), UCMJ, review. As we resolve this issue on the deficiency prong, we do not address one way or the other whether the military judge erred in denying appellant's challenge for cause.

* Corrected

[6] Corrected.

"numbers game" the government prefers to have panels composed of multiples of three (e.g. 6, 9, or 12, panel members). R.C.M. 902(c)(2)(B).

In this case, when it came time for the defense to exercise a peremptory[7] challenge, there were seven members on the panel. Under the "numbers game," the defense counsel's choice was to leave the panel at seven members or exercise a peremptory[8] challenge and reduce the panel to six members.

By not exercising a peremptory[9] challenge, the panel of seven required the concurrence of at least five members to convict appellant. If the defense exercised a peremptory[10] challenge, a guilty verdict would require the concurrence of only four members. The exercise of a peremptory[11] challenge would have removed a vote that, all other things being equal, the government would have needed to prove guilt.

Assume, as appellant contends, that COL F was a government-friendly panel member. With a seven member panel, the government would need to convince COL F and at least four other members of appellant's guilt. With COL F removed, the government would still need to convince at least four members. As a matter of math, the defense counsel's reasoning for not exercising a peremptory[12] challenge was sound.

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[7] Corrected.

[8] Corrected.

[9] Corrected.

[10] Corrected.

[11] Corrected.

[12] Corrected.

Of course, panel member selection is *not* merely a question of math. Many litigators often pay little attention to the "numbers game" and focus instead on shaping the panel based the panel members' answers to questions in voir dire. Thus, one can say as a matter of logic that COL F's vote would have been irrelevant, as the government would have been required to have four votes for guilty whether COL F remained on the panel or not. But, one cannot say COL F's presence on the panel was of no consequence. Panel members deliberate. The danger of an unfavorable panel member is not merely they vote against your client, it is also they may persuade other panel members how to vote. Perhaps the danger is all the more so when the member in question will become the panel president.

This scenario is likely why in *United States v. Newson*, our superior court stated they "do not subscribe to the myth of the 'numbers game.'" 29 M.J. 17, 21 (C.A.A.F. 1989). However, the context in that case is important. In *Newson*, game" because the military judge altered the order of challenges. The court found no prejudice, stating there "is no reason to suspect that a different mix of members would have produced results more favorable to appellant." *Id.* Indeed that same court stated "[t]here is no question that in the court-martial system the numerical composition of the court may be said to be either 'favorable' or 'unfavorable' to either side." *Id.* at 19 n.1.

This case is not *Newson*. Is there a sound logic behind the "numbers game"? There is. The Court of Appeals for the Armed Forces (CAAF) has explicitly said that certain numbers are "favorable" to one side or the other. *Id.* In the same footnote in *Newson* quoted above the court described the numbers game

as a matter of "trial tactics and strategy." *Id*. Accordingly, the performance of the defense counsel at trial was not constitutionally deficient. That, however, should not be read as a ringing endorsement of the practice. There is an obvious danger in substituting math for advocacy.[13]

II. Improper Argument

Appellant alleges the court-martial committed plain error when the military judge failed to sua sponte correct the trial counsel's findings argument. Specifically, we address appellant's claim that the trial counsel told the panel appellant lied to them during his testimony.

Part of the government's strategy at trial was to admit appellant's statements regarding the night of the assault. The government wanted the panel to question appellant's reliability and veracity because of his changing statements. The trial counsel analogized that appellant had been caught in his own "web of lies." We decline to provide appellant relief because: 1) we find appellant waived any objection to this argument; and 2) if not waived, the argument did not amount to plain error.

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[13] As a coda to this analysis we note the "numbers game" will come to an end with the recent amendments to the UCMJ establishing fixed panel sizes. National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, § 5187 (2016) (Assembly and Impaneling of Members and Related Matters).

that appellant had been caught in his own "web of lies." We decline to provide appellant relief because: 1) we find appellant waived any objection to this argument; and 2) if not waived, the argument did not amount to plain error.

A. Waiver

The Rules for Courts-Martial use the term "waiver" in two different contexts. On some occasions, a rule will state that an objection is "waived, absent plain error." *See*, *e.g.*, R.C.M. 920. In other cases the rule will say the objection is "waived" without any condition for plain error.

R.C.M. 919(c) governs argument on findings. The rule states: "[f]ailure to object to improper argument before the military judge begins to instruct the members on findings shall constitute waiver of the objection." R.C.M. 919(c). The rule has no "plain error" condition.

In the recent case of *United States v. Ahern*, 76 M.J. 194 (C.A.A.F. 2017), our superior court discussed this difference while interpreting Military Rule of Evidence [hereinafter Mil. R. Evid.] 304. The waiver provision of Mil. R. Evid. 304 is virtually identical to the rule at issue here, R.C.M. 919(c). Our superior court wrote the rule "unambiguously provides that any claim arising under [the rule] is waived absent an objection." *Id*. at 197. The CAAF noted the difference between the two types of waiver and stated "[t]his is not a case where the rule uses the word 'waiver' but actually means 'forfeiture.'" *Id*. The court in *Ahern* found this court erred when we tested for forfeiture and plain error. *Id*. at 198.

To avoid making the same error here, and applying *Ahern* to this case, we find appellant waived any

objection to the trial counsel's argument. As a matter of statutory interpretation, R.C.M. 919 "unambiguously" provides "failure to object . . .shall constitute waiver of the objection" (emphasis added).[14] R.C.M. 919(c).

We duly recognize in numerous prior cases, both this court and our superior court have tested improper arguments for forfeiture and plain error.[15] *See*, *e.g.*, *United States v. Fletcher*, 62 M.J. 87, 88 (C.A.A.F. 2005). However, the plain language of the rule, and our superior court's decision in *Ahern*, compel our result here. To find otherwise would mean the same "unambiguous" words have polar opposite meaning within the same regulatory structure. It would also demand we give no meaning to the stark differences between R.C.M. 919(c) and 920(f), which were promulgated simultaneously. Such a finding would be contrary to the plain language of the rule and contrary to the CAAF's decision in *Ahern*. To the extent we are presented with contrary case law, we follow our superior court's most recent decision.

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[14] The obvious effect of *Ahern* is to encourage timely objections at trial. Timely objections allow the military judge to issue corrective instructions (or declare a mistrial if the error is too egregious to be corrected) and prevent additional erroneous argument. In general, a rule properly promulgated by the President is binding on this court unless it violates an applicable statute such as the UCMJ or the Constitution. Thus, we discuss here only circumstances where application of the rule is not of a constitutional magnitude (e.g. commenting on the accused's right to silence).

[15] This court may "notice" waived error. *See United States v. Chin*, 75 M.J. 220 (C.A.A.F. 2016); UCMJ, art. 66(c). Thus, if application of waiver results in an unbalance, equilibrium may be restored by a Court of Criminal Appeals (CCA).

B. Plain Error

Ahern was decided after we held oral argument in this case, so the parties did not have the opportunity to address its impact. Accordingly, we will also address the error as it was assigned. We do not find the trial counsel's argument amounted to plain error. Plain error occurs when: 1) there is error; 2) the error is plain or obvious; and 3) the error results in material prejudice to a substantial right of the accused. *United States v. Rodriguez*, 60 M.J. 87, 88-89 (C.A.A.F. 2004).

Our superior court stated "[c]alling the accused a liar is a dangerous practice that should be avoided." *Fletcher*, 62 M.J. at 182. The court stopped short, however, of stating that such comments are per se error. The question is then, when is it error for a party (especially the trial counsel) to label the testimony of a witness a "lie"? And, when may that witness be called a "liar"?

Our superior court has described the difference between permissible and impermissible arguments as an "exceedingly fine line which distinguishes permissible advocacy from improper excess." *Id*. at 183. On which side of that line one falls will depend on whether the counsel is arguing a permissible inference from the evidence or engaging in "name-calling." *United States v. White*, 486 F.2d. 204, 207 (2d Cir. 1973).

When an accused testifies, the veracity of the testimony is at issue. The trial counsel may properly point out the incredulous nature of the testimony and point out contradictions with other evidence. Counsel may also call witnesses to testify that in their opinion the accused is not a truthful person. If a person can be shown to have lied on one or more occasion, it is also

permissible to argue the panel should not believe the testimony in other regards. Indeed, trials often turn on such credibility determinations.

The CAAF's decision in *Fletcher* cited *White* heavily. In *White*, the Second Circuit remonstrated the prosecutor for calling the defendant a liar. 486 F.2d. at 204-05. In a subsequent case, however, that same court noted "because defendant had put his credibility in issue, the prosecutor's arguments portraying him as a liar were not improper." *United States v. Edwards*, 342 F.3d 168, 181 (2d Cir. 2003); *see also United States v. Coriaty*, 300 F.3d 244, 255-56 (2d Cir. 2002) (observing it is generally not improper for the prosecutor to use the words "liar" and "lie" to characterize disputed testimony when the witness's credibility is clearly in issue) (internal citations omitted).

Likewise, the D.C. Circuit has stated they could "conceive of no reason in law why the words 'lie' and 'lying' should be banned from the vocabulary of summation, particularly in cases that turn on the defendant's credibility." *United States v. Donato*, 99 F.3d 426, 432 (D.C. Cir. 1996) (*citing United States v. Dean*, 55 F.3d 640, 665 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996)) (internal quotations omitted); *see also Virgin Islands v. Edwards*, 233 F. App'x 167, 173 (3rd Cir. 2007).

Summarizing federal case law, the Fourth Circuit Court of Appeals said the following:

> We have not determined whether describing a defendant as a "liar" is, per se, improper. But the Second, Seventh, Eighth, and Ninth Circuits have held that the government may refer to a

> defendant as a liar under some circumstances. *E.g., United States v. Moreland*, 622 F.3d 1147, 1161-62 (9th Cir. 2010) (allowing where based on reasonable inferences from the evidence); [*Coriaty*, 300 F.3d 244, 255 (2nd Cir. 2002)] (permitting as long as not excessive or inflammatory); *United States v. Shoff*, 151 F.3d 889, 893 (8th Cir. 1998) (finding no misconduct as long as the prosecutor is arguing about the evidence); *United States v. Manos*, 848 F.2d 1427, 1437 (7th Cir. 1988) (deducing no undue prejudice from labeling "the teller of [a] falsity a liar").

United States v. Powell, 680 F.3d 350, 358 (4th Cir. 2012).

On the other hand, the First Circuit stated the impropriety of a prosecutor calling the defendant a "liar" and a "crook" is "so clear as not to brook serious discussion." *United States v. Rodriguez-Estrada*, 877 F.2d 153, 158 (1st Cir. 1989); *United States v. Moore*, 11 F.3d 475, 481 (4th Cir. 1993) ("We have recognized that it is highly improper for the government to refer to a defense witness as a liar."). Perhaps the difference lies between arguing that testimony was intentionally false (a lie) and calling the witness a liar (name-calling).

Answering this question likely applies not only to the testimony of the accused. When an accused takes the stand, he or she is subject to same credibility determinations as other witnesses. The United States Supreme Court has stated that "[o]nce a defendant takes the stand, he is subject to cross-examination

impeaching his credibility just like any other witness." *Portuondo v. Agard*, 529 U.S. 61, 70 (2000) (internal quotations and citations omitted); *see also United States v. Piren*, 74 M.J. 24 (C.A.A.F. 2015). A prohibition on the trial counsel calling the accused's testimony a lie may, therefore, be equally applicable to the testimony of his accuser.

However, we need not decide definitively in this case which side of the line the trial counsel's argument fell.[16] This is a case of unpreserved error. Assuming the trial counsel's argument was error, it was not plain and obvious error for two reasons.

First, error is "plain" when it is "obvious" or "clear under current law." *United States v. Olano*, 507 U.S. 725, 734 (1993). As the prior discussion shows, the trial counsel's arguments were not clearly error under current law.

Second, we look to see how obvious the error was in the context of the trial. When examining this prong, we ask whether the error was so obvious "in the context of the entire trial" that "the military judge should be 'faulted for taking no action' even without an objection." *United States v. Gomez*, 76 M.J. 76, 81 (C.A.A.F. 2017) (citing *United States v. Burton*, 67 M.J. 150, 153 (C.A.A.F. 2009) (quoting *United States v. Maynard*, 66 M.J. 242, 245 (C.A.A.F. 2008))); *see*

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[16] Consider the following possible arguments ranging from the permissible to the clearly impermissible: "The evidence shows the accused deliberately tried to deceive when he testified that . . . ;" "The evidence shows the accused lied when he testified that . . . ;" "The accused lied when he testified that . . . ;" "The evidence shows the accused is a liar;" "The accused is a liar;" "I think the accused is a liar who lied to you when . . . ;" and "Trust me, I've been working on this case for months, the accused is a liar."

also United States v. Frady, 456 U.S. 152, 163 (1982) (noting that error is clear if "the trial judge and prosecutor [would be] derelict in countenancing it, even absent the defendant's timely assistance in detecting it"). The trial counsel's arguments were not so wrong that we could fault the military judge for not sua sponte intervening.

We cannot say appellant meets either definition of plain and obvious error. Therefore, we do not find appellant has met his burden of establishing plain error. The argument in this case is not nearly as severe as that which was made in *Fletcher*.

We therefore answer this question identically to our superior court in *United States v. Jenkins*:

> Applying the foregoing principles to trial counsel's argument in this case, we hold that there was no plain error. Although trial counsel repeated called appellant a thief and a liar, defense counsel did not find the argument sufficiently offensive to warrant an objection or a request for a curative instruction.

54 M.J. 12, 20 (C.A.A.F. 2000)

Accordingly, we leave this issue where we started, with our superior court's guidance that "[c]alling the accused a liar is a dangerous practice that should be avoided." *Fletcher*, 62 M.J. at 182 (emphasis added).

III. The Rules of Completeness

At trial, the prosecution called U.S. Army Criminal Investigation Command (CID) Special Agent (SA) AG to testify about statements appellant made during an interrogation. On cross-examination, the defense attempted to elicit other statements made by

appellant during the same interrogation. What followed was a tripartite misunderstanding of the interplay between the two "rules of completeness" in the Military Rules of Evidence.

After the trial counsel finished the direct examination, the defense counsel asked SA AG about other statements appellant made during the interrogation. After the military judge sustained the trial counsel's hearsay objection, the defense counsel said the following:

> [A]t this time, we would request that under the "rule of completeness" that - - as portions of the accused's statement have been offered by the prosecution, that the entire statement - - being that the - - made by the accused be permitted to be questioned by the defense pursuant to Rule 806.

The military judge directed an Article 39(a), UCMJ, session to consider appellant's objection. The defense counsel explained:

> The defense believes that the government opened the door to this line of questioning and to permit the defense to offer the rest of the statement offered - - that the accused gave under the "rule of completeness" as this was not testimony that was only offered to prove - - to demonstrate an inconsistent statement. . . . And as the - - one of the charged offenses, events that happened in the bedroom, we believe that, at the very least, a mistake to fact as to consent has been raised. And therefore, we

> should be able to discuss the rest of the statement with the individual that he - - who received that statement.

The military judge found this explanation confusing and asked the defense, "So what specifically do you want to ask this witness, and what rule allows its admissibility?"

The defense counsel responded the remainder of the accused's statement was admissible as the "rule of completeness" under Mil. R. Evid. 806. The military judge then questioned whether counsel was citing the correct rule. The defense apologized, admitted he was citing the wrong rule, and that he was looking for the correct rule.

The military judge asked if the defense had intended to cite Mil. R. Evid. 106. The defense counsel agreed, and told the judge "Yes. That's exactly the rule we were thinking of."

It was not the right rule.

"Under the Military Rules of Evidence . . . there are two distinct rules of completeness." *United States v. Rodriguez*, 56 M.J. 336, 339 (C.A.A.F. 2002). They are Mil. R. Evid. 106 and 304(h)(2). Our superior court in Rodriguez explained the difference between the two. Id. In short, Mil. R. Evid. 106 applies to written or recorded statements made by any person, and Mil. R. Evid. 304(h)(2) applies to statements made by the accused whether in writing, recorded, or oral.

As Mil. R. Evid. 106 does not apply to oral statements, the military judge correctly determined that Mil. R. Evid. 106 was inapplicable to appellant's oral statement to SA AG. No one discussed the rule that was the most likely applicable, Mil. R. Evid.

304(h)(2). The CAAF explained the effect of Mil. R. Evid. 304(h)(2) as follows:

> Rule 304(h)(2): (1) applies to oral as well as written statements; (2) governs the timing under which applicable evidence may be introduced by the defense; (3) permits the defense to introduce the remainder of a statement to the extent that the remaining matter is part of the confession or admission or otherwise is explanatory of or in any way relevant to the confession or admission, even if such remaining portions would otherwise constitute inadmissible hearsay; and (4) requires a case-by-case determination as to whether a series of statements should be treated as part of the original confession or admission or as a separate transaction or course of action for purposes of the rule.

Rodriguez, 56 M.J.. at 341-42. As the correct rule was not discussed, we are faced with an undeveloped record on appeal. There are two rules of completeness. As the defense counsel told the military judge that Mil. R. Evid. 106 was "exactly" the rule he was referring to, the correct rule was never identified. The military judge's ruling on Mil. R. Evid. 106 was correct. The better rule, Mil. R. Evid. 304(h)(2), was never mentioned. Accordingly, the "case-by-case" determination on whether the statements were part of the same statement never happened.

Nonetheless, we need not dwell on whether any error was preserved (unclear) or whether we would under Article 66(c), UCMJ, notice the error if forfeited

(we likely would, given these facts), as appellant was clearly not prejudiced by any error. The defense counsel sought to admit, through SA AG, appellant's version of events about the alleged sexual assault. Appellant took the stand and testified to exactly this same information. Accordingly, we cannot find prejudice.

IV. Improper Panel Questions

During trial, the panel asked a series of questions regarding past adulterous acts by appellant. Appellant asserts on appeal the member's repeated questions demonstrate they were unable to follow the military judge's instructions to ignore this information. Therefore, appellant argues, the military judge should have granted appellant's request for a mistrial.

The sequence of events is important and requires some explanation. The defense at trial was any sexual contact between appellant and SGT RK was consensual. To buttress this theory, defense counsel elicited that appellant told his wife he had consensual intercourse with SGT RK shortly after it happened.

Appellant's wife testified she was a light sleeper and did not hear any evidence of an assault. After appellant's wife finished testifying, a panel member asked whether appellant had ever cheated on her before. The military judge sustained the defense objection.

Appellant then testified. The same panel member asked appellant if he had ever been unfaithful to his wife. Again, the military judge sustained the defense objection.

Near the conclusion of appellant's testimony, a third question was asked regarding appellant's infidelity. This time, the defense made the tactical decision to answer the question and did not object. Appellant testified that on one prior occasion, he had an affair. He further explained during this instance he also informed his wife of the transgression. He also testified the affair had not resulted in any allegation of sexual assault or sexual misconduct. Appellant's testimony successfully framed his prior affair as being consistent with his version of what happened during the alleged assault. That is, he had cheated on his wife when he engaged in consensual conduct with SGT RK, just as he had before.

The military judge ultimately instructed the members to disregard any evidence of prior marital infidelity by appellant. Notwithstanding that instruction, the panel interrupted deliberations to ask one more question: "When did SGT Kelly tell his wife about his first adulterous event?" The military judge again instructed the members to ignore issues of adultery. Appellant did not object to the military judge's instructions or request additional instructions. However, after the panel members returned a guilty verdict appellant moved for a mistrial.

A mistrial is appropriate when "manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." R.C.M. 915(a). We do not find the military judge abused his discretion in denying appellant's request for a mistrial.

Panel members normally have no formal training in the law. In general, and in this case, panel members

are not offered a chance to explain why they ask the questions they do. Also, the military judge does not explain the legal basis as to why an objection to a question is sustained. Indeed, when a question is improper such an explanation would often compound the problem the question presents.

In this case, the defense presented the panel with testimony from appellant and his wife there had been no sexual assault and instead there was a consensual event where appellant cheated on his wife. The panel was required to judge the credibility of the testimony in light of the other evidence. Questions about appellant's marriage and relationship with his wife were probative of appellant's wife's bias and motive in testifying. The final panel question regarding "when" he told his wife of the first affair would help explain the similarity of the two events.[17] In other words, from the perspective of a panel member, adultery was relevant.

To find prejudice to appellant, we would need to find the panel wanted to know of prior adulterous acts because they believed someone who would commit adultery was more likely to commit sexual assault. We discount this rational for two reasons. First, appellant's defense was he did indeed commit (consensual) adultery. That is, appellant's very defense depended on the panel not making such far-fetched assumptions. Second, the panel's final question—about when appellant told his wife about the prior affair—demonstrates they were focused on

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[17] We speak only of logical relevance under Mil. R. Evid. 402, not legal relevance under Mil. R. Evid. 403. We do not dispute the military judge's ruling to keep issues of adultery out of the court-martial on Mil. R. Evid. 403, Mil. R. Evid. 404, or other grounds.

the credibility of appellant's story, not whether appellant was a bad person.

Considering the entire record, the fact that the defense placed the issue of adultery squarely before the panel when appellant testified about his prior affair, considering appellant did not request or ask for any additional instructions to the members, and given the high threshold to require a mistrial, we do not find the military judge abused his discretion in denying the defense request for a mistrial.

V. Prior Inconsistent Statements, Extrinsic Evidence, and Hearsay

The defense called Specialist (SPC) EU in their case in chief. Specialist EU was a mutual friend of both SGT RK and appellant. The morning after the charged offenses, SPC EU gave SGT RK a ride. It was at this time that SGT RK told SPC EU what happened the night before. The defense asked SPC EU to repeat a few of SGT RK's statements. The government then asked SPC EU to repeat other statements SGT RK made that morning.

A. The Direct Examination

The defense asked whether SGT RK said she was awake or asleep during "the events that occurred on the couch." Specialist EU testified SGT RK said she was awake. The defense also asked the witness to repeat whether SGT RK said what appellant's wife had told SGT RK that morning. Specialist EU said SGT RK told him appellant's wife was upset and had asked SGT RK to leave.

Both statements were inconsistent with SGT RK's testimony at trial. However, offered through SPC EU,

they were extrinsic evidence of a prior inconsistent statement.

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Mil. R. Evid. 801(d)(2).

Mil. R. Evid. 613.

When SGT RK was on the stand, the defense never asked SGT RK whether she made the allegedly inconsistent statements. If a witness admits making a prior inconsistent statement, extrinsic evidence of the statement is prohibited. *See United States v. Gibson*, 39 M.J. 319 (C.A.A.F. 1994); *United States v. Harcrow*, 65 M.J. 190 (C.A.A.F. 2007). Again, however, no objection was made to the testimony.

B. The Cross Examination

The trial counsel began the cross-examination of SPC EU by laying a foundation for the "excited utterance" hearsay exception. The direct examination already established SPC EU and SGT RK talked about the alleged assault while driving away from appellant's house. Specialist EU stated SGT RK became emotional and was crying. He then agreed that she was crying "a lot."

The trial counsel then sought to ask SPC EU about the remainder of the conversation. Specifically, the

government asked SPC EU if SGT RK told him she had been raped. The defense objected on two grounds—the testimony was hearsay and was beyond the scope of the direct examination.

The trial counsel explained to the military judge the defense "asked about the conversation . . . . We are simply asking for clarification in the context of the conversation."

The military judge overruled appellant's objection but without explanation. Neither party further developed the record. Specialist EU then testified that the morning after the alleged assault, SGT RK told him appellant raped her.

C. Analysis

On appeal, appellant claims the statements admitted by the government were inadmissible hearsay. We find the military judge did not err in admitting the statements because either they were an excited utterance[18] or because the defense opened the door to putting the conversation in context.

At issue is whether the trial counsel may properly admit statements made by SGT RK to SPC EU in order to more fully explain the context of the conversation. The defense improperly introduced extrinsic evidence of prior inconsistent statements that, as they were narrow questions, failed to provide context to SGT RK's conversation with SPC EU. The

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[18] Counsel on appeal do not address the excited utterance issue. The first questions the trial counsel asked SPC EU were about SGT RK's emotional state. She was "emotional" and crying "a lot" and just left the scene of the assault for the first time. Only after laying the foundation did the trial counsel begin eliciting hearsay.

government then sought to introduce the context of the conversation.

We have recognized at least four instances in which prior statements of a witness are relevant to rehabilitate the witness's credibility. They are:

> (1) to place a purported inconsistent statement in context to show that it was not really inconsistent with a witness' trial testimony; (2) to support the denial of making an inconsistent statement; (3) to refute the suggestion that the witness' memory is flawed due to the passage of time; and (4) to refute an allegation of recent fabrication, improper influence, or motive.

United States v. Adams, 63 M.J. 691, 696-97 (Army Ct. Crim. App. 2006) (internal citations omitted).

Here, the defense tried to portray the conversation between SPC EU and SGT RK, made shortly after the alleged assault, as starkly inconsistent with SGT RK's trial testimony. This was not a fair description. Sergeant RK had tearfully told SPC EU she had been groped on the couch, "raped" in the bedroom, and she awoke with no pants on.

The trial counsel explained to the military judge the statements elicited by the defense needed "context" to be understood. Neither party ever asked for a limiting instruction.

As our superior court stated in *United States v. Martin*,

> The invited error doctrine prevents a party from creating error and then taking advantage of a situation of his

> own making on appeal. As a result, invited error does not provide a basis for relief. The question of whether trial defense counsel invited an error at trial is a question of law, which we review de novo.

75 M.J. 321, 325 (C.A.A.F. 2016) (internal citations and quotations omitted).

In *United States v. Jumping Eagle*, the Eighth Circuit addressed an issue almost the same as here: "[I]t is fundamental that where a defendant 'opens the door' or 'invites error,' there can be no reversible error." 515 F.3d 794, 801 (8th Cir. 2008) (internal citation omitted). "Accordingly, we have allowed the use of otherwise inadmissible evidence, including hearsay statements, to clarify, rebut, or complete an issue opened up by defense counsel on cross-examination." *Id*. The court summarized the issue as follows:

> Jumping Eagle first brought up this conversation during Mandy's cross-examination, when he queried: "[J.J.] told you that this had happened over 20 times to him, didn't he?" During redirect of Mandy, the government asked her what J.J. had told her about the abuse. Jumping Eagle's inquiry of Mandy, opened the door, permitting further evidence of the conversation between Mandy and J.J. As a result, the district court did not commit reversible error by admitting the testimony.

Id. Accordingly, even if not an excited utterance, we cannot find the military judge erred in overruling the

defense objection. "Otherwise, preventing the Government from walking through the door already opened by the defense would have left the members with a skewed view of the evidence." *Martin*, 75 M.J. at 327; *See United States v. Banks*, 36 M.J. 150, 162 (C.M.A. 1992) (noting that evidence "may be admitted in rebuttal when a party 'opens the door' by introducing potentially misleading testimony.") (citation omitted); *see also United States v. Segines*, 17 F.3d 847, 856 (6th Cir. 1994) (allowing evidence on the same issue "to rebut any false impression that might have resulted from the earlier admission") (citation and internal quotation marks omitted).

Judge Cox addressed this same issue through a different lens in *United States v. McCaskey*:

> In my view, this is not a hearsay issue at all. The proper basis for admission of the statements is that they were relevant evidence -- made so by the defense -- and it was necessary and proper for the factfinder to know their content in order to understand the witness' explanation of the changes. The defense cannot be heard to complain that it has a right to present an abbreviated or distorted picture of the facts to the court.

30 M.J. 188, 194 (C.M.A. 1990) (Cox, J., concurring)

As we find no error, we do not answer the question of whether SPC EU's testimony would have been otherwise admissible as a prior consistent statement, or whether the admission of the statement was harmless in the context of a trial in which SGT RK's

several reports of being sexually assaulted were also admitted through other witnesses.[19]

VI. Factual Sufficiency

Appellant testified at this trial. If believed, appellant's version of events would result in a finding of not guilty. Consistent with our Article 66(c), UCMJ, responsibilities we conducted a factual sufficiency review.

Article 66(c), UCMJ, provides that this court may "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact." When exercising this authority, this court does not give deference to the decisions of the trial court (such as a finding of guilty). *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (A court of criminal appeals gives "no deference to the decision of the trial court" except for the "admonition . . . to take into account the fact that the trial court saw and heard the witnesses.").

We note the degree to which we "recognize" or give deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witness is at issue. *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015), *aff'd on other grounds*, 76 M.J. 224 (C.A.A.F. 2017).

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[19] During cross-examination of SGT RK, the defense counsel inferred she was inflating her testimony at trial by pointing out that many of the facts had not been included in her statement to CID. The thrust of the cross-examination was that she elaborated (i.e. "recently fabricated") her story since being interviewed by CID. *See* Mil. R. Evid. 801(d)(1). Her statement to SPC EU was consistent with her trial testimony and predated the statement to CID, although it also lacked the specificity of her trial testimony.

Given this deference, we credit SGT RK's version of events. *See also United States v. Crews*, ARMY 20130766, 2016 CCA LEXIS 127, at *11-12 (Army Ct. Crim. App. 29 Feb. 2016) (mem. op.) ("The deference given to the trial court's ability to see and hear the witnesses and evidence—or 'recogni[tion]' as phrased in Article 66, UCMJ—reflects an appreciation that much is lost when the testimony of live witnesses is converted into the plain text of a trial transcript."). The evidence here is factually sufficient to support the verdict.

VII. Can the Military Judge Require an Accused to Testify to Raise a Mistake of Fact Defense?

We briefly discuss an issue raised by appellant in his R.C.M. 1105 submission to the convening authority. Appellant claimed that the night prior to the alleged assault, SGT RK kissed appellant. The defense filed a motion under Mil. R. Evid. 412 to admit the kiss as evidence of a reasonable mistake of fact as to consent.

> [W]hether evidence is constitutionally required — so as to meet the [Mil. R. Evid.] 412(b)(1)(C) exception to [Mil. R. Evid.] 412's general prohibition of sexual behavior or predisposition evidence — demands the ordinary contextual inquiry and balancing of countervailing interests, e.g., probative value and the right to expose a witness's motivation in testifying versus the danger of harassment, prejudice, confusion of the issues, the witness' safety, or evidence that is repetitive or only marginally relevant. This balance is bounded on the

> one hand by the broad discretion of trial judges and rulemakers' broad latitude under the Constitution to establish rules excluding evidence from criminal trials, and on the other by the Constitution's guarantee of a meaningful opportunity to present a complete defense.

United States v. Gaddis, 70 M.J. 248, 252 (C.A.A.F. 2011) (internal citations and quotations omitted).

Here, the defense wanted to ask SGT RK about the kiss on cross-examination. Sergeant RK, however in a closed Article 39(a), UCMJ, session pursuant to Mil. R. Evid. 412, denied the kiss happened. The military judge excluded evidence regarding the kiss unless appellant testified.

An accused is not required to testify to establish a mistake of fact defense. *United States v. Jones*, 49 M.J. 85, 91 (C.A.A.F. 1999). However, to warrant an instruction on the mistake of fact defense there must be "some evidence of an honest and reasonable mistake to which the members could have attached credit if they had so desired." *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003).

In other words, there is no per se requirement an accused testify to establish a mistake of fact defense, but evidence the accused honestly and reasonably believed the victim had consented must come from somewhere. In many cases, the only source of admissible evidence about the accused's subjective belief the victim consented may well be from the accused himself.

Here, only appellant and SGT RK could testify about the kiss—and SGT RK flatly denied it. Therefore, SGT RK's testimony would result in no

evidence of a kiss, let alone the accused was honestly or reasonably mistaken about SGT RK's consent because of a kiss. Having SGT RK testify there was no kiss would not be some evidence of a kiss. See id. As SGT RK's denial of a kiss would not be any evidence, let alone "some evidence" of a defense, it was not constitutionally required under Mil. R. Evid. 412. Put differently, appellant does not have a constitutional right to admit evidence there was no kiss.

However, even assuming the military judge erred in restricting the cross-examination of SGT RK, we cannot find prejudice to appellant. UCMJ art. 59(a). Appellant took the stand and testified about the kiss. Accordingly, there was no prejudice when appellant was prevented from asking SGT RK about a kiss.

VIII. Cross-examining the Accused on his Preparation for Testifying

While cross-examining appellant, trial counsel asked a series of questions designed to elicit that appellant had been well-prepared to testify. Appellant was asked several questions about having access to and reviewing the evidence in the case, as well as his ability to speak to his attorneys before testifying.

United States v. Carpenter, 51 M.J. 393 (C.A.A.F. 1999), addressed a similar issue on whether such questions were an inappropriate commentary on an accused's exercise of constitutional rights. *Id*. at 395-96. In *Carpenter*, the trial counsel specifically argued the accused testified with the benefit of having first seen all the government's evidence. The CAAF stated:

> This Court has not specifically ruled on the propriety of a prosecution argument that an accused has had the opportunity to shape his testimony by his presence

> throughout the trial and opportunity to hear all the witnesses. In *Agard v. Portuondo*, 117 F.3d 696, 709 ([2d Cir.] 1997), the Second Circuit held, in a split decision, that such an argument violates the Sixth Amendment.

Id. at 396. Ultimately, our superior court did not address the issue of whether such arguments are per se impermissible, as they decided that any error did not amount to plain error.

Subsequent to the CAAF's decision in *Carpenter*, however, the Supreme Court had the opportunity to consider *Agard v. Portuondo* 529 U.S. 61 (2000), and stated when an accused testifies last it is "quite impossible" for "the jury to evaluate the credibility of the defendant's testimony while blotting out from its mind the fact that before giving the testimony the defendant had been sitting there listening to the other witnesses." *Id*. at 68. The Court concluded that:

> A witness's ability to hear prior testimony and to tailor his account accordingly, and the threat that ability presents to the integrity of the trial, are no different when it is the defendant doing the listening. Allowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate -- and indeed, given the inability to sequester the defendant, sometimes essential -- to the central function of the trial, which is to discover the truth.

Id. at 73. Given the Supreme Court's ultimate resolution of the very case that gave the CAAF pause in Carpenter, we see no error, let alone plain error, in the trial counsel's questions.

IX. Mandatory Sentences and Article 66(c), UCMJ

In his final assignment of error, appellant asks that we set aside the mandatory sentence of a dishonorable discharge as being too severe. We conclude we lack the authority to give appellant his requested relief.

Congress amended Article 56, UCMJ, in 2013 to read, in relevant part, as follows:

> While a person subject to this chapter who is found guilty of [sexual assault] shall be punished as a general court-martial may direct, such punishment must include, at a minimum, dismissal or dishonorable discharge, except as provided for in section 860 of this title (article 60) [10 U.S.C. § 860].

The article requires that "such punishment must include" a "dishonorable discharge" in this case. The only exception to the mandatory minimum is a reference to the convening authority's ability to reduce the sentence at initial action, in two very limited circumstances.[20] There is no exception

[20] Under Article 60(c)(4)(B-C), UCMJ, the convening authority may set aside a mandatory minimum when: 1) the prosecutor so recommends based on the accused's substantial assistance in another case; and 2) as part of a pretrial agreement it is agreed that the dishonorable discharge will be reduced to a bad-conduct discharge.

provided for a sentence reduction as part of our Article 66(c), UCMJ, authority.[21]

Additionally, Article 66(c), UCMJ, limits our authority to give relief in a case with a mandatory punishment. "Article 66(c), UCMJ, empowers the CCAs to 'do justice,' with reference to some legal standard, but does not grant the CCAs the ability to 'grant mercy.'" *United States v. Nerad*, 69 M.J. 138, 145 (C.A.A.F. 2010). When a sentence is mandatory as a matter of law, there is no "legal standard" that would allow us to set the sentence aside.

United States v. Curtis, 52 M.J. 166 (C.A.A.F. 1999), is the closest case we could find on point. In that case, the CAAF set aside the appellant's death sentence. The court concluded the CCA could order a rehearing on sentence or reassess the sentence and approve the mandatory life sentence. The court did not provide for the CCA approving a sentence less than the mandatory sentence.

Appellant's matters submitted pursuant to R.C.M. 1105 contain numerous letters and other mitigating material. However, as we see ourselves as lacking the authority to provide relief, we do not reach the

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[21] The mandatory minimum punishment contained in Article 56, UCMJ, is unique. The other mandatory punishments in the UCMJ are contained directly in their respective punitive articles and refer to the mandatory punishment the court-martial could direct. *See* UCMJ arts. 106 and 118. That is, by their own terms, the other mandatory minimums are a limit on the court-martial, not the CCA. By contrast, the language of Article 56(b), UCMJ, directs the "punishment" must include, in this case, a dishonorable discharge. Thus appellant's argument is weaker here than it would be with respect to the mandatory minimum sentence for premeditated murder contained in Article 118, UCMJ.

question of whether appellant's sentence "should be approved" in the absence of an applicable mandatory minimum.

CONCLUSION

Upon consideration of the entire record, the findings of guilty and the sentence are AFFIRMED.

Chief Judge RISCH, Senior Judge TOZZI, Senior Judge MULLIGAN, Judge HERRING, and Judge FEBBO concur.

Senior Judge CAMPANELLA, concurring in the judgment, joined by Judge CELTNIEKS, Judge PENLAND, and Judge BURTON:

The majority reads the recent amendment to Article 56, UCMJ, too broadly, and this reading results in construing the court's Article 66, UCMJ, authority too narrowly. While the ultimate judgment of not providing relief for sentence appropriateness is sound in this case, the foundation upon which the majority judgment is based is flawed.

In concluding this court has no power to examine the sentence appropriateness of a trial court's issuance of a mandatory dishonorable discharge, the majority disregards three things. First, the majority disregards the language of the statute mandating a dishonorable discharge; second, they ignore the purpose behind the change in the statute; and finally they discount the precedents regarding the Article 66, UCMJ, authority of a service court of criminal appeal.

Article 66(c), UCMJ, provides this court "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, *should be approved*." (Emphasis added).

The plain language of this provision effectively establishes a three-pronged constraint on our authority to affirm. To affirm the findings and sentence, we must be satisfied that the findings and sentence are: 1) "correct in law," and 2) "correct in fact." However, even if these first two prongs are satisfied, we "may affirm only so much of the findings and sentence as we determine, on the basis of the entire record, *should be approved*." *United States v. Nerad*, 67 M.J. 748, 751 (C.A.A.F. 2009) (emphasis added).

This power has been described as "an awesome, plenary, de novo power of review" that we may use to substitute our judgment for that of the trial judge. *United States v. Cole*, 31 M.J. 270, 272 (C.A.A.F. 1990). "A clearer *carte blanche* to do justice would be difficult to express." *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991) (citations omitted) (emphasis added). "If the Court . . . in the interest of justice, determines that a certain finding or sentence should not be approved . . . the Court need not approve such finding or sentence." *Id.* While cases have addressed this power within the context of sentence appropriateness determinations, the plain language of the statute, and the quoted decisions, make clear this court's power is not limited to that application. The majority opinion, likely for the first time ever, finds there is now one area where our "carte blanche" is no longer accepted.

Prior to the recent amendments, the convening authority could reduce the sentence of an accused as a matter of clemency.[22] Congress recently restricted

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[22] This power included the authority to set aside the mandatory minimum punishment of life in prison required by Article 118,

the convening authority's power. National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, § 5322 (2016) (Limited Authority to Act on Sentence in Specified Post-Trial Circumstances). The new Article 60a, UCMJ, generally limits the convening authority's clemency powers to minor offenses and punishments. *Id*.

Congress, however, neither explicitly nor implicitly, restricted our authority under Article 66, UCMJ, to review a mandated sentence of dishonorable discharge for sentence appropriateness and determine whether it "should be approved."

Having thus reached the question the majority avoids, in this case a dishonorable discharge is appropriate and therefore should be approved.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court

UCMJ. As the majority points out, the mandatory minimum punishment in Article 118, UCMJ, is a limitation on the courtmartial's sentencing authority, not a limitation on the convening authority or this court.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES

Appellee

v.

Eric F. KELLY, Sergeant

United States Army, Appellant

No. 17-0559

Crim. App. No. 20150725

Argued March 22, 2018—Decided May 23, 2018

Military Judge: David H. Robertson

For Appellant: *Zachary Spilman, Esq*. (argued); *Lieutenant Colonel Christopher D. Carrier* (on brief); *Captain Oluwaseye Awoniyi*.

For Appellee: *Captain Joshua B. Banister* (argued); *Lieutenant Colonel Eric K. Stafford* and *Captain Austin L. Fenwick* (on brief); *Major Virginia H. Tinsley*.

Amicus Curiae for the Air Force Appellate Defense Division: *Colonel Jane E. Boomer*, USAF and *Brian L. Mizer*, Esq. (in support of Appellant's petition for grant of review).

Amicus Curiae for the Navy-Marine Corps Appellate Defense Division: *Captain Andrew R. House*, JAGC, USN (in support of Appellant's petition for grant of review).

Chief Judge STUCKY delivered the opinion of the Court, in which Judges RYAN, OHLSON, SPARKS, and MAGGS, joined.

Chief Judge STUCKY delivered the opinion of the Court.

Today, we reconcile two Uniform Code of Military Justice (UCMJ) provisions that, at first blush, are seemingly at odds: Article 56(b), UCMJ, 10 U.S.C. § 856(b) (2012 & Supp. I 2014), which mandates that an accused convicted of certain offenses be punished with a dismissal or dishonorable discharge, and Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012), which vests the Courts of Criminal Appeals (CCAs) with broad discretionary power to review sentence appropriateness.

On appeal below, the United States Army Court of Criminal Appeals (ACCA) held that it lacked the authority to reduce a mandatory minimum sentence. We disagree. Given the unrivaled statutory powers of the CCAs, we hold that Article 56(b), UCMJ, does not restrict a CCA's ability to review a mandatory minimum sentence for sentence appropriateness.[1]1

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[1] After we granted review of the assigned issue, this Court further specified the issue of whether the ACCA appropriately applied waiver rather than forfeiture when Appellant failed to object to improper argument. *United States v. Kelly*, 77 M.J. 137 (C.A.A.F. 2017) (order granting review). The issue has recently been decided in our opinion in *United States v. Andrews*, __ M.J. __ (C.A.A.F. 2018), which held that forfeiture applies. The ACCA thus erred in applying waiver in Appellant's case. Appellant was not prejudiced, however, as the ACCA still conducted a plain error review and deemed the error not clear or obvious. *United*

I. Background and Procedural History

Appellant's convictions stem from a single night in December 2014, when Appellant fondled Sergeant RK's breast while she slept and proceeded to have sex with her despite her resistance.

For this conduct, a panel of members with enlisted representation convicted Appellant, contrary to his pleas, of one specification of abusive sexual contact and one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012). The panel sentenced Appellant to a dishonorable discharge, confinement for one year, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. The convening authority approved the adjudged sentence but suspended the adjudged forfeitures and waived automatic forfeitures for two months and seven days for the benefit of Appellant's dependents.

On appeal before the ACCA, Appellant argued that the mandatory minimum sentence of a punitive discharge was inappropriately severe. Regarding itself as powerless to provide relief in the face of an applicable mandatory minimum sentence, the en banc ACCA, in a sharply divided 6-4 vote, affirmed, and did not reach the question of whether Appellant's sentence " 'should be approved.' " *Kelly*, 76 M.J. at 807.

II. The Law

A. The Article 66 Power of the CCAs

The CCAs were established at the behest of Congress by the Judge Advocates General. Article

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States v. Kelly, 76 M.J. 793, 798–800 (A. Ct. Crim. App. 2017) (en banc).

66(a), UCMJ. As Article I courts, they enjoy limited jurisdiction, and are circumscribed by the Constitution to the powers specifically granted to them by statute. *See United States v. Lopez de Victoria*, 66 M.J. 67, 69 (C.A.A.F. 2008).

The scope of the CCAs' authority as to sentencing is contained in Article 66(c), UCMJ, which provides, in relevant part, that a CCA "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." This Court has recognized that it is a "settled premise" that in exercising this statutory mandate, a CCA has discretion to approve only that part of a sentence that it finds "should be approved," even if the sentence is "correct" as a matter of law. *United States v. Nerad*, 69 M.J. 138, 142 (C.A.A.F. 2010); *see United States v. Atkins*, 8 C.M.A. 77, 79, 23 C.M.R. 301, 303 (1957) ("In short, the criterion for the exercise of the board of review's power over the sentence is not legality alone, but legality limited by appropriateness." (citation omitted)). Given their "awesome, plenary, de novo power of review," *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990), it is little wonder that this Court has described the CCAs as having a "carte blanche to do justice." *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991).

B. Mandatory Minimums Under Article 56

In 2013, Congress amended Article 56, UCMJ, to provide for mandatory minimum punitive discharges in cases involving rape, sexual assault, forcible sodomy, and attempts to commit such offenses. National Defense Authorization Act for Fiscal Year

2014, Pub. L. No. 113-66, § 1705, 127 Stat. 672, 959 (2013).

Article 56(b), UCMJ, provides:

> (b)(1) While a person subject to this chapter who is found guilty of an offense specified in paragraph (2) shall be punished as a general court-martial may direct, such punishment must include, at a minimum, dismissal or dishonorable discharge, except as provided for in section 860 of this title (article 60).
>
> (2) Paragraph (1) applies to the following offenses:
>
> > (A) An offense in violation of subsection (a) or (b) of section 920 of this title (article 120(a) or (b)).

10 U.S.C. § 856(b) (2012 & Supp. I 2014).

Article 56(b), UCMJ, expressly provides that the convening authority may disapprove or commute such a mandatory minimum sentence in certain limited circumstances. *See id.*; *see also* Article 60(c)(4)(B)–(C), UCMJ, 10 U.S.C. § 860(c)(4)(B)–(C) (Supp. I 2014). Article 56(b) does not, however, call into question the vast powers of the CCAs or indeed reference Article 66(c), UCMJ, at any point.

III. Discussion

The construction of a statute is a question of law we review de novo. *Lopez de Victoria*, 66 M.J. at 73. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks

omitted) (citation omitted). As such, "[t]his Court typically seeks to harmonize independent provisions of a statute." *United States v. Christian*, 63 M.J. 205, 208 (C.A.A.F. 2006).

In the instant case, Article 56(b), UCMJ, and Article 66(c), UCMJ, initially appear to be in tension. However, the two provisions may be harmonized by construing Article 56(b) as a limit on the court-martial, not on any of the reviewing authorities. We have previously elected to treat mandatory minimum sentences as such. For example, in *United States v. Jefferson*, this Court declined to construe Article 118's mandatory minimum punishment as an absolute minimum, and instead interpreted it as applying only to the court-martial, thus leaving appellate authorities "free to reappraise the appropriateness of the sentence in the normal exercise of their review powers." 7 C.M.A. 193, 194, 21 C.M.R. 319, 320 (1956). On that basis, this Court concluded that a board of review could ameliorate a mandatory sentence without first changing the findings of guilty. *Id.*; *see* Atkins, 8 C.M.A. at 79, 23 C.M.R. at 303 ("[T]he desire of Congress to have the board of review determine the appropriateness of a sentence is so strongly stated we concluded that a board of review can even ameliorate a sentence which the Uniform Code makes mandatory for the court-martial.").

Such treatment gives full force and effect to both Article 56(b), UCMJ, and Article 66(c), UCMJ. Moreover, it recognizes that Congress has vested the CCAs with the oft-cited "awesome, plenary, de novo power of review," *Cole*, 31 M.J. at 272, that effectively gives them "carte blanche to do justice." *Claxton*, 32 M.J. at 162.

The CCAs and their predecessors have enjoyed this discretion over sentence appropriateness since the inception of the UCMJ. *See* Article 66(c), UCMJ, 50 U.S.C. § 653(c) (Supp. IV 1951), *repealed by* Act of Aug. 10, 1956, ch. 1041, § 53, 70A Stat. 1, 641.[2] This power "has no direct parallel in the federal civilian sector," and no other federal appellate court, including ours, in the American criminal justice system possesses the same power. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *see* Article 67(c), UCMJ, 10 U.S.C. § 867(c) (2012) ("In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals.… The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.").

It has not escaped our attention that, while Congress has made many changes to the UCMJ over the years, Congress has left Article 66(c) largely intact. Its language remains functionally unchanged since the UCMJ's enactment in 1950. See Article 66(c), UCMJ, 50 U.S.C. § 653(c) (Supp. IV 1951) (now at 10 U.S.C. § 866(c) (2012)); see National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5330(d)(1), 130 Stat. 2000, 2933 (2016) (leaving the CCAs' power to review sentence appropriateness intact). Although Congress has seen fit to impose several new limits on a convening authority's power, it has not, to date, similarly

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[2] A similar version of Article 66(c), with language closely tracking that of the version codified in 50 U.S.C. § 653(c), was enacted concurrently with the repeal of 50 U.S.C. § 653(c). Act of Aug. 10, 1956, ch. 1041, § 866(c), 70A Stat. 1, 59.

constrained the CCAs. See National Defense Authorization Act for Fiscal Year 2014, § 1702, 127 Stat. at 956 (restricting a convening authority's power to disapprove, commute, or suspend in whole or in part sentences in excess of six months or a sentence of dismissal, dishonorable discharge, or bad-conduct discharge) (codified at 10 U.S.C. § 860(c)(4)(A) (Supp. I 2014)).

For the foregoing reasons, we decline the Government's invitation to read an implied repeal of the CCAs' vast powers into Article 56(b), UCMJ. Congress is presumed to know the law. *See United States v. Kick,* 7 M.J. 82, 85 (C.M.A. 1979) ("It is reasonable to assume that Congress was aware of the existence of such military law when performing its constitutional task to make laws for the armed forces."); *see also Cannon v. University of Chicago*, 441 U.S. 677, 696–97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law.…"). As such, we presume Congress was aware of Article 66(c)'s broad scope when it enacted Article 56 and thus would have explicitly limited Article 66(c) review if it so desired. We trust that Congress knows how to limit the broad powers of the CCAs and note that Congress remains free to do so if it so chooses. To date, Congress has not so chosen. Until (and unless) it does, we hold that a CCA has the power to disapprove a mandatory minimum sentence set forth in Article 56, UCMJ.

IV. Judgment

The judgment of the United States Army Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Army for remand to the United States Army Court of

Criminal Appeals for an assessment of sentence appropriateness pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012), consistent with this decision.

CORRECTED COPY

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before the Court Sitting En Banc[1]

UNITED STATES, Appellee

v.

Sergeant ERIC F. KELLY
United States Army, Appellant

ARMY 20150725

Headquarters, 21st Theater Sustainment Command
David H. Robertson, Military Judge
Major Michael P. Baileys, Acting Staff Judge Advocate (pretrial)
Colonel Paula I. Schasberger, Staff Judge Advocate (post-trial)

For Appellant: Zachary Spilman, Esquire (argued); Lieutenant Colonel Christopher D. Carrier, JA; Zachary Spilman, Esquire (on brief and reply brief).

For Appellee: Captain Sandra Ahinga, JA[2] (argued); Colonel Steven P. Haight, JA; Lieutenant Colonel Eric K. Stafford, JA; Major Wayne H. Williams, JA; Captain Joshua Banister, JA (on brief).

30 November 2018

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[1] Judge Schasberger took no part in this case as a result of her disqualification.

[2] Corrected.

OPINION OF THE COURT ON REMAND

WOLFE, Judge:

We issued an initial decision on this case on 5 July 2017. In our initial decision, we determined that we lacked the authority to set aside a dishonorable discharge that was a mandatory sentence under Article 56(b) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 856(b) (2012 & Supp. I 2014). *United States v. Kelly*, 76 M.J. 793, 806-07 (Army Ct. Crim. App. 2017). Accordingly, because we viewed our authority as limited, we declined to consider whether appellant's dishonorable discharge was an appropriate sentence under Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012). *Id*. at 807. The Court of Appeals for the Armed Forces (CAAF) disagreed, determined we did have the power to set aside a mandatory punitive discharge, and remanded the case back to us. *United States v. Kelly*, 77 M.J. 404 (C.A.A.F. 2018).

The circumstances of this case are adequately laid out in our initial opinion. *See Kelly*, 77 M.J. at 795-96.

DISCUSSION

A. The Scope of the Remand

The threshold issue we must decide today is the

scope of the CAAF's remand.[3] Appellant argues that the remand is broad and that we must consider additional assignments of error that he has submitted on appeal, and determine whether the findings and sentence are correct in law and fact, and should be approved. The government, by contrast, argues that the scope of the CAAF's remand is narrow.

We begin with a discussion of our superior court's opinion.

1. The Decision by the Court of Appeals for the Armed Forces

After we issued our initial opinion, the CAAF granted review on two unrelated issues.

The first, as discussed above, was to determine whether our authority under Article 66(c), UCMJ, extends to setting aside mandatory dishonorable discharges. We determined we lacked that authority. The CAAF found we had erred. *Kelly*, 77 M.J. at 408.

The second issue was whether we had erred in applying the wrong standard when reviewing the case for improper argument. The second issue included claims of error in both the findings and sentencing argument. The CAAF found that we had erred in applying waiver, but that "[a]ppellant was not prejudiced" by the error as we had also tested for plain error. *Kelly*, 77 M.J. at 405 n.1.

Having resolved the two claims, the CAAF returned the case to this court. We begin our analysis,

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[3] The court sitting en banc heard oral argument on this issue on 13* November 2018.

* Corrected

as we must, with the plain language of our superior court's order. The CAAF's order stated, in its entirety:

> The judgment of the United States Army Court of Criminal Appeals [(ACCA)] is set aside. The record of trial is returned to the Judge Advocate General of the Army for remand to the United States Army Court of Criminal Appeals for an assessment of sentence appropriateness pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012), consistent with this decision.

Id. at 408. Broadly, appellant focuses on the first line of the order. The government focuses on the second. We will take each clause in turn.

2. "The judgment of [ACCA] is set aside."

Appellant argues that when the CAAF set aside our "judgment," the CAAF's order necessarily set aside both our affirmance of the findings and sentence. If no findings are currently affirmed, so goes appellant's argument, we must affirm or set aside the findings so that the case may progress through the appellate process under Articles 66 and 71, UCMJ. So, if we must consider anew the findings, we must address appellant's additional assignments of error. Appellant further notes that the CAAF has, in other cases, specifically affirmed the findings while simultaneously setting aside the sentence and remanding the case for additional proceedings. *See, e.g., United States v. Jerkins*, 77 M.J. 225, 229 (C.A.A.F. 2018); *United States v. Chikaka*, 76 M.J. 310, 314 (C.A.A.F. 2017). Appellant asserts that because the CAAF did not do so in this case, they did not intend for our review to be limited.

Appellant's argument is persuasive when the reader is limited to the first sentence of the remand.

It is also a persuasive understanding of the intersection of Articles 66, 67 and 71, UCMJ. But we see that reading as inconsistent when read with the history of the case.

The CAAF's opinion addressed only one alleged error of law that would affect the findings in this case.[4] That issue was the alleged improper findings argument by the trial counsel. However, the CAAF resolved that error in a footnote, granted no relief, and found appellant had not been prejudiced. *Kelly*, 76 M.J. at 405 n.1. We see no legal basis in the CAAF's opinion that supports that CAAF set aside our findings decision based on an error of law. To read their remand as a *decision* setting aside the findings without an error of law would be inconsistent with our understanding of how military appellate courts review errors of law. *See* Article 67(c), UCMJ, 10 U.S.C. § 867(c) (2012) ("The [CAAF] shall take action only with respect to matters of law."); Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2012) (establishing the standard for reversing findings based on errors of law).

We can resolve this tension by turning to our superior court's decision in *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997). Although appellant argues that it is only persuasive authority, there the CAAF explained how we should treat their remands:

> When this Court sets aside the decision of a Court of Criminal Appeals and remands for further consideration, we do not question the correctness of all that was done in the earlier opinion announcing that decision. All that is to

[4] CAAF was presented with additional multiple assignments of error by appellant regarding the findings phase but did not grant review.

> be done on remand is for the court below to consider the matter which is the basis for the remand and then to add whatever discussion is deemed appropriate to dispose of that matter in the original opinion. The original decretal paragraph of the Court of Military Review's opinion . . . is not affected by the set-aside order *unless resolution of the matter which is the subject of the remand dictates a different result*. The amended opinion then becomes the decision which is subject to our review. This procedure does not permit or require starting the review process anew or setting aside action favorable towards an accused on other grounds.

Ginn, 47 M.J. at 238 n.2 (citation omitted) (emphasis added). Under the framework announced by *Ginn* our initial decision affirming the findings "is not affected" by the CAAF's decision, unless reexamining findings is necessary for the purpose of the remand. *See id*. As the purpose of the remand was for an "assessment of sentence appropriateness," a reexamination of findings is not required, and perhaps may not be "permit[ted]." *See id*.

3. "The record of trial is returned to [ACCA] . . . ."

The CAAF's rules of court distinguish between when the CAAF remands "the case" and when the CAAF remands the "record of trial." Rules of Practice and Procedure United States Court of Appeals for the Armed Forces, [C.A.A.F. R.] R. 30A (as amended through June 22, 2017). The CAAF "may . . . order a remand of the case *or* the record to the Court of Criminal Appeals." *Id*. (Emphasis added). There is a

significant difference between remanding the case and remanding the record. The rule explains:

> If the record is remanded, the [CAAF] retains jurisdiction over the case. If the case is remanded, the [CAAF] does not retain jurisdiction, and a new petition for grant of review or certificate for review will be necessary if a party seeks review of the proceedings conducted on remand.

Id. Here, the CAAF remanded the record of trial, not the case. If we read this correctly,[5] our authority in this case is limited, as the CAAF has retained jurisdiction over the case. Or put differently, our jurisdiction on the case only extends to the subject of the remand.

4. "[F]or an assessment of sentence appropriateness . . . ."

All parties agree that the CAAF's remand clearly mandates that this court must conduct a sentence appropriateness review. The disagreement is on what else we may (or must) do.

The closest case law we have found on point is appellate litigation of *United States v. Riley*, 47 M.J. 603 (A.F. Ct. Crim. App. 1997). The CAAF would

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[5] The quoted language is from the CAAF's rule on remands for factfinding. The remand here was for a sentence appropriateness review. While sentence appropriateness review may involve factfinding, and is part of our broad Article 66(c) authority, we do not see it as a pure question of fact. While we see no reason why the CAAF would use the same language differently when remanding a case for a sentence appropriateness review, we are cautious about reading too much from our interpretation of our superior court's rules.

eventually issue three opinions in that case.[6] It is the first two, however, that shed light on our issue here. Broadly, when the case returned to CAAF after a remand, the CAAF in *Riley II* found that the Air Force Court of Criminal Appeals (AFCCA) had exceeded the scope of the remand when they used their Article 66(c) factfinding authority to address matter not required by the remand. *See Riley II*, 55 M.J. at 187-89.

When *Riley* was first at the AFCCA, our sister court found the evidence of murder to be factually insufficient. 47 M.J. at 608. However, the AFCCA affirmed a lesser-included offense of involuntary manslaughter by culpable negligence. *Id*.

At CAAF, the issue in *Riley I* was whether it was permissible to convict the accused on a theory of manslaughter that had not been presented to the panel. 50 M.J. at 415-16. The CAAF found that AFCCA erred by affirming the conviction of the lesser-included offense. *Id*. at 416. The CAAF then requested clarification from AFCCA on the findings because it was unclear whether the AFCCA also found evidence factually insufficient to support a conviction of a lesser-included offense premised on a different theory. *Id*. The CAAF in *Riley I* returned the case to the AFCCA using language similar to the remand we received in this case:

> The decision of the United States Air Force Court of Criminal Appeals is reversed. The record of trial is returned . . . for remand to the Court of Criminal Appeals for clarification of its holding and reconsideration consistent with the

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[6] *United States v. Riley*, 50 M.J. 410 (C.A.A.F. 1999) [*Riley I*]; *United States v. Riley*, 55 M.J. 185 (C.A.A.F. 2001) [*Riley II*]; *United States v. Riley*, 58 M.J. 305 (C.A.A.F. 2003) [*Riley III*].

> principles of due process set out [in the opinion].

Id.

On remand from *Riley I*, the AFCCA concluded that it lacked the power to revisit its earlier finding that the evidence was insufficient to support the unpremeditated murder conviction. *United States v. Riley*, 52 M.J. 825, 827 (A.F. Ct. Crim. App. 2000). Acting under the belief that the case had been returned with their full Article 66(c) authority intact, the AFCCA affirmed a conviction of involuntary manslaughter, this time based on facts presented to the panel. *Id*. at 828-30. In doing so, AFCCA reconsidered and modified its previous findings of fact, rather than clarifying the findings as the CAAF's order directed. *See Riley II*, 55 M.J. at 189.

When the case returned to the CAAF, the first issue in *Riley II* was whether the AFCCA had the power to reinstate the original conviction for unpremeditated murder.[7] *Id*. at 187. The CAAF held that under the terms of the original remand, the AFCCA was not permitted to reconsider its finding that the evidence of unpremeditated murder was not factually sufficient.[8] *Id*. at 188. The CAAF stated that

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[7] The CAAF also considered three additional issues of law. One of the additional issues, relevant to this discussion, was whether, upon a remand from CAAF, a Court of Criminal Appeals (CCA) may reconsider and change findings of fact favorable to the defense, if it concludes on reconsideration that its earlier findings of fact were clearly erroneous. *Riley II*, 55 M.J. at 187.

[8] The CAAF found two reasons why the AFCCA did not have the power to reinstate the original conviction, only one of which was that the CCA had exceeded the scope of the remand. *See Riley II*,

"a Court of Criminal Appeals 'can only take action that conforms to the limitations and conditions prescribed by the remand.'" *Id*. (quoting *United States v. Montesinos*, 28 M.J. 38, 44 (C.M.A. 1989)). The CAAF concluded, "[a] mandate to clarify whether the evidence was insufficient to support a lesser-included offense cannot reasonably be construed to permit reinstatement of the greater offense." *Riley II*, 55 M.J. at 188.

Addressing the remaining assignments of error, the CAAF also found that the lower court erred when it reconsidered factual determinations made in its initial opinion. *See id*. at 189. As a result, the CAAF found that the AFCCA exceeded the authority of the remand. *Id*. The CAAF reiterated the scope of the remand and stated, "a mandate to clarify a finding . . . does not encompass overturning that finding and substituting specific findings . . . ." *Id*.

Applying the CAAF's reasoning in *Riley II* to this case, the scope of the remand is limited to determining the appropriateness of the appellant's sentence in light of our superior court's decision in this case. A remand "for an assessment of sentence appropriateness" cannot "reasonably be construed" to include consideration of issues that only affect the findings. If for example, we were to consider an assignment of error that went only to findings, and used our fact-finding authority under Article 66(c), UCMJ, to assist in resolving the error, it would be

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55 M.J. at 188. However, we do not see the CAAF's language as being dicta, as it was a specific holding of our superior court.

hard to distinguish our action from the AFCCA's improper actions in *Riley*.[9]

Having construed the remand, we now turn to the issue of whether appellant's sentence to a dishonorable discharge for abusive sexual contact and sexual assault is an appropriate punishment.

B. The Sentence is Appropriate.

Appellant argues that his sentence to a dishonorable discharge is inappropriately severe when considering the facts of his case. We disagree.

Article 66(c), UCMJ, provides, in relevant part, that we "may affirm . . . the sentence or such part or amount of the sentence, as [we] find correct in law and fact and determine[], on the basis of the entire record, should be approved." Stated another way, we must determine whether we personally find appellant's sentence to be appropriate. *See United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005). In making this assessment, we give "individualized consideration of the particular accused on the basis of the nature and seriousness of the offenses and the character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (citations omitted).

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[9] At oral argument, appellant noted that a narrow reading of the CAAF's mandate could prevent this court from addressing case dispositive developments in the law. *See, e.g., United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016). In such a case, nothing would prevent us from noting the issue and suggesting to the CAAF that the case might be returned to this court with an expanded mandate. Or, if a remand is viewed as too narrow, an appellant can also request reconsideration of the CAAF's opinion and seek an expanded remand. These actions reflect that it is the CAAF that controls the scope of the remand, not the parties or this Court.

Appellant stands convicted of abusive sexual contact and sexual assault of a fellow soldier. For these offenses, he received a sentence to a dishonorable reduction to the grade of E-1.

Appellant faced thirty-seven years confinement based on his convictions. In our review of the record, the sentence to confinement for one year was more than appropriate, if not lenient. Likewise, a dishonorable discharge, in our assessment, remains appropriate when considering not only the appellant, but the seriousness of his crimes.

For these reasons, we find appellant's sentence, to include the dishonorable discharge, appropriate.

CONCLUSION

Upon consideration of the matters remanded to this court, the findings of guilty and the sentence remain AFFIRMED. The Clerk of Court is directed to return the record of trial to the CAAF.

Chief Judge BERGER, Senior Judge MULLIGAN, Senior Judge BURTON, Judge FEBBO, Judge SALUSSOLIA, Judge HAGLER, Judge ALDYKIEWICZ, and Judge FLEMING concur.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before the Court Sitting En Banc[1]

UNITED STATES, Appellee

v.

Sergeant ERIC F. KELLY
United States Army, Appellant

ARMY 20150725

ORDER

Per Curiam:

On consideration of appellant's "Motion for Reconsideration" filed 28 December 2018, appellant's request for reconsideration is DENIED.

DATE: 10 January 2019

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court

CF: JALS-DA
JALS-GA
JALS-CCR
JALS-CCZ
JALS-CR4
Zachary Spilman, Esquire

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[1] Judge Schasberger took no part in this case as a result of her disqualification.

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

v.

Eric F. Kelly,

Appellant

USCA Dkt. No. 19-0156/AR
Crim.App. No. 20150725

ORDER DENYING PETITION

On consideration of the petition for grant of review of the decision of the United States Army Court of Criminal Appeals, it is by the Court, this 26th day of July, 2019,

ORDERED:

That the petition is hereby denied.

For the Court,

/s/ Joseph R. Perlak
Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (Spilman)
Appellate Government Counsel (Ahinga)

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

v.

Eric F. Kelly,
Appellant

USCA Dkt. No. 19-0156/AR
Crim.App. No. 20150725

ORDER

On consideration of Appellant's petition for reconsideration of the Court's order issued July 26, 2019, it is, by the Court, this 16th day of September, 2019, ORDERED:

That the petition for reconsideration is hereby denied.

For the Court,

/s/ Joseph R. Perlak
Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (Spilman)
Appellate Government Counsel (Ahinga)

10 U.S.C. § 866. Art. 66. Review by Court of Criminal Appeals

(a)Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(b)The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial—

> (1)in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and
>
> (2)except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been

withdrawn under section 861 of this title (article 61).

(c)In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d)If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e)The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Appeals for the Armed Forces, or the Supreme Court, instruct the convening authority to take action in accordance with the decision of the Court of Criminal Appeals. If the Court of Appeals for the Armed Forces has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(f)The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Criminal Appeals and shall meet periodically to formulate policies and procedure in regard to review of court-

martial cases in the offices of the Judge Advocates General and by Courts of Criminal Appeals.

(g)No member of a Court of Criminal Appeals shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Criminal Appeals, an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty.

(h)No member of a Court of Criminal Appeals shall be eligible to review the record of any trial if such member served as investigating officer in the case or served as a member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer of such trial.

10 U.S.C. § 867. Art. 67. Review by the Court of Appeals for the Armed Forces

(a)The Court of Appeals for the Armed Forces shall review the record in—

(1)all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2)all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and

(3)all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

(b)The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of--

(1)the date on which the accused is notified of the decision of the Court of Criminal Appeals; or

(2)the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record. The Court of Appeals for the Armed Forces shall act upon such a petition promptly in accordance with the rules of the court.

(c)In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

(d)If the Court of Appeals for the Armed Forces sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e)After it has acted on a case, the Court of Appeals for the Armed Forces may direct the Judge Advocate General to return the record to the Court of Criminal Appeals for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

10 U.S.C. § 876. Art. 76. Finality of proceedings, findings, and sentences

The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74), and the authority of the President.