No. ____

IN THE

Supreme Court of the United States

KALAB D. WILLMAN, ET AL.,
Petitioners,

v.

UNITED STATES
Respondent.

On Petition for a Writ to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Article 66 of the Uniform Code of Military Justice (UCMJ) obligates the military Courts of Criminal Appeals (CCAs) to evaluate the entire record to determine whether a court-martial sentence is correct in law, correct in fact, and appropriate. In *United States v. Willman*, a divided Court of Appeals for the Armed Forces (CAAF) interpreted this mandate to preclude the CCAs from considering, for sentence appropriateness purposes, matters properly attached to the record that are used to determine whether sentences are correct in law.

The Question Presented is:

Does the CAAF's decision prevent the CCAs from fulfilling their Congressionally imposed mandate pursuant to Article 66, UCMJ, 10 U.S.C. § 866, to determine the appropriateness of sentences imposed by courts-martial based on the entire record?

RELATED PROCEEDINGS

Air Force Court of Criminal Appeals (AFCCA):

United States v. Willman, No. ACM 39642 (Sept. 2, 2020)

United States v. Frantz, No. ACM 39657 (Nov. 10, 2020)

United States v. Turner, No. ACM 39706 (Nov. 25, 2020)

United States v. Williams, No. ACM 39746 (Mar. 12, 2021)

Court of Appeals for the Armed Forces (CAAF):

United States v. Willman, 8.1. M.J. 355 (C.A.A.F. 2021)

United States v. Frantz, No. 21-0146/AF (Aug. 10, 2021)

United States v. Turner, No. 21-0130/AF (Aug. 10, 2021)

United States v. Williams, No. 21-0243/AF (Aug. 10, 2021)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgments of the CAAF.

OPINIONS BELOW

The opinion in *United States v. Willman* from the Air Force Court of Criminal Appeals (AFCCA) is not reported, but is available at 2020 CCA LEXIS 300. It is reprinted in the Appendix at Pet. App. 25a. The CAAF's affirmation is published at 81 M.J. 355 (C.A.A.F. 2021) and is reprinted in the Appendix at Pet. App. 4a.

The opinion in *United States v. Frantz* from the AFCCA is not reported, but is available at 2020 CCA LEXIS 404. It is reprinted in the Appendix at Pet. App. 60a. The CAAF's affirmation is not reported, but is available at 2021 CAAF LEXIS 744. It is reprinted in the Appendix at Pet. App. 52a.

The opinion in *United States v. Turner* from the AFCCA is not reported, but is available at 2020 CCA LEXIS 428. It is reprinted in the Appendix at Pet. App. 131a. The CAAF's affirmation is not reported, but is available at 2021 CAAF LEXIS 736. It is reprinted in the Appendix at Pet. App. 118a.

The opinion in *United States v. Williams* from the AFCCA is not reported, but is available at 2020 CCA LEXIS 109. It is reprinted in the Appendix at Pet. App. 188a. The CAAF's affirmation is not reported, but is available at 2021 CAAF LEXIS 745. It is reprinted in the Appendix at Pet. App. 171a.

JURISDICTION

The CAAF granted review of Petitioner Willman's direct appeal; on July 21, 2021, it affirmed the AFCCA's decision. Pet. App. 4a. The CAAF also granted Petitioner Frantz's, Petitioner Turner's, and Petitioner Williams's cases; on August 10, 2021, it summarily affirmed the AFCCA's decisions in those cases as well. Pet. App. 52a, 118a, 171a. On October 12, 2021, the Chief Justice extended the time within which to file a petition for a writ of certiorari to December 18, 2021. This Court's jurisdiction over each case emanates from Article 67a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867a, and 28 U.S.C. § 1259. *See Ortiz v. United States,* 138 S. Ct. 2165 (2018).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

Article 54, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 854 (2016), *Record of Trial*, stated in relevant part:

> (a) Each general court-martial shall keep a separate record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the military judge
>
> . . .

> (c)(1) A complete record of the proceedings and testimony shall be prepared—
>
> (A) in each general court-martial case in which the sentence adjudged includes death, a dismissal, a discharge, or (if the sentence adjudged does not include a discharge) any other punishment which exceeds that which may otherwise be adjudged by a special court-martial[.]

Article 55, UCMJ, 10 U.S.C. § 855 (2016), *Cruel and Unusual Punishments Prohibited*, stated:

> Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by any court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

Article 66(a), UCMJ, 10 U.S.C. § 866(a) (2016), *Review by Court of Criminal Appeals*,[1] stated in relevant parts:

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[1] The Military Justice Act of 2016 (MJA 2016) subsequently modified Article 66, UCMJ. *See* National Defense Authorization Act of Fiscal Year 2017 (NDAA 2017), Pub. L. 114-328, div. E, title LIX, § 5330, 130 Stat. 2932. However, the MJA 2016 did not alter the cited language above. *See* Article 66(a), UCMJ, 10 U.S.C. § 866(a) (2019).

> 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 purposes of reviewing court-martial cases, the court may sit in panels or as a whole . . .

Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2016), *Review by Court of Criminal Appeals*, stated:[2]

> 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 and 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,

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[2] The MJA 2016 modified the above cited language; however, the CCAs remain limited to acting "only with respect to the findings and sentence," and "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines . . . should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2019).

> recognizing that the trial court saw and heard the witnesses.

Article 67(a), UCMJ, 10 U.S.C. § 867(a) (2016), *Review by the Court of Appeals for the Armed Forces*, stated:[3]

> 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 review.

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[3] The MJA 2016 modified Article 67, UCMJ. *See* NDAA 2017, Pub. L. 114-328, div. E, title LIX, § 5331, 130 Stat. 2934. However, the MJA 2016 altered the cited language above only to the extent that certain notification is required prior to certifying a case. Article 67(a), UCMJ, 10 U.S.C. § 867(a) (2019).

INTRODUCTION

This case is about removing an unreasonable imposition on the CCAs' ability to fulfill their statutory duties to provide servicemembers the chance to seek a form of sentencing relief unique to the military justice system. The CAAF's decision below both violates that mandate and produces an incongruous result.

In a divided opinion, the CAAF held that, on the one hand, formerly outside-the-record materials that were properly attached to the record on appeal in support of Petitioners' Eighth Amendment and Article 55, UCMJ, claims could be considered by the CCAs in reviewing those legal challenges. But, on the other hand, the CAAF held that those same attached materials were "outside the record" and could not be considered for purposes of the CCAs' mandated review of the appropriateness of Petitioners' sentences under Article 66(c), UCMJ.

Beyond violating the plain language of the statute, the CAAF's decision is particularly problematic for servicemembers in the context of asserting claims of improper post-trial confinement conditions. As in Petitioners' cases here, servicemembers' claims of improper post-trial confinement conditions often arise after the record of trial is completed. Unlike in federal and state courts, which provide procedures for post-conviction relief, the military justice system limits servicemembers' ability to seek collateral relief. Thus, despite Congress' intent to provide servicemembers the opportunity to seek sentence appropriateness relief in the CCAs, the CAAF's decision curtails the CCAs' authority to consider evidence properly supplemented to the record in conducting this unique

review, and leaves servicemembers with no other forum to seek such relief.

STATEMENT OF THE CASE

A. Legal Background

Pursuant to Article I, Section 8 of the United States Constitution, "Congress has long provided for specialized military courts to adjudicate charges against servicemembers." *Ortiz,* 138 S. Ct. at 2170. Congress vested in the service CCAs the extraordinary power to review both the legal *and* factual findings of courts-martial, as well as the sentences they impose—a scope of power not granted by Congress to the CAAF or the federal Circuit Courts of Appeals:

> [T]he scope of review by the Courts of Criminal Appeals differs in significant respect from direct review in the civilian federal appellate courts. In addition to reviewing the case for legal error in a manner similar to other appellate courts…Congress has provided the Courts of Criminal Appeals with plenary, *de novo* power of review and the ability to determine, on the basis of the entire record which findings and sentence should be approved.

United States v. Roach, 66 M.J. 410, 412 (C.A.A.F. 2008) (internal quotations and citations omitted); *see also United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). Given their "awesome, plenary, *de novo* power of review . . . it is little wonder that [the CAAF] has described the CCAs as having a *carte blanche* to do justice." *United States v. Kelly*, 77 M.J. 404, 406

(C.A.A.F. 2018) (internal quotations and citations omitted).

Congress intended the CAAF to enforce procedural safeguards it provided to those serving in the nation's armed services, i.e., to "assure that procedural due process has been observed, that evidence supports the verdict and judgment of the court, and that fundamental rights have been observed." *Sweet v. Taylor,* 178 F. Supp. 456, 459 (D. Kan. 1959). As noted by this Court, the Article I origins of the CAAF and the service CCAs should compel them to be more attuned to their jurisdictional responsibilities than their federal judicial brethren. *See United States v. Denedo*, 556 U.S. 904, 912 (2009).

Article 66(c), UCMJ, statutorily requires the CCAs to act with respect to the findings and sentence of a court-martial, and to affirm only such findings of guilty and the sentence or such part and 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 *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020), the CAAF considered whether the CCA conducted a proper review of the appellant's sentence under Article 66(c), UCMJ, when it did not consider the appellant's First and Fifth Amendment claims when assessing the lawfulness and appropriateness of his sentence. *Id*. at 438. The CAAF first considered whether the CCA was authorized to consider materials outside the record that the appellant submitted in support of his constitutional claims. *Id*. at 440. In resolving this question, the CAAF identified and considered three distinct and conflicting lines of its own precedent which might

inform its decision: 1) precedents restricting the service CCAs to reviewing materials included in the "entire record"; 2) precedents allowing the service CCAs to supplement the record in resolving issues raised by the record[4]; and 3) precedents allowing the CCAs to consider matters entirely outside the record. *Id*.

The first line of precedent stems from *United States v. Fagnan*, 12 C.M.A. 192, 30 C.M.R. 192 (1961), which established a "clear rule" that the service CCAs may not consider anything outside of the "entire record" when reviewing a sentence under Article 66(c). *Id.* at 441 (citation omitted). The CAAF subsequently re-affirmed this rule in *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988). *Id*. The *Fagnan* rule did not preclude the service CCAs from considering an appellant's confinement conditions if the record already contained information about those conditions (for example, by way of an appellant's written clemency petition). *Id.* at 441-42 (citing *United States v. Gay*, 75 M.J. 264 (C.A.A.F. 2016)). But the *Fagnan* rule did preclude the service CCAs from considering information provided for the first time at the appellate stage of the litigation, such as an appellant's written declaration of post-trial

[4] The second line of precedent permits service CCAs to supplement the record when deciding issues that are raised, but not fully resolved, by evidence in the record, *see Jessie*, 79 M.J. at 442—a situation not at issue here where the Petitioners' complaints regarding their respective post-trial confinement conditions were not raised by materials already in the record of trial.

confinement conditions. Such matters fall outside of what the *Fagnan* court considered "the entire record." *Jessie*, 79 M.J. at 441-42.

The third line of CAAF precedent on the issue of the scope of Article 66(c) review deviated further from the first than did the second. This line of precedent permitted the service CCAs to consider materials wholly outside what it considered the "entire record" when reviewing issues which were not raised by any materials within the record. *Id.* at 443. The leading case in this line of precedent is *United States v. Erby*, 54 M.J. 476 (C.A.A.F. 2001), wherein the appellant sought sentence relief from the CCA because his treatment at the hands of prison officials amounted to cruel and unusual punishment in violation of the Eighth Amendment and Article 55, UCMJ. The CCA held it lacked authority to review appellant's claim because the appellant's alleged mistreatment was not part of the sentence adjudged, and because the appellant had failed to raise the matter of his mistreatment in clemency. *Id.* at 477. The CAAF reversed, holding that Article 66(c) did grant the CCA the authority to review appellant's cruel and unusual punishment claim, explaining that Article 66(c) imposed upon the CCAs the duty to determine whether a sentence is correct "in law," which included the duty to "ensure that the severity of the adjudged and approved sentence has not been unlawfully increased by prison officials." *Id* at 478-79.

Confronted with all three competing lines of precedent, the *Jessie* court, in a split 3-2 decision, opted to re-affirm *Fagnan* and its progeny, reasoning that in *Fagnan*, it "correctly interpreted the express requirement that a CCA base its review on the 'entire

record' to mean that a CCA cannot consider matters outside the 'entire record.'" *Jessie*, 79 M.J. at 444. But, in re-affirming *Fagnan*, the *Jessie* court also sought to "cabin[]" the third line of precedent, referring to those decisions as potential "aberrations."[5] *Jessie*, 79 M.J. at 444-45 (concluding that "the practice of considering material outside the record should not be expanded beyond the context of Article 55, UCMJ, and the Eighth Amendment"). In other words, the *Jessie* court held that when a service CCA is determining whether a sentence is correct in law and fact and should be approved pursuant to its statutory responsibilities under Article 66(c), it is prohibited from allowing the parties to *supplement* the record, *except* in those tightly circumscribed instances in which the appellant raises Eighth Amendment and Article 55 claims.

Petitioners' cases present a novel fact pattern. Unlike in *Gay*, the Petitioners did not raise their Eighth Amendment and Article 55, UCMJ, complaints until their appeal to the CCA (i.e., they did not raise the issue in clemency or by any other means through which the issue would have been preserved in the original record of trial). Unlike in *Erby*, the issue before the CCA in these cases was not whether Article 66(c), UCMJ, permits the service CCAs to review Eighth Amendment and Article 55, UCMJ, claims first raised on appeal (i.e., not contained in the original record of trial), but instead whether, once those matters have been attached to the record the

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[5] It is this third line of precedent at issue in Petitioners' cases.

CCAs may also consider them for Article 66(c), UCMJ, sentence appropriateness review. Pet. App. 12a.

B. Procedural and Factual Background

1. *United States v. Willman*

On November 6, 2018, Petitioner, Staff Sergeant (SSgt) Kalab D. Willman, United States Air Force, was found guilty, consistent with his pleas, of one specification of indecent recording in violation of Article 120c, UCMJ, 10 U.S.C. § 920c. Pet. App. 6a. He was sentenced to confinement for one year, reduction by one grade to E-4, and a dishonorable discharge from the service. *Id*.

While confined post-trial in a military-operated confinement facility, Petitioner Willman suffered an injury. Pet. App. 6a. On appeal to the AFCCA, Petitioner Willman sought sentence relief, alleging that the government's failure to provide adequate medical care for his injury amounted to a violation of the Eighth Amendment and Article 55, UCMJ, and rendered his sentence inappropriate under Article 66(c), UCMJ. Pet. App. 6a-7a. Prior to his appeal to the AFCCA, Petitioner Willman did not file a formal complaint about the inadequate medical care, and he waived his right to submit matters in clemency. Pet. App. 36a. During Petitioner Willman's appeal, however, the AFCCA granted his motion to attach his written declaration substantiating his cruel and unusual punishment claim. Pet. App. 6a-7a.

After finding that Petitioner Willman's claims raised in his declaration did not amount to Eighth Amendment or Article 55, UCMJ, violations, the AFCCA declined to consider *these same declarations* that it, upon motion, had already attached to the

record, when conducting its sentence appropriateness review under Article 66(c), UCMJ. Pet. App. 42a-43a. Stated differently, even if the confinement conditions did not present cruel and unusual punishment concerns under the appropriate legal standards, the AFCCA declined to consider whether those same conditions rendered the sentence, as approved, inappropriately severe. *Id*. In a 3-2 decision, the CAAF affirmed the AFCCA's decision, holding the AFCCA lacked authority to consider the declarations when determining if the sentence was inappropriately severe under Article 66(c), UCMJ—even though it could consider them for cruel and unusual punishment claims. Pet. App. 17a.

2. *United States v. Frantz*

A general court-martial composed of a military judge alone convicted Senior Airman (SrA) Cory J. Frantz, contrary to his pleas, of two specifications of committing lewd acts upon a child under the age of 12 years, in violation of Article 120b, UCMJ, 10 U.S.C. § 920b. Pet. App. 56a. The military judge sentenced SrA Frantz to confinement for seven years, a reduction to the grade of E-1, and a dishonorable discharge from the service. Pet. App. 57a.

SrA Frantz is serving his term of confinement at the Naval Consolidated Brig at Miramar, California. Pet. App. 99a. In a declaration attached to the record on appeal, SrA Frantz alleged that the Miramar Brig maintained policies that sex offenders could not associate with any children and that he was denied communication with his son, who was not involved in the charged offense, in violation of Article 55, UCMJ, and the constitutional right to familial association

rooted in the Fifth Amendment Due Process Clause. Pet. App. 99a-101a.

The AFCCA analyzed SrA Frantz's cruel and unusual punishment claim pursuant to *Jessie*, and denied relief. Pet. App. 104a-05a. The court failed to consider the allegations regarding the Brig's policies contained in SrA Frantz's declaration for sentence appropriateness. *Id.* The CAAF, "in view of *United States v. Willman*" affirmed. Pet. App. 52a.

3. *United States v. Turner*

A general court-martial consisting of a military judge sitting alone convicted SSgt Clayton W. Turner—contrary to his pleas—of five specifications of assault consummated by a battery, all in violation of Article 128, UCMJ, 10 U.S.C. § 928. Pet. App. 121a. The military judge sentenced SSgt Turner to confinement for eight months, a reduction to the grade of E-1, and a bad-conduct discharge. Pet. App. 121a-22a.

SSgt Turner was directed to serve his term of confinement at the Taylor County Jail near Abilene, Texas, rather than at a military confinement facility. Pet. App. 146a. While there, he submitted a complaint to the Commander of the 7th Security Forces Squadron pursuant to Article 138, UCMJ. *Id.* In this complaint, SSgt Turner identified vermin-ridden conditions at the confinement facility. *Id.*

On appeal before the AFCCA, SSgt Turner asserted that the conditions of his confinement amounted to cruel and unusual punishment in violation of the Eighth Amendment and Article 55, UCMJ. Pet. App. 146a. SSgt Turner also sought relief on the alternative grounds that even if the conditions

of his confinement did not amount to cruel and unusual punishment, they still rendered his sentence inappropriately severe such that relief was warranted under Article 66(c), UCMJ. *Id*

In support of these claims, SSgt Turner submitted a post-trial declaration for the AFCCA's consideration wherein he detailed the unsanitary conditions at the Taylor County Jail. Pet. App. 147a-48a. Although it considered the merits of his Eighth Amendment and Article 55, UCMJ, claims, the AFCCA ultimately declined to find that his confinement conditions amounted to cruel and unusual punishment. Pet. App. 153a. The AFCCA also declined to consider SSgt Turner's alternative sentence severity claim grounded in Article 66(c), UCMJ, entirely because—in its view—his complaint arose from matters which fell "outside the record as he did not raise them in his clemency submission." Pet. App. 154a-55a. It therefore concluded that it could not consider this issue that was "outside the record" even though it had previously attached the declarations to the record. *Id*. The CAAF affirmed. Pet. App. 118a.

4. United States v. Williams

A general court-martial convicted SSgt Derrick O. Williams, contrary to his plea, of one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920. Pet. App. 175a. The court-martial sentenced SSgt Williams to 45 days' confinement, reduction to the grade of E-1, hard labor without confinement for three months, and a dishonorable discharge. *Id*.

After SSgt Williams entered confinement on March 22, 2019, a litany of pay errors followed. Pet.

App. 227a-28a. During a period between September and October 2019, SSgt Williams performed hard labor without confinement for 12 hours a day, seven days a week, and received no pay because of Government errors. Pet. App. 228a. He took a second job working overnight at a fitness center to support his family. *Id*. His coverage under the military's health insurance system was also prematurely revoked, rendering his wife and daughter unable to obtain prescribed medications. Pet. App. 231a-32a. Additionally, the wrongful denial of pay resulted in SSgt Williams missing housing and child support payments. Pet. App. 231a.

In his appeal to the AFCCA, SSgt Williams asserted these conditions both unlawfully increased his sentence and amounted to cruel and unusual punishment in violation of the Eighth Amendment and Article 55, UCMJ. Pet. App. 228a. In support of these claims, SSgt Williams submitted a post-trial declaration and documentation of the Government's errors. Pet. App. 231a-32a. The AFCCA held that any deprivation of pay did not rise to the level of an Eighth Amendment or Article 55, UCMJ, violation. Pet. App. 238a. However, the court concluded that it could not consider the same matters it attached to the record when conducting sentence appropriateness review under Article 66, UCMJ. Pet. App. 240a. The CAAF, "in view of *United States v. Willman*," affirmed. Pet. App. 171a.

REASONS FOR GRANTING THE PETITION

The CAAF's decision prevents a military CCA from fulfilling its congressionally imposed responsibilities under Article 66(c), UCMJ. That statute requires the CCAs to review the legal and factual sufficiency of a

conviction and the appropriateness of a sentence imposed at a court-martial based on the "entire record." When the AFCCA attached Petitioners' respective materials to the record, they became part of the "entire record" under the plain meaning of that phrase, such that the AFCCA was permitted—indeed, obligated—to consider them when evaluating the appropriateness of Petitioners' respective sentences under its Article 66(c) authority.

The CAAF's restrictive holding in *Willman* creates an incongruous result. The CAAF held that matters properly attached to the record could be considered by the CCAs in conducting one part of their Article 66(c) review (whether the sentence was "correct in law" under the Eighth Amendment or Article 55, UCMJ), but the CCAs could not then consider those same matters in conducting the other part of their Article 66(c) review (whether the sentence was appropriate). Yet, as the dissent pointed out, Article 66, UCMJ is the central source of authority for a CCA to review any issue, whether that be an alleged violation of the Eighth Amendment or whether a sentence appropriate. Pet. App. 19a. Once the CCAs supplement the record on appeal with materials outside the record, those materials become part of the record and Article 66, UCMJ, does not authorize the CCAs to limit which part of their Article 66(c) review to apply to the "entire record." Because *Willman* holds otherwise, certiorari should be granted to correct this arbitrary limitation of Congress's mandate.

This Court should also grant the writ because the CAAF's recent decisions addressing this issue, culminating with *Willman*, have caused considerable disagreement and confusion in the military courts.

The CCA' s opinion generated a separate concurrence in part on this issue and the CAAF's divided opinion was split 3-2. Pet. App. 4a, 48a-51a. Even the majority conceded that its "Article 66(c), UCMJ, precedents have created an odd paradigm[.]" Pet. App. 15a. If left unchecked, the CAAF's incongruous approach to Article 66, UCMJ, review in *Willman* will continue to cause confusing results.

Finally, this issue is of national importance. Congress implemented a special standard of review and opportunity for sentence relief on appeal for servicemembers that is unique to the military justice system. The jurisdiction of Article I military courts, however, is tightly bound to congressional statute and those courts do not have the ability to hear collateral attacks on convictions; all issues must be resolved on direct appeal. *See United States v. Murphy*, 50 M.J. 4, 5 (C.A.A.F. 1998). The CAAF's restrictive ruling limits servicemembers' ability to vindicate their right to seek sentence appropriateness relief on direct appeal in military courts, where such a right would not be available in Article III courts.

A. The CAAF's decision violates the Congressional mandate of Article 66, UCMJ.

The CAAF's decision violates the congressionally imposed mandate of Article 66(c), UCMJ in a number of ways. First, the CAAF's decision violates the plain language of the statute. As Judge Sparks's dissent explains, once the CCA attached Petitioners' formerly outside-the-record declaration to the record, the declarations become "part of the record and the lower court was required to consider this information in performing its Article 66(c) review." Pet App. 20a.

Second, the CAAF misinterpreted the phrase "entire record" in Article 66(c), UCMJ, 10 U.S.C. § 866(c) by narrowing its meaning to the "record of trial," a term of art, and excluding from its meaning any matters later attached to the record on motion granted. Pet. App. 16a. In determining what constitutes "the entire record" of a case, it is imperative to note the distinction between that phrase contained in Article 66(c), UCMJ, 10 U.S.C. § 866(c), and the term "record of trial" as defined by Congress in Article 54, UCMJ, 10 U.S.C. § 854 (2019), and further defined by executive order in R.C.M. 1104. Reference to the "record" in Article 54, UCMJ, centers on the "record of the proceedings" of a court-martial. 10 U.S.C. § 854 ("Each general or special court-martial shall keep a separate record of the proceedings in each case brought before it."). By contrast, when defining the scope of the service CCA's review authority, Congress deliberately used a different phrase; rather than refer to a "record of the proceedings" of a court-martial (or, to use the phrase found in the statute's title, a "record of trial") as it did in Article 54, UCMJ, 10 U.S.C. § 854, Congress expanded the service CCA's review authority to the "*entire* record" when it drafted and passed Article 66(c), UCMJ, 10 U.S.C. § 866(c). The CAAF conflates "entire record" with the "record of trial" even though these two terms do not equate to the same thing.

Notably, the CAAF's erroneous view of what constitutes the "entire record" for Article 66, UCMJ, review conflicts with federal civilian court practice. This Court has "repeatedly stated that an appellate court conducting plain-error review may consider the *entire* record—not just the record from the *particular*

proceeding where the error occurred." *Greer v. United States*, 141 S. Ct. 2090, 2098 (2021) (citing *United States v. Vonn*, 535 U.S. 55, 58-59, 74-75, 122 S. Ct. 1043, 152 L. Ed. 2d 90 (2002)); *Puckett v. United States*, 556 U. S. 129, 142-43, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009); *United States v. Dominguez Benitez*, 542 U. S. 74, 84-85, 124 S. Ct. 2333, 159 L. Ed. 2d 157 (2004); *United States v. Cotton*, 535 U. S. 625, 632-633, and n. 3, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002)) (emphasis added).

Finally, the CAAF's flawed rationale even undermines the propriety of its own rules and practices (as well as those of the CCAs), which permit it to consider new material on motion from the parties for issues not raised by the record:

> The Court will normally not consider any facts outside of the record established at the trial *and the Court of Criminal Appeals*. Requests to consider factual material that is *not contained in the record* shall be presented by a motion to *supplement the record* filed pursuant to Rule 30 [of these Rules]. The motion shall include statements explaining why the matter was not raised previously at trial or before the Court of Criminal Appeals and why it is appropriate to be considered for the first time in this Court.

Court of Appeals for the Armed Forces Rules, Rule 30A (emphasis added). And as Judge Sparks's dissent also pointed out, the CAAF's decision ignored Rule 23(b) of the Joint Rules of Appellate Procedure, promulgated by Article 66(f), UCMJ, which authorizes

the CCAs "to attach documents to the record, which is precisely what was done in this case." Pet. App. 19a.

The CAAF's erroneous decision compels certiorari review. The CAAF's flawed view of what constitutes the "entire record" violates the mandate of Article 66, UCMJ. If left unchecked, the CAAF's decision will constrain the CCAs' ability to meet their statutory mandate by unreasonably limiting their Article 66(c) review of properly supplemented materials in support of servicemembers' claims of improper post-trial confinement.

B. The CAAF's decision will continue to create confusion in the military courts.

This case provides a good vehicle to provide clarity on an important issue. In the short period of time between *Willman* and *Jessie*, whose rationale *Willman* principally relied on, considerable disagreement has emerged in the military courts over the CCAs' authority to consider formerly outside-the-record materials that were attached to the record on appeal while performing a sentence appropriateness review under Article 66(c), UCMJ. In the AFCCA opinion below, Judge Meginley specially concurred, noting his disagreement with the majority on whether the court was precluded from considering the appropriateness of Petitioner Willman's sentence under Article 66, UCMJ, based on materials that were outside the record of trial. Pet. App. 48a. The Chief Judge of the AFCCA expressed the same opinion in a special concurrence, *see United States v. Matthews*, No. ACM 39593, 2020 AFCCA LEXIS 193, at *16-17 (A.F. Ct. Crim. App. June 2, 2020) (unpub. Op.) (Johnson, C.J., concurring in the result), and at least one other CCA held that it had authority to consider

materials outside the record that were attached to the record in support of Eighth Amendment or Article 55, UCMJ, claims in determining whether a sentence was appropriate. *See United States v. Jacinto*, 79 M.J. 870, 890 (N.M. Ct. Crim. App. 2020), aff'd in part, set aside in part by *United States v. Jacinto*, 81 M.J. 350 (C.A.A.F. 2021).

The CAAF's divided 3-2 opinion in *Willman* did not alleviate this disagreement, but rather created more confusion. As the dissent noted, "the majority's view sets up the odd situation in this and future cases where documents that are obviously part of the record are, curiously, simultaneously outside 'the entire record.'" Pet. App. 20a. The dissent further noted a prior CAAF opinion that appeared to be remain in conflict with the majority's rationale. Pet. App. 18a-19a. (citing *Healy*, 26 M.J. at 397, n.6). Specifically, the dissent pointed out that in *Healy*, the CAAF commented that if evidence of insanity, developed after the trial was completed, was attached to the appellate record in support an insanity claim, this information, once attached, was part of the record and could be considered in making sentence appropriateness determination. *Id*.

The majority did not address how the holding of *Willman* squares with *Healy*. This fact, combined with the general incongruent nature of the majority's decision, signals that the confusion will continue in the military courts. This Court should grant certiorari to correct *Willman's* flawed result and provide clarity on this issue to the military courts.

C. The CAAF's decision contravenes Congressional intent for military courts to serve as the primary source for servicemembers seeking sentence relief.

This Court should grant review in this case to address an issue of national importance by ensuring the uniquely equipped military courts of appeal meet their statutory charge to affirm, uniformly across the military services, only those findings and sentences of courts-martial that are correct in law and fact. The CAAF, through its erroneous statutory interpretation, has impermissibly barred the CCAs from meeting their statutory obligations under Article 66(c), UCMJ. Specifically, by interpreting Article 66(c), UCMJ, to exclude from consideration any matters that were not contained within an original record of trial but were subsequently attached to the record, the CAAF has prevented the service CCAs from exercising their judgment in affirming only findings and sentences they deem correct in law and fact and should be approved *based on the entire record*. Indeed, the service CCAs must now divest themselves of the authority to grant relief to those appellants who, despite failing to carry their very high burden to substantiate constitutional claims, are nevertheless deserving of sentence appropriateness relief under Article 66(c), UCMJ.

Congress established Article I military courts for the express purpose of adjudicating military-specific issues, to include issues related to the treatment of military prisoners confined to military-operated facilities. *See Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975) ("The military is 'a specialized society separate from civilian society' with 'laws and

traditions of its own [developed] during its long history.'") (internal citations omitted). This Court has recognized:

> In enacting the [UCMJ], Congress attempted to balance…military necessities against the equally significant interest of ensuring fairness to servicemen charged with military offenses, and to formulate a mechanism by which these often competing interests can be adjusted…an integrated system of military courts and review procedures, a critical element of which is the [U.S. Court of Appeals for the Armed Forces] consisting of civilian judges…who would gain over time thorough familiarity with military problems.

Id. at 757-58.

Consistent with these interests, one of the unique features that Congress established in the military justice system was a widened scope of review by the CCAs of findings and sentences. Specifically, through Article 66, UCMJ, Congress empowered the CCAs with an "awesome, plenary, *de novo* power of review," *Kelley*, 77 M.J. at 406, which mandates the CCAs to conduct a "de novo review of the sentence under Article 66(c) as part of its responsibility to make an affirmative determination as to sentence appropriateness." *Roach*, 66 M.J. at 412. In other words, Congress provide the CCAs the unique authority to review the appropriateness of a sentence, even if no legal or constitutional error occurred. But the CAAF's decision here curtails a service member's ability to seek this relief regarding improper post-trial

confinement conditions, without any other forum to seek redress.

The widened scope of review granted to the service CCAs is not the only trait unique to the military courts which weighs in favor of this position. The lack of any mechanism in the UCMJ for adjudicating post-conviction claims also weighs in favor of granting the service CCAs considerable discretion when it comes to ordering fact-finding and supplementing the record. Indeed, the service CCAs have a number of tools at their disposal, employed over the course of a half-century (e.g., post-trial factfinding hearings pursuant to *United States v. DuBay*, 17 C.M.A. 147 (1967), receipt of affidavits, etc.), to fill gaps in the record when addressing claims which are, in the civilian context, collaterally litigated. While *Willman* does not discard these tools outright, the CAAF's determination that such methods cannot be used by the service CCAs in meeting their Article 66(c), UCMJ, obligation is incongruous and inconsistent with calcified precedent—an admission the majority in the lower court makes in the instant case: "[Petitioner] argues that [adhering to the *Fagnan* rule rather than expanding the *Erby* exception] creates an incongruity, with the [service] CCAs having the authority to review outside-the-record materials for some purposes, but not for others. We acknowledge that this Court's Article 66(c), UCMJ precedents have created an odd paradigm[.]" Pet. App. 15a.

As incongruous as the decision in Petitioners' case is, it is equally arbitrary. Its effect is to bar from relief those claims which, while not rising to the level of an Eighth Amendment or Article 55, UCMJ, violation, nonetheless have merit vis-à-vis whether a particular

sentence is appropriate, despite the CCA's statutory requirement to conduct this review. Because these claims center on the conditions of an appellant's post-trial confinement conditions, it is wholly conceivable that such claims could ripen *after* a court-martial's convening authority takes action on a sentence, an entry of judgment is entered, and a record of trial is completed. The CAAF's decision bars sentence appropriateness relief from appellants who have had the misfortune of not only being confined under illegal conditions but of enduring those conditions too late.

The CAAF erroneously circumscribed the CCA's historically broad discretion on sentence appropriateness. The CAAF itself has recognized that the "breadth of the power granted to the [CCAs] to review a case for sentence appropriateness is one of the unique and longstanding features of the [UCMJ]." *United States v. Hutchison*, 57 M.J. 231, 233 (C.A.A.F. 2002) (citations omitted); *see also United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999) ("Congress, recognizing that the decentralized exercise of such broad discretion [in the military justice system] is likely to produce disparate results, has provided the [CCAs] . . . with the highly discretionary power to determine whether a sentence 'should be approved.'" (citing Article 66(c), UCMJ)). The CCAs role in sentence review is to "do justice," as distinguished from the "discretionary power of the convening authority to grant mercy." *See United States v. Boone*, 49 M.J. 187, 192 (C.A.A.F. 1998) (citation omitted). Stated differently, the CCAs assure "that justice is done and that the accused gets the punishment he deserves." *Healy*, 26 M.J. at 395. Indeed, the CAAF has recently affirmed these "vast powers" by holding

that CCAs may disapprove even mandatory minimum sentencing requirements. *See Kelly*, 77 M.J. at 406-08 (holding that the mandatory minimum sentencing requirements under Article 56 of the UCMJ are inapplicable to reviewing authorities and do not in any way limit the sentence reviewing powers of the CCA under Article 66).

Where Congress has charged the CCAs with such broad discretion and specifically obligated the CCAs to review the appropriateness of a sentence, the fact that a service member was unable to raise a post-trial confinement issue with the military judge or convening authority prior to the entry of judgment should not bar consideration of the continued appropriateness of the sentence.

D. The CAAF's decision will preclude servicemembers from seeking sentencing relief from improper post-trial confinement conditions in the military courts where no comparable relief is available in the civilian court system.

Willman's effective restriction on complete, meaningful sentence review under Article 66(c), UCMJ, has far-reaching implications. By abdicating the CCAs' statutory responsibility, the CAAF's decision will strip the military justice system of a remedy and will leave servicemembers without an adequate forum to seek comparable relief through the federal judiciary. This is significantly problematic for several reasons.

First, civilian courts are ill-equipped to handle military specific issues, particularly those involving

the post-trial confinement of servicemembers. As this Court has acknowledged, "the military constitutes a specialized community governed by a separate discipline from that of the civilian[.]" *Parker v. Levy*, 417 U.S. 733, 744 (1974). Because "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . . the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment." *Burns v. Wilson*, 346 U.S. 137, 140 (1953). Rather, Congress has this task. *Id.* To this end, Congress established what it intended to be a self-sufficient, self-correcting uniform military justice system. The bedrock of this system, the UCMJ, with its seemingly imprecise standards based on centuries of customs and general usages, simply "cannot be equated to a civilian criminal code." *Parker*, 417 U.S. at 749. Accordingly, "Congress has codified primary responsibility for the supervision of military justice" in the CAAF. *Noyd v. Bond*, 395 U.S. 683, 695 (1969).

The civilian courts have correspondingly given a "substantial degree of civilian deference" to military tribunals. *Loving v. United States*, 62 M.J. 235, 250 (C.A.A.F. 2005) (citing *Noyd*, 395 U.S. at 694-95). This deference is grounded in the doctrine of exhaustion, which generally requires litigants seeking post-conviction relief to first seek such relief from the judicial system responsible for the conviction. There is no authority or precedent promoting civilian courts as the primary arbiters over military-related claims. This is for good reason. Included within the military-specific exhaustion requirement are concerns regarding judicial economy, the separation of powers, the need to maintain good order and discipline in the

armed forces, avoiding needless friction between the civilian and military judicial systems, and respect for the military courts' "expertise in interpreting the technical provisions of the UCMJ." *Id*. (citing *Noyd*, 395 U.S. at 696); *accord Parisi v. Davidson*, 405 U.S. 34 (1972); *Lawrence v. McCarthy*, 344 F.3d 467, 471 (5th Cir. 2003) ("Because the military constitutes a specialized community governed by a separate discipline from that of the civilian, orderly government requires that the judiciary scrupulously avoid interfering with legitimate Army matters.").

The authority of Article III courts over the military has thus been limited through a combination of Congressional design and judicial temperance. Servicemembers cannot readily pursue their claims in federal courts. The doctrine set out in *Feres v. United States*, 340 U.S. 135 (1950), prohibits lawsuits by military prisoners against the federal government. *See Schnitzer v. Harvey*, 389 F.3d 200, 203 (D.C. Cir. 2004) ("Every circuit to consider the issue [of whether and how the *Feres* doctrine applies to military prisoners], however, has found the doctrine to apply without modification."). Thus, there is no other forum to consider a service member's claim that his sentence is inappropriate based on improper post-trial confinement conditions that arose after entry of judgement. Through Article 66(c), UCMJ, the appropriate, statutorily required forum for seeking such relief are the CCAs. But *Willman* strips those courts of carrying out this congressionally mandated duty.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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APPENDIX

No. _____

IN THE

Supreme Court of the United States

KALAB D. WILLMAN, ET AL.,
Petitioners,

v.

UNITED STATES
Respondent.

On Petition for a Writ to the United States Court of Appeals for the Armed Forces

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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This opinion is subject to revision before publication

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

Kalab D. WILLMAN, Staff Sergeant
United States Air Force, Appellant

No. 21-0030
Crim. App. No. 39642

Argued April 20, 2021—Decided July 21, 2021

Military Judge: John C. Degnan

For Appellant: *Major Megan E. Hoffman* (argued); *Mark C. Bruegger,* Esq. (on brief).

For Appellee: *Captain Cortland T. Bobczynski* (argued); *Lieutenant Colonel Matthew J. Neil* and *Mary Ellen Payne,* Esq. (on brief).

Judge HARDY delivered the opinion of the Court, in which Chief Judge STUCKY and Judge MAGGS joined. Judge SPARKS filed a dissenting opinion, in which Judge OHLSON joined.

Judge HARDY delivered the opinion of the Court.

In general, Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c) (2012), restricts appellate review performed by the Courts of Criminal Appeals (CCAs) to consideration of the "entire record" of the case before them.[1] This Court has held, however, that the CCAs have authority to consider evidence entirely outside the record when considering an appellant's cruel and unusual punishment claims raised under the Eighth Amendment, U.S. Const. amend. VIII, or Article 55, UCMJ, 10 U.S.C. § 855 (2012). *United States v. Erby*, 54 M.J. 476, 478 (C.A.A.F. 2001). This case presents a question that straddles these two issues: whether the CCAs have authority to consider outside-the-record evidence submitted in support of an appellant's Eighth Amendment or Article 55, UCMJ, claims when performing sentence appropriateness review under Article 66(c), UCMJ. Consistent with the plain language of Article 66(c), UCMJ, and this Court's recent decision in *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020), we conclude that the CCAs do not. Accordingly, we affirm the decision of the United States Air Force Court of Criminal Appeals (AFCCA).

I. Background

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[1] This case was referred to court-martial prior to January 1, 2019, and thus all post-trial procedures were performed in accordance with the 2016 edition of the *Manual for Courts-Martial, United States* (*MCM*). All references to the UCMJ, Rules for Courts- Martial (R.C.M.), and Military Rules of Evidence (M.R.E.) are to the2016 edition of the *MCM*.

A military judge convicted Appellant, consistent with his pleas, of one specification of indecent recording in violation of Article 120(c), UCMJ, 10 U.S.C. § 920 (2012). Appellant was sentenced to one year of confinement, reduction to E-4, and a dishonorable discharge. During his post-trial confinement, Appellant injured his big toe in a flag football game, an injury for which Appellant now claims the Government failed to pro- vide adequate care. Appellant never filed a formal complaint about the allegedly insufficient care he received with the prison health clinic, the prison administration, his commander, or the convening authority (CA). Appellant also waived his right to submit matters in clemency to the CA. As a result, the record contains no mention of Appellant's toe in jury or the subsequent medical treatment he received for that injury. The CA approved the findings and Appellant's sentence as adjudged.

On appeal to the AFCCA, Appellant asserted—for the first time—that the allegedly deficient medical care he received violated his Eighth Amendment and Article 55, UCMJ, rights against cruel and unusual punishment and rendered his sentence inappropriate pursuant to Article 66(c), UCMJ. Appellant detailed the nature of his injury, medical treatment, and post-trial confinement conditions in a declaration, and filed a motion requesting the AFCCA attach his declaration to his assignment of errors. The AFCCA granted the request.

After reviewing Appellant's declaration, the AFCCA determined that Appellant's Eighth

Amendment and Article 55, UCMJ, claims did not merit relief. *United States v. Willman*, No. ACM 39642, 2020 CCA LEXIS 300, at *17–20, 2020 WL 5269775, at *7 (A.F. Ct. Crim. App. Sept. 2, 2020) (unpublished). The CCA concluded that, even if the facts asserted in the declaration were true, Appellant failed to meet this burden of establishing that the prison officials improperly administered medical treatment and were deliberately indifferent to his health and safety. *Id.* at *19–20, 2020 WL 5269775, at *7.

Turning to Appellant's Article 66(c), UCMJ, sentence appropriateness claim, the AFCCA concluded that the plain language of Article 66(c), UCMJ, and this Court's decision in *Jessie*, 79 M.J. 437, precluded it from considering Appellant's "outside-the-record" affidavit. 2020 CCA LEXIS 300, at *21– 25, 2020 WL 5269775, at *7–9. Concluding that "the record contains no support to grant sentencing relief on the basis of Appellant's claims about the conditions of post-trial confinement," the AFCCA affirmed the sentence as approved by the CA. *Id*. at *25, 2020 WL 5269775, at *9.

We granted review of the following issue: "[w]hether the lower court erred when it ruled that it could not consider evidence outside the record to determine sentence appropriateness under Article 66(c), UCMJ." *United States v. Willman*, 80 M.J. 470 (C.A.A.F. 2020) (order granting review).

II. Standard of Review

The scope, applicability, and meaning of Article

66(c), UCMJ, is a matter of statutory interpretation that we review de novo. *United States v. Gay*, 75 M.J. 264, 267 (C.A.A.F. 2016) (citing *United States v. Schloff*, 74 M.J. 312, 313 (C.A.A.F. 2015)).

III. Discussion

Congress specified the jurisdiction and authority of the CCAs in Article 66, UCMJ. The relevant section and applicable version of the article states:

> [T]he 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.

Article 66(c), UCMJ. At first glance, these two sentences suggest that the CCA's role is straightforward—to review an appellant's findings and sentence as approved by the convening authority based on the "entire record." But as we recently acknowledged in *Jessie*, this Court's various precedents regarding the scope of the CCA's review of the "entire record" can be difficult to reconcile. 79 M.J. at 443. Nevertheless, the Court in *Jessie* explained how those cases should be understood. *Id.* at 441–45 (reviewing in detail the Court's precedents analyzing Article 66(c), UCMJ).

The Court began by reaffirming long-standing precedent from *United States v. Fagnan*, 12 C.M.A.

192, 193, 30 C.M.R. 192, 193 (1961), which "established a clear rule that the CCAs may not consider anything outside of the 'entire record' when reviewing a sentence under Article 66(c), UCMJ." *Jessie*, 79 M.J. at 441 (citing Edward S. Adamkewicz Jr., *Appellate Consideration of Matters Outside the Record of Trial*, 32 Mil. L. Rev. 1, 16 (1966)). In *Fagnan*, the intermediate appellate court—then the Army Board of Review—declined to consider two outside-the-record documents when it assessed the appellant's sentence: a psychiatric report that the Army Board of Review itself had requested and a letter from a correctional officer written on the appellant's behalf. 12 C.M.A. at 193, 30 C.M.R. at 193. The Army Board of Review explained that neither document was " 'part of the record subject to review under Article 66, and should not be considered with respect to the appropriateness of the sentence as approved by the convening authority.' " *Id.* at 193, 30 C.M.R. at 193 (quoting the Army Board of Review's opinion).

Although this rule appears strict, the Court clarified in *Jessie* that "*Fagnan* does not preclude the CCAs from considering prison conditions when reviewing a sentence under Article 66(c), UCMJ, if the record contains information about those conditions." 79 M.J. at 441. In addition to permitting consideration of any materials contained in the "entire record," our precedents also authorize the CCAs to supplement the record to decide any issues that are raised, but not fully resolved, by evidence in the record. Two of the examples highlighted in *Jessie* illustrate these points.

First, in *Gay*, 75 M.J. 264, the appellant made a formal clemency complaint about his post-trial confinement conditions to the convening authority prior to the convening authority taking action. Because clemency materials submitted to the convening authority must be attached to the record of trial, R.C.M. 1103(b)(3)(C), and the subsequent action of the convening authority is part of the record of trial, R.C.M. 1103(b)(2)(D)(iv), evidence about the appellant's post-trial confinement conditions were incorporated into the entire record. Thus, the CCA did not abuse its discretion when it considered the appellant's post-trial confinement conditions while exercising its Article 66(c), UCMJ, sentence reassessment authority.

Second, in *United States v. Brennan*, 58 M.J. 351, 352–53 (C.A.A.F. 2003), the appellant described illegal post-trial punishment that she suffered in a clemency petition that she filed with the convening authority prior to the convening authority taking action. As explained above, those clemency materials were thus part of the entire record and available for consideration by the CCA. In addition to the clemency materials, both the CCA and this Court also considered a subsequent statement that the appellant filed before the Court of Criminal Appeals. *Id*. at 353. In *Jessie*, the Court explained that, because the *Brennan* appellant raised the issue in her clemency materials, the CCA's review of her outside-the-record statement was consistent with this Court's long practice of using " 'extra- record fact determinations' " to resolve certain appellate questions. 79 M.J. at 442–43 (quoting *United States v. Parker*, 36 M.J. 269, 272

(C.M.A. 1993)).

Finally, in *Jessie*, the Court recognized a significant exception to the *Fagnan* rule set forth in this Court's precedents: the CCAs may consider materials completely outside of the "entire record" when determining whether the manner of execution of an accused's sentence violates either the Eighth Amendment or Article 55, UCMJ. *Id*. at 443 (citing *Erby*, 54 M.J. at 479 (ordering factfinding into the appellant's cruel and unusual punishment claim raised for the first time before the CCA) and *United States v. Pena*, 64 M.J. 259, 266–67 (C.A.A.F. 2007) (reviewing the appellant's outside-the-record declaration to decide his cruel and unusual punishment claim on the merits)). Acknowledging the significant tension between *Fagnan* and cases like *Erby* and *Pena*, this Court in *Jessie* decided to apply *Fagnan* and "cabin[ ]" precedents like *Erby* and *Pena* to their express holdings. *Jessie*, 79 M.J. at 444–45 (concluding that "the practice of considering material outside the record should not be expanded beyond the context of Article 55, UCMJ, and the Eighth Amendment").

Despite the Court's careful analysis of our precedents interpreting the scope of the CCAs' Article 66(c), UCMJ, authority in *Jessie*, this case presents a novel fact pattern that is not squarely on point with the precedents described above. Here, unlike in *Gay* or *Brennan*, Appellant did not raise his complaints about his post-trial confinement conditions until his appeal to the AFCCA. Appellant's declaration was thus out- side-the-record and, under *Fagnan*, the

AFCCA had no authority to review it for the purpose of assessing Appellant's sentence. However, under the *Fagnan* rule exception, the AFCCA did have authority to consider the Appellant's outside-the-record declaration for the purpose of evaluating Appellant's Eighth Amendment and Article 55, UCMJ, claims. The critical question then is once the AFCCA considered Appellant's outside-the-record declaration to decide his cruel and unusual punishment claims, could it also consider the declaration to perform its Article 66(c), UCMJ, sentence appropriateness review?

Although we acknowledge that reasonable arguments can be made to the contrary, we agree with the AFCCA that it could not consider Appellant's outside-the-record affidavit. Forced to choose between strictly enforcing the *Fagnan* rule and further expanding the exceptions to that rule that this Court has created for cruel and unusual punishment claims, we elect to apply *Fagnan*. Our reasoning mirrors that of the Court in *Jessie* when it expressly declined to extend the holdings of *Erby* and *Pena* beyond the context of the Eighth Amendment and Article 55, UCMJ, claims. *Jessie*, 79 M.J. at 444 ("[W]e believe that *Fagnan* rather than *Erby* should control in this case.").

The *Fagnan* rule is derived from the plain language of the statute, which states that the CCAs may only act "on the basis of the entire record" when performing sentence appropriateness review under Article 66(c), UCMJ. *See Fagnan*, 12 C.M.A. at 195, 30 C.M.R. at 195 ("[W]e cannot ignore the plain words of

the statute involved."). As we noted in *Jessie*, this Court's precedents establishing exceptions to the *Fagnan* rule, such as *Erby* and *Pena*, neither discuss Article 66(c)'s express "entire record" restriction nor wrestle with the Court's seemingly contrary holding in *Fagnan*. *Jessie*, 79 M.J. at 444. Presumably, because the Court believed that the CCAs had a "duty" to determine on direct appeal whether the appellant's sentence was being executed in a manner that offends the Eighth Amendment or Article 55, UCMJ, *Erby*, 54 M.J. at 478, the Court was unconcerned about whether the evidence about an appellant's post-trial confinement appeared in the entire record or was proffered for the first time on appeal. As the Court has long recognized, facts concerning an appellant's "post-trial confinement can rarely, if ever, be made the subject of a brief by trial defense counsel or otherwise made a part of the 'entire record.' " *Fagnan*, 12 C.M.A. at 195, 30 C.M.R at 195. Accordingly, to whatever extent Article 66(c), UCMJ, imposes a duty to review all cruel and unusual punishment claims on the CCAs, it would make no sense to restrict that review to matters within the "entire record."

But it does not logically follow that just because this Court has permitted the CCAs to review outside-the-record materials to decide Eighth Amendment and Article 55, UCMJ, claims, we must also authorize the CCAs to consider those materials when they perform Article 66, UCMJ, sentence appropriateness review. To conclude otherwise would create a broad, extra-statutory exception that would potentially swallow the text-based *Fagnan* rule. Any savvy appellant who wished to supplement the record with

outside- the-record materials would have an incentive to do so by raising Eighth Amendment or Article 55, UCMJ, claims— regardless of their merit.

Appellant argues that we can trust the CCAs to be the gatekeepers of the "entire record," admitting only those materials that are relevant to an appellant's cruel and unusual punishment claims. But we see no reason to impose a greater burden on the CCAs to adjudicate arguments over whether outside-the-record materials are relevant to an appellant's Eighth Amendment or Article 55, UCMJ, claims both by encouraging appellants to bring such claims and by raising the consequences of such a determination. Further, there is a wide range of outside-the-record materials about an appellant's post-trial confinement that would be relevant to such claims (given the low bar for demonstrating relevancy) without coming anywhere near establishing a right to relief. Appellant does not explain why it would be just to consider those materials when the CCAs assess the sentence of an appellant who makes an Eighth Amendment or Article 55, UCMJ, claim but not to review the same materials for a similarly situated appellant who does not assert those claims.

It is probably true that we could mandate—and the CCAs would ably execute—a complicated scheme to litigate these issues and parse through an appellant's proffered evidence, admitting only the relevant and necessary parts and rejecting the rest, but nothing in the text of Article 66(c), UCMJ, supports such a scheme. The fact that such a scheme would be necessary raises questions not about the *Fagnan* rule,

which is based on the plain text of Article 66(c), UCMJ, but on our precedents creating exceptions to the rule. As this Court's recent decision in *United States v. Guinn*, __ M.J. __, __ (14) (C.A.A.F. 2021), acknowledged, arguments can be made that this Court's decisions in cases like *Erby* and *Pena* "are not properly predicated on the plain language of that statute." *See also id.* at __ (2) (Maggs, J, concurring) ("I agree with the Court that it may be argued, from the plain meaning of its text, that Article 66(c), UCMJ, does not give a CCA jurisdiction to address post-trial confinement conditions that are not part of the approved sentence."). Given these issues, we conclude that the correct approach here is to adhere to the rule announced in *Fagnan* rather than to further expand the exception set forth in cases like *Erby* and *Pena*.

Appellant argues that this result creates an incongruity, with the CCAs having the authority to review outside-the-record materials for some purposes, but not for others. We acknowledge that this Court's Article 66(c), UCMJ, precedents have created an odd paradigm, but we do not believe that oddness justifies further deviation from the plain text of Article 66(c), UCMJ. The practice of considering evidence for some purposes but not for others is not foreign to American courts. *See* Fed. R. Evid. 105 advisory committee's note to the 1972 proposed rules (recognizing the practice of "admitting evidence for a limited purpose"); *see also* David P. Leonard, *The New Wigmore: A Treatise On Evidence: Selected Rules Of Limited Admissibility* § 1.6.1 (3d ed. 2019) (examining situations where evidence is logically relevant for

more than one purpose but admissible only for one). There is no legal reason why the same practice cannot be applied here. In any case, complete resolution of the incongruities in our Article 66(c), UCMJ, precedents is not before us. As was the case in *Jessie*, the question here "is not whether we must follow one line of precedent and completely reject another, but instead only whether we should expand recent precedents like *Erby* into new contexts when this step would further erode older precedents like *Fagnan*." 79 M.J. at 444 n.9. Again, we decline to do so.

Finally, Appellant also argues that when the CCA granted his motion to attach his outside-the-record declaration as an appendix to his assignment of errors, the declaration became part of the "entire record," so the *Fagnan* rule should not apply. We disagree. Even after the CCA granted Appellant's motion, his declaration about his post-trial confinement conditions is neither part of the record of trial under R.C.M. 1103(b)(2), nor does it qualify as a matter attached to the record of trial under R.C.M. 1103(b)(3). And because Appellant waived his right to submit this matter for clemency to the convening authority, the "entire record" contains nothing about this issue, and thus the briefs and arguments that he and his counsel submitted are not "allied papers" because they do not address a matter in the record of trial. *Jessie*, 79 M.J. at 440– 41 (internal quotation marks omitted) (citation omitted). In *Jessie*, this Court described cases like *Erby* and *Pena* as allowing "the CCAs to consider materials *outside the 'entire record'* when reviewing issues that were not raised by anything in the record." *Id.* at 443 (emphasis added).

This Court has never held, or even suggested, that outside-the-record materials considered to resolve an appellant's cruel and usual punishment claims became part of the entire record. We decline to do so in the present case.

IV. Decision

For the reasons described above, we conclude that the CCA did not err when it held that it could not consider evidence outside the record to determine sentence appropriateness under Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012), even when it had already considered that evidence to resolve Appellant's Eighth Amendment and Article 55, UCMJ, 10 U.S.C. § 855 (2012), claims. The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Judge SPARKS, with whom Judge OHLSON joins, dissenting.

I must dissent from the majority's viewpoint that *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020), and *United States v. Fagnan*, 12 C.M.A. 192, 30 C.M.R. 192 (1961), preclude the lower court's review of the appropriateness of Appellant's sentence pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c) (2012), where Appellant raised his Eighth Amendment and Article 55, UCMJ, 10 U.S.C. § 855 (2012), claims for the first time on appeal and the lower court granted a motion to attach documents relevant to such allegations.

In *Jessie*, we held that other than claims of

punishment in violation of the Eighth Amendment or Article 55, UCMJ, Article 66(c), UCMJ, does not authorize the lower court to "consider materials outside the 'entire record' when reviewing issues that were not raised by anything in the record." 79 M.J. at 443. I disagreed with this holding and would reiterate as I did in my dissent in *Jessie*, that "the courts of criminal appeals are bound, under Article 66, UCMJ, to consider any colorable constitutional claim related to sentence appropriateness even if that requires review of documents outside the record of trial." *Id*. at 448 (Sparks, J., dissenting).

Putting my continued disagreement aside, I note that neither *Jessie* nor *Fagnan* discussed sentence appropriateness review in the context of declarations attached to the record for the purpose of deciding Eighth Amendment and Article 55, UCMJ, allegations. An analogous situation arose in *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988), where this Court commented in a footnote:

> If there is evidence of insanity after the trial has been completed and the convening authority has acted, the Court of Military Review can receive psychiatric information relevant to mental competence to stand trial, to cooperate with the appeal, or mental responsibility for the crime itself. Once admitted for this purpose, the information would be in the "record" and presumably could be used by the Court of Military Review in performing its task of determining what sentence

is appropriate.

Id. at 397 n.6 (citation omitted). In my view, the same outcome should occur in this case. Once the lower court attached to the record Appellant's declarations in support of his Article 55, UCMJ, and Eighth Amendment claims, this information became part of the record and the lower court was required to consider this information in performing its Article 66(c). UCMJ, review. Furthermore, the majority is ignoring Rule 23(b) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, which was promulgated pursuant to Article 66(f), UCMJ. This rule authorizes the lower courts to attach documents to the record, which is precisely what was done in this case. Yet, the majority states that Appellant's declaration is not part of the entire record because it does not fall within Rule for Courts-Martial (R.C.M) 1103(b)(2) or R.C.M. 1103(b)(3). It would appear, however, when the lower court attached these documents they became part of the record under Rule 23(b) of the Joint Rules of Appellate Procedure. The majority fails to account for this rule.

Article 66, UCMJ, is the central source of the lower court's authority to review any issue, to include alleged violations of the Eighth Amendment and Article 55, UCMJ. It seems odd for the majority to hold that, under *Jessie* and *Fagnan*, the lower court has jurisdiction to review alleged violations of the Eighth Amendment and Article 55, UCMJ, based on material that was once outside the original record of trial until attached to the record by the lower court, but does not have jurisdiction to consider that same material for Article 66(c), UCMJ, sentence

appropriateness review. By holding that these documents are outside the record, the majority's new rule violates the mandate in Article 66(c), UCMJ, to consider the "entire record" when affirming "such part or amount of the sentence." Notwithstanding the majority's view that they are adhering to the plain text of the statute, a contrary view emerges from my reading of the Court's opinion. In my view, the majority is, in essence, ignoring the law and refusing to acknowledge the congressional delegation to the Judge Advocates General. Moreover, the majority's view sets up the odd situation in this and future cases where documents that are obviously part of the record are, curiously, simultaneously outside "the entire record."

For the foregoing reasons I must respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
Washington, D.C.

United States,
Appellee

USCA Dkt. No. 21-0030/AF
Crim.App. No. 39642

v. **ORDER GRANTING REVIEW**

Kalab D. Willman,
Appellant

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is, by the Court, this 21st day of December, 2020,

ORDERED:

That said petition is hereby granted on the following issue:

> WHETHER THE LOWER COURT ERRED WHEN IT RULED THAT IT COULD NOT CONSIDER EVIDENCE OUTSIDE THE RECORD TO DETERMINE SENTENCE APPROPRIATENESS UNDER ARTICLE 66(c).

Briefs will be filed under Rule 25.

For the Court,

/s/ Joseph R. Perlak
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Hoffman)
Appellate Government Counsel (Bobczynski)

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

No. ACM 39642

UNITED STATES
Appellee

v.

Kalab D. WILLMAN
Staff Sergeant (E-5), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary Decided 2 September 2020

Military Judge: John C. Degnan.

Approved sentence: Dishonorable discharge, confinement for 1 year, and reduction to E-4. Sentence adjudged 6 November 2018 by GCM convened at Vandenberg Air Force Base, California.

For Appellant: Major Megan E. Hoffman, USAF.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Lieutenant Colonel Brian C. Mason, USAF;

Lieutenant Colonel G. Matt Osborn, USAF; Mary Ellen Payne, Esquire.

Before POSCH, RICHARDSON, and MEGINLEY, *Appellate Military Judges.*

Senior Judge POSCH delivered the opinion of the court, in which Judge RICHARDSON joined. Judge MEGINLEY filed a separate opinion concurring in part and in the result.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

POSCH, Senior Judge:

In accordance with Appellant's unconditional guilty plea pursuant to a pre- trial agreement (PTA), a general court-martial composed of a military judge sitting alone found Appellant guilty of one charge and specification of indecent recording of the private area of BM on divers occasions in violation of Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c.[1] The military judge sentenced Appellant to a dishonorable discharge, confinement for one year, and reduction to the grade of E-4. At action, the convening authority approved the adjudged sentence. In accordance with the terms of the PTA and Article 58b,

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[1] All references in this opinion to the Uniform Code of Military Justice, Rules for Courts-Martial (R.C.M.), and Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2016 ed.).

UCMJ, 10 U.S.C. § 858b, the convening authority also waived mandatory forfeitures of Appellant's pay and allowances for a period of six months, or upon his release from confinement, whichever was sooner, with the waiver commencing on 8 November 2018, for the benefit of Appellant's dependent daughter.[2]

Appellant raises two issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982): (1) whether Appellant is entitled to relief because he was compelled to give testimonial information after invoking his right to an attorney and refusing to answer questions; and (2) whether Appellant suffered cruel and unusual punishment in violation of the Eighth Amendment[3] and Article 55, UCMJ, 10 U.S.C. § 855, when he was not given proper medical treatment while in confinement. Alternatively, Appellant contends that the conditions of his post-trial confinement render his sentence inappropriately severe, warranting relief under Article 66(c), UCMJ, 10 U.S.C. § 866(c).[4]

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[2] The PTA placed no limitation on the sentence the convening authority could approve. Among the Government's PTA concessions, the convening authority agreed to dismiss with prejudice a charge and its specifications that alleged Appellant possessed and viewed child pornography.

[3] U.S. CONST. amend. VIII.

[4] In addition to these issues, we note the action waived mandatory forfeitures and directed Appellant's pay and allowances "to be paid to AW, spouse of [Appellant], for the benefit of [Appellant's] dependent

Finding no error materially prejudicial to the substantial rights of Appellant, we affirm.

I. BACKGROUND

Appellant's conviction is founded on his plea of guilty to making recordings of the private area of BM, a sixteen-year-old female, without legal justification or authorization. Appellant met BM in an Internet chat forum and began communicating with her in private through texts and online video chat sessions. In time, their conversations became sexual and they showed each other their bodies and masturbated during some of these sessions. On 14 occasions, Appellant used his personal laptop computer to record BM engaging in sexually explicit conduct, including masturbating and lasciviously exhibiting her genitals and pubic area to Appellant. BM did not consent to Appellant making recordings of her during these sessions and was unaware she was being recorded.

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daughter." Based on the record before us, AW is Appellant's dependent daughter and not his spouse; and this error is repeated in the court-martial order (CMO). Although Appellant is silent about the error in the action, he asserts the CMO error "did not prejudice Appellant or the relief ordered by the Convening Authority," and "Appellant does not raise it as an error here." We find no prejudice to Appellant by the error in either the action or the CMO, and conclude that instructing the convening authority to withdraw the action and substitute a corrected action, see R.C.M. 1107(g), is not warranted.

Appellant's conduct came to the attention of military authorities at Vandenberg Air Force Base (AFB) after BM's mother learned that Appellant sent her daughter a picture of himself with his shirt pulled up to reveal his stomach. BM's mother filed a police report and the matter was ultimately referred to agents of the Air Force Office of Special Investigations (AFOSI) at Vandenberg AFB. At the time she reported Appellant's conduct, BM's mother was not fully aware of details of Appellant's online relationship with her daughter and the extent of their sexual communications.

AFOSI agents opened an investigation and, on 7 November 2016, took Appellant into custody. Before questioning Appellant about his relationship with BM, an agent advised Appellant of his rights, including the right to have counsel present at the interview. *See* Article 31, UCMJ, 10 U.S.C. § 831; Mil. R. Evid. 305. Following the rights advisement, Appellant declined to answer questions and requested legal counsel.

The same day Appellant was questioned, AFOSI agents conducted a search of Appellant's home and seized multiple electronic devices. The AFOSI agents presented Appellant with a search authorization and a written order dated 7 November 2016 and signed by the military magistrate. The written order directed Appellant "to unlock any and all electronic devices seized pursuant to the search and seizure authorization. This include[d] any fingerprint, password, pin number, or other forms of security

systems for the electronic devices." The military magistrate also ordered Appellant "to disable all security and/or lock settings for any and all electronic devices seized pursuant to this search and seizure authorization." According to the AFOSI report of investigation, when presented with the search authorization and the written order, Appellant unlocked his phone and disabled the security settings.

Later in their investigation, the AFOSI agents presented Appellant with an additional written order to unlock his other electronic devices. This order was from the alternate military magistrate at Vandenberg AFB. Appellant refused to comply with the order and was issued a letter of reprimand (LOR) by his commander, Colonel KB, for disobeying the direct orders given to him by the military magistrates.[5]

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[5] Inexplicably, the letter of reprimand (LOR) that is attached to the AFOSI report of investigation censures Appellant for disobeying an order from the primary military magistrate on 7 November 2016, even though the AFOSI report indicates that Appellant complied with the order. Also according to the AFOSI report, Appellant was given two additional written orders to unlock his electronic devices, on 5 January 2017 and 19 January 2017, which he failed to obey, but neither incident is referenced in the LOR and the orders are not included in the record. The report indicates that Appellant refused to comply with these orders on the advice of an area defense counsel. Nonetheless, the failure of the record to explain the facts underlying the LOR that Appellant received is not dispositive to our decision.

A week after AFOSI agents seized Appellant's electronic devices, a preliminary search of Appellant's cell phone revealed it did not have the applications that Appellant and BM used to meet and communicate over the Internet. Those applications were discovered in software that was installed on Appellant's personal laptop computer. The AFOSI agents' initial review of Appellant's phone also turned up no contraband; however, the AFOSI agents found a picture of Appellant with his shirt pulled up and displaying his abdomen. The AFOSI report of investigation suggests that this picture corroborated BM's account of receiving a picture from Appellant that showed his stomach. Analysis of Appellant's laptop uncovered evidence of Appellant's communications with BM, including videos Appellant recorded of BM and the software Appellant used to record their online sessions.

II. DISCUSSION

A. Appellant's Right against Self-Incrimination

Appellant contends he is entitled to relief because he was compelled to give testimonial information when AFOSI agents unlawfully ordered him to unlock his electronic devices after he invoked his right to an attorney and refused to answer questions. In reference to the LOR he received from his commander, Appellant claims he is entitled to relief for the almost two years of stress he experienced having to report for duty knowing that his commander was upset with him for disobeying the unlawful orders that were given to

him by the military magistrates. Appellant contends that the only meaningful relief this court can grant is to set aside his conviction because he has already served his sentence and is out of confinement.

1. Additional Background

As part of his obligation under the PTA, Appellant agreed to "[w]aive all waivable motions." The military judge conducted an extensive inquiry with Appellant to ensure Appellant understood the meaning and effect of this condition. At one point, the military judge explained:

> [Y]our [PTA] states that you waive or give up the right to make waivable motions. I advise you that certain motions are waived or given up if your defense counsel does not make the motion prior to entering your plea. Additionally, other motions, even if not waived by guilty plea, are nonetheless waived if not brought up during the trial. Some motions, however, such as motions to dismiss for lack of jurisdiction, for example, can never be given up. Do you understand that this term of your [PTA] means that you give up the right to make any motion, which by law is given up when you plead guilty?

Appellant replied, "Yes, sir."

The military judge then asked Appellant, "Do you understand that this term of your [PTA] means you give up the right to make any motion if it is not raised during the trial?" Appellant responded, "Yes, Your

Honor." Appellant acknowledged that no one forced him to agree to this term, and that even though the term originated with the Government, Appellant acknowledged he freely and voluntarily agreed to the term in order to receive the benefit of the PTA.

Appellant entered an unconditional plea of guilty to knowingly and wrongfully making a recording of the private area of BM without her consent on divers occasions. During the guilty plea inquiry with the military judge, Appellant explained that he "recorded approximately 14 videos" of BM's private area "using software installed on [his] laptop." Appellant explained that he and BM would have online "video chat sessions" and that he recorded the videos on his laptop. At one point, the military judge asked Appellant what electronic device Appellant used to communicate with BM. Appellant replied, "Via my laptop, sir." Appellant would later agree that the 14 video recordings at issue were found on his laptop computer.

2. Law

It is well-settled law that an unconditional guilty plea generally waives any objection related to the factual question of guilt. Rule for Courts-Martial (R.C.M.) 910(j); *see also United States v. Mooney*, 77 M.J. 252, 254 (C.A.A.F. 2018). "Objections that do not relate to factual issues of guilt are not covered by this bright-line rule, but the general principle still applies: [a]n unconditional guilty plea generally 'waives all defects which are neither jurisdictional nor a deprivation of due process of law.'" *United States v.*

Schweitzer, 68 M.J. 133, 136 (C.A.A.F. 2009) (quoting *United States v. Rehorn*, 26 C.M.R. 267, 268– 69 (C.M.A. 1958)). The United States Court of Appeals for the Armed Forces (CAAF) has observed, "[w]hile the waiver doctrine is not without limits, those limits are narrow and relate to situations in which, on its face, the prosecution may not constitutionally be maintained." *United States v. Bradley*, 68 M.J. 279, 282 (C.A.A.F. 2010) (citations omitted).

Consequently, an appellant who has entered an unconditional guilty plea ordinarily may not raise on appeal an error previously waived at trial. *United States v. Chin*, 75 M.J. 220, 222 (C.A.A.F. 2016) (citing *United States v. Campos*, 67 M.J. 330, 332–33 (C.A.A.F. 2009); *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)). However, this "ordinary" rule does not apply to statutory review by a military court of criminal appeals (CCA) under Article 66(c), UCMJ. *Id*. "Article 66(c) empowers CCAs to consider claims . . . even when those claims have been waived." *Id*. (quoting *United States v. Chin*, No. ACM 38452, 2015 CCA LEXIS 241, at *9–11 (A.F. Ct. Crim. App. 12 Jun. 2015) (unpub. op.), *aff'd,* 75 M.J. 220 (C.A.A.F. 2016)). This is because CCAs maintain an "affirmative obligation to ensure that the findings and sentence in each such case are 'correct in law and fact . . . and should be approved.'" *Id*. at 223 (quoting *United States v. Miller*, 62 M.J. 471, 472 (C.A.A.F. 2006) (alteration in original)).

"If an appellant elects to proceed with Article 66, UCMJ, review the CCAs are required to assess the

entire record to determine whether to leave an accused's waiver intact, or to correct the error." *Id.* (citation omitted). This requirement does not mean an unconditional guilty plea is without meaning or effect. *Id*. "Waiver at the trial level continues to preclude *an appellant* from raising the issue" on appeal, *id.* (citing *Gladue*, 67 M.J. at 313–14), and an "unconditional guilty plea continues to serve as a factor for a CCA to weigh in determining whether to nonetheless disapprove a finding or sentence." *Id.*

3. Analysis

At the time Appellant was ordered to unlock his electronic devices, the CAAF had not decided *United States v. Mitchell*, 76 M.J. 413 (C.A.A.F. 2017); however, *Mitchell* was decided before Appellant was arraigned and is factually similar to the conduct of the AFOSI agents after Appellant invoked his right to counsel. In *Mitchell*, the appellant's phone had been seized in accordance with a valid search authorization. *Id.* at 416. However, after being advised of his rights under custodial interrogation, the appellant invoked his right to counsel. *Id.* Law enforcement officials then asked the appellant to input the passcode to unlock his phone, and the appellant complied. *Id.* The CAAF concluded that the Government violated the appellant's Fifth Amendment[6] right to counsel as protected by *Edwards v. Arizona*, 451 U.S. 477 (1981), when he was asked to enter his phone's passcode in the absence of counsel. *Mitchell*, 76 M.J. at 415.

[6] U.S. CONST. amend. V.

Appellant contends that because an AFOSI agent unlawfully made Appellant unlock his phone, the AFOSI agents should never have been allowed to use the evidence on his phone to build the case against him. Although AFOSI agents did not find contraband on Appellant's phone, they did discover a picture of him with his shirt raised. Appellant claims AFOSI agents used this photograph to corroborate information they obtained from BM and, consequently, the AFOSI's investigation materially benefited from the illegal search of Appellant's phone.

Even if we assume Appellant's claim of error reaches his laptop computer where the 14 charged images were found, we nonetheless decline to grant relief. By his unconditional plea of guilty, Appellant waived the issues of the invocation of the right to counsel and the lawfulness of the orders to unlock his phone and other devices and to disable their security settings. R.C.M. 910(j). Appellant acknowledged on the record that he was not forced to agree to that term of the PTA, and this court finds no reason to question Appellant's voluntary waiver. Furthermore, the Government did not offer the LOR that Colonel KB served on Appellant as evidence at the sentencing hearing as part of the personnel records of the accused. *See* R.C.M. 1001(b)(2). Thus, we find Appellant was not prejudiced by any error or action by a Government official.[7]

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[7] Based on our review of the record, we need not decide the prejudicial impact of Colonel KB's 11 January

Further, we conclude Appellant's claims are neither jurisdictional nor was Appellant denied the due process of law, and thus are waived insofar as our consideration of the factual question of his guilt on appeal. *See* R.C.M. 910(j); *Schweitzer*, 68 M.J. at 136. We have determined to leave Appellant's waiver intact. *See Chin,* 75 M.J. at 222.

B. Conditions of Post-Trial Confinement

For the first time on appeal, Appellant urges this court to find he was subjected to impermissible confinement conditions in violation of Article 55, UCMJ, and the Eighth Amendment. Appellant also contends the conditions warrant sentencing relief under this court's Article 66(c), UCMJ, authority to approve only so much of a sentence that, based on the entire record, should be approved. We are not persuaded.

1. Additional Background

After the conclusion of Appellant's sentencing hearing on 6 November 2018, Appellant waived his right to submit matters in clemency on 27 February 2019, and the convening authority took action the next day. In his appeal, Appellant submitted a sworn declaration and asked this court to reduce his

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2017 reprimand of Appellant for disobeying orders to unlock his devices after Appellant asked for legal counsel, particularly the portion that reads, "[m]ake no mistake, these were lawful orders from properly appointed military magistrates . . . "

sentence because he did not receive proper medical treatment for an injury that occurred in December 2018 when he was confined at the Naval Consolidated Brig in Charleston, South Carolina. Appellant did not raise a claim of improper medical treatment to the convening authority when he waived clemency.

Appellant explains in his declaration that near the end of December, another inmate stepped on his foot during a game of flag football, causing significant bruising to his large toe and toenail. Over the next two to three weeks his toenail swelled and became painful. It discharged pus and became detached from the nail bed. On 14 January 2019, Appellant reported to sick call for a medical evaluation. A medical staff member concluded that no action was needed. Appellant requested the nail be removed and that the issue be raised to a supervisor. The supervisor refused to remove the nail, applied an antiseptic, and gave Appellant instructions to return to sick call should the issue worsen. Later that evening, the nail completely detached from the nail bed when Appellant removed his boots and socks.

Approximately three weeks later, Appellant returned to sick call to have his condition reevaluated because the nail was regrowing over the exposed nail bed in an unusual manner and with significant discoloration, and caused pain when Appellant donned his socks and boots each morning. Appellant was again told by medical personnel that no action was needed and to return to sick call if additional symptoms or issues developed. In his 3 September

2019 declaration to this court, Appellant states that in the months since the onset of the issue, he is unable to put on socks and shoes without "slow and methodical effort." His nail has yet to regenerate fully and it remains an unusual color and form.

In response to Appellant's sworn statement, the Government provided a sworn declaration from a legal officer at the Naval Consolidated Brig. The declaration states that Appellant served a period of confinement at the facility from 28 November 2018 until 11 August 2019, and he sustained an injury to his toe during a recreational activity. After a medical evaluation, a member of the medical staff determined the best course of action was to let the nail remain intact until it fell off spontaneously because removing the nail would have left Appellant's toenail matrix exposed, which could increase the chances of an injury or infection. An antiseptic solution was administered "to decrease the amount of surface pathogens to help prevent further infection." Appellant was advised he could cover the area with a plastic bandage to prevent the nail from catching on his socks. The medical staff member concluded there was no mandate to remove Appellant's toenail. The declaration explained that in the opinion of the medical staff member, toenails can grow back abnormally or discolored after a traumatic event to the nail bed and it may take months or years for the nail to fully grow. Lastly, the declaration asserted that a review of Appellant's prisoner record did not contain any requests for redress or grievances.

2. Law

"Both the Eighth Amendment and Article 55, UCMJ, prohibit cruel and unusual punishment. In general, we apply the Supreme Court's interpretation of the Eighth Amendment to claims raised under Article 55, UCMJ, except where legislative intent to provide greater protections under Article 55, UCMJ, is apparent." *United States v. Gay*, 74 M.J. 736, 740 (A.F. Ct. Crim. App. 2015) (citing *United States v. Avila*, 53 M.J. 99, 101 (C.A.A.F. 2000)), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016).

"[T]he Eighth Amendment prohibits two types of punishments: (1) those 'incompatible with the evolving standards of decency that mark the progress of a maturing society' or (2) those 'which involve the unnecessary and wanton infliction of pain.'" *United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102–03 (1976)). A violation of the Eighth Amendment is shown by demonstrating:

> (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [appellant]'s health and safety; and (3) that [appellant] "has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, UCMJ, 10 U.S.C. § 938 [2000]."

Id. (third and fourth alterations in original) (footnotes

omitted) (quoting *United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 1997)).

The CAAF has emphasized that "[a] prisoner must seek administrative relief prior to invoking judicial intervention to redress concerns regarding post-trial confinement conditions." *United States v. Wise*, 64 M.J. 468, 469 (C.A.A.F. 2007) (citing *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001)). "This requirement 'promot[es] resolution of grievances at the lowest possible level [and ensures] that an adequate record has been developed [to aid appellate review].'" *Id.* at 471 (alterations in original) (quoting *Miller*, 46 M.J. at 250).

Except under some unusual or egregious circumstance, an appellant must demonstrate he or she has exhausted the prisoner grievance process provided by the confinement facility and has petitioned for relief under Article 138, UCMJ, 10 U.S.C. § 938. *White,* 54 M.J. at 472 (citation omitted).

Under Article 66(c), UCMJ, we have broad authority and the mandate to approve only so much of the sentence as we find "correct in law and fact and determine, on the basis of the entire record, should be approved." *See also United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002) (observing that the "legislative history of Article 66 reflects congressional intent to vest broad power in the Courts of Criminal Appeals"). The scope of our Article 66(c), UCMJ, authority to consider claims of post-trial confinement conditions "is limited to consideration of these claims as part of our determination of sentence

appropriateness." *United States v. Towns*, 52 M.J. 830, 833 (A.F. Ct. Crim. App. 2000) (citation omitted), *aff'd*, 55 M.J. 361 (C.A.A.F. 2001). "It is also limited to claims based on post-trial treatment that occurs prior to the action of the convening authority and which is documented in the record of trial." *Id.* (citing Article 66(c), UCMJ).

3. Analysis

a. Article 55, UCMJ, and the Eighth Amendment

We conclude that even if the facts, as asserted by Appellant in his declaration, are true, Appellant has not met his burden to establish prison officials failed to administer proper medical treatment, and, thus, grounds for relief.[8]

Article 55, UCMJ, prohibits infliction of "[p]unishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment." The Eighth Amendment prohibits "deliberate indifference to serious medical needs of prisoners," whether manifested by prison guards "intentionally denying or delaying access to medical care or intentionally interfering with the treatment

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[8] Having applied the decisional framework announced in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997), for evaluating conditions of post-trial confinement, and considered the entire record, we find we can resolve the issues raised by Appellant without additional factfinding. *See United States v. Fagan*, 59 M.J. 238, 242 (C.A.A.F. 2004).

once prescribed." *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976) (citation omitted). However, "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Id.* at 106. "Deliberate indifference" requires that the responsible official must be aware of an excessive risk to an inmate's health or safety and disregard that risk. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). "[I]t is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Id.* at 842 (citation omitted). However, "prison officials who [lack] knowledge of a risk cannot be said to have inflicted punishment." *Id.* at 844.

Apart from Appellant's factual declaration, we find no basis for the assertions made by Appellant's counsel on behalf of Appellant that (1) Appellant's "serious and potentially disabling medical issue—an infected toe—was brushed aside by brig medical personnel and not taken seriously;" (2) "[t]he brig sick bay officials' lack of concern led to a long-term infection and permanent damage to the digit that continues to this day;" and that (3) "[t]here is no explanation for the conditions under which Appellant was kept except that the confinement facility officials deliberately and willfully disregarded Appellant's well-being." The most Appellant shows from the post-trial declarations is that the treatment of his injured toe was aimed at preventing infection. Appellant has

not shown that either alternative or additional medical interventions would have restored his health to the same condition before the injury happened.

In the present case, the information provided by Appellant in his appeal lacks evidence that prison officials were aware of a substantial risk of serious harm to Appellant's health or safety and disregarded that risk. We find that Appellant has not presented evidence to establish wrongful intent, namely, that any official failed to properly administer treatment for the purpose of increasing Appellant's suffering or the severity of his sentence. Appellant has not shown conduct of prison officials that rises to the level of "deliberate indifference to serious medical needs of prisoners" proscribed by the Eighth Amendment whether manifested by prison guards "intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Estelle*, 429 U.S. at 104–05. Moreover, a review of Appellant's case does not reveal any information to suggest that Appellant attempted to use a grievance process to address his complaint. *See Wise*, 64 M.J. at 469; *White*, 54 M.J. at 471.

We find Appellant's post-trial claims do not demonstrate circumstances warranting relief under Article 55, UCMJ, or the Eighth Amendment. Even if the facts as asserted by Appellant are true, there is insufficient evidence to objectively conclude that a sufficiently serious act or omission occurred which resulted in the denial of necessities. *See Lovett*, 63 M.J. at 215. The information falls far short of wrongful

intent, namely, a culpable state of mind of an identifiable official which constituted deliberate indifference to Appellant's health and safety. *See id.* Finally, the record does not provide evidence that Appellant attempted to use a grievance process to address complaints of mistreatment. *See id.* Accordingly, Appellant does not warrant relief under Article 55 or the Eighth Amendment and we conclude his sentence is correct in law.

b. Appropriateness of Sentence

Having resolved Appellant's Article 55 and Eighth Amendment claims, we next consider if our review of whether Appellant's sentence should be approved "on the basis of the entire record," Article 66(c), UCMJ, permits or precludes our consideration of the post-trial confinement conditions Appellant presents for the first time on appeal. We conclude Article 66(c) limits our review of the appropriateness of the sentence to the record and thus precludes consideration of Appellant's statements of fact about those conditions.

In *United States v. Jessie*, the CAAF observed that some of the court's precedents hold that CCAs "may consider only what is in the record" when reviewing a sentence under Article 66(c). 79 M.J 437, 440 (C.A.A.F. 2020) (citation omitted). The CAAF noted that the leading case for these precedents is *United States v. Fagnan*, 30 C.M.R. 192 (C.M.A. 1961), in which the appellant asked the Army Board of Review to reject his punitive discharge based on a favorable psychiatric assessment and a favorable report

regarding his conduct while in confinement. *Jessie*, 79 M.J. at 441 (citing *Fagnan*, 30 C.M.R. at 193). The Board of Review declined to consider these documents, explaining that because the submission "concerns matters which occurred months after the convening authority acted upon the sentence and forwarded the record of trial, it is not a part of the record subject to review under Article 66." *Id.* (quoting *Fagnan*, 30 C.M.R. at 193). The United States Court of Military Appeals, the predecessor to the CAAF, affirmed, holding that under Article 66(c), UCMJ, "the board of review is expressly restricted by Congress to the 'entire record' in assessing the appropriateness of the sentence." *Id.* (quoting *Fagnan*, 30 C.M.R. at 194). The *Jessie* court reiterated the reasoning in *Fagnan* that "if military justice proceedings are to be 'truly judicial in nature,' then the appellate courts cannot 'consider information relating to the appropriateness of sentences when it has theretofore formed no part of the record.'" *Id.* (quoting *Fagnan*, 30 C.M.R. at 195).

In *Jessie*, our superior court concluded that "*Fagnan* established a clear rule that the CCAs may not consider anything outside of the 'entire record' when reviewing a sentence under Article 66(c), UCMJ." *Id.* (citation omitted). Specifically in regard to conditions of post-trial confinement, "[t]he rule in *Fagnan* does not preclude the CCAs from considering prison conditions when reviewing a sentence under Article 66(c), UCMJ, *if the record contains information about those conditions*." *Id.* at 441–42 (emphasis added); *see also id.* at 444 n.10 ("Because both the

sentence appropriateness and correctness in law determinations require a decision based upon the 'entire record,' we need not determine whether posttrial confinement conditions fall under one or both provisions.").

Here, the "entire record"[9] contains no information about the conditions of Appellant's post-trial confinement. Although we exercised our authority to consider outside-the-record matters to determine if Appellant's sentence is correct in law under Article 55, UCMJ, and the Eighth Amendment, *see United States v. Erby*, 54 M.J. 476, 478 (C.A.A.F. 2001), we are precluded from considering Appellant's statement of facts about these conditions to determine if his sentence is appropriate and "should be approved" as part of our Article 66(c) review. *Jessie*, 79 M.J. at 441. In *United States v. Gay*, the CAAF affirmed a decision of this court that reduced an appellant's sentence under Article 66(c) because prison officials, without justification, had made him serve part of his sentence in maximum security solitary confinement. 75 M.J. 264, 266 (C.A.A.F. 2016). However, information about

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[9] *See* R.C.M. 1103(b)(2) (contents of the record) and R.C.M. 1103(b)(3) (matters attached to the record). In addition, the "entire record" includes briefs and arguments that appellate counsel and an appellant personally present regarding matters that are already in the record of trial, R.C.M. 1103(b)(2), or have been attached to the record of trial under R.C.M. 1103(b)(3). *See Jessie*, 79 M.J. at 440–41 (citing *United States v. Healy*, 26 M.J. 394, 396 (C.M.A. 1988)).

these conditions was part of the record of trial because the appellant had requested additional confinement credit when he complained about the conditions to the convening authority. *Id.* at 265–66. Unlike *Gay*, neither the record of trial nor the matters attached to Appellant's record of trial mentions the conditions Appellant raises for the first time after the convening authority took action in Appellant's case.

It may seem incongruous to consider outside-the-record matters to evaluate Appellant's Article 55 and Eighth Amendment claims, and then not consider those matters in this court's sentence appropriateness review under Article 66(c). Nonetheless, our superior court has declined to further erode precedents like *Fagnan*, noting, "[w]e see nothing in the statutory text [of Article 66(c)] requiring special treatment for all appeals raising statutory or constitutional claims." *Jessie*, 79 M.J. at 444. The CAAF further rejected the contention "that appellants should have the right to supplement the record whenever they raise claims of constitutional or statutory violations."[10] *Id.* at 443.

We depart from our esteemed colleague concurring in the result in regard to the position that was taken by Chief Judge Johnson in *United States v. Matthews*, No. ACM 39593, 2020 CCA LEXIS 193 (A.F. Ct. Crim.

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[10] "The 'entire record' restriction . . . applies equally whether the CCA is reviewing a sentence's correctness in law, reviewing a sentence's correctness in fact, or determining whether a sentence should be approved." *Jessie*, 79 M.J. at 444 (footnote omitted).

App. 2 Jun. 2020) (unpub. op.) (J. Johnson, C.J., concurring in the result). Like this case, the *Matthews* appellant raised his Article 55, UCMJ, and Eighth Amendment claims for the first time on appeal and based them on material outside the original record of trial. *Matthews*, unpub. op. at *12. Chief Judge Johnson simply concluded that the question of this court's authority to grant sentence appropriateness relief under Article 66(c), UCMJ, for claimed violations of Article 55, UCMJ, and the Eighth Amendment was not before the CAAF in *Jessie*, and thus "the CAAF's position on this point is undecided and unclear." *Matthews*, unpub. op. at *16–17 (J. Johnson, C.J., concurring in the result). In our view, the CAAF's majority opinion was resolute and clear.

Following the court's Article 66(c) mandate to approve only so much of a sentence that, based on "the entire record, should be approved," we conclude the record contains no support to grant sentencing relief on the basis of Appellant's claims about the conditions of post-trial confinement.

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and the sentence are **AFFIRMED**.[11]

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[11] Although not raised by the parties, we note an error in the CMO where the charged article is incorrectly

MEGINLEY, Judge (concurring in the result):

I agree with the majority in that Appellant is not entitled to relief for cruel or unusual conditions of post-trial confinement in violation of the Eighth Amendment[1] or Article 55, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 855. Nor do I believe the conditions Appellant describes render his sentence inappropriately severe, warranting relief under Article 66(c), UCMJ, 10 U.S.C. § 866(c).

However, I disagree with the premise that we are precluded from considering the appropriateness of Appellant's sentence pursuant to Article 66, UCMJ, 10 U.S.C. § 866, in a case such as this where Appellant raises his Eighth Amendment and Article 55, UCMJ, claims for the first time on appeal, and supports his claim with material that is outside of the original record of trial. I agree with the observations made by Chief Judge Johnson in his concurring opinion in *United States v. Matthews*, No. ACM 39593, 2020 CCA LEXIS 193 (A.F. Ct. Crim. App. 2 Jun. 2020) (unpub. op.), in his assessment of our superior court's recent decision in *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020):

Article 66, UCMJ, is the fundamental source of this court's authority to review any issue, to include

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identified as Article "120" rather than "120c." We direct the publication of a corrected CMO to remedy this error.

[1] U.S. CONST. amend. VIII.

alleged violations of the Eighth Amendment and Article 55, UCMJ. It does seem incongruous (to borrow the majority's term) to find that, under *Jessie*, we have jurisdiction to review alleged violations of the Eighth Amendment and Article 55, UCMJ, based on material outside the original record of trial, but to find we lack jurisdiction to consider such materials for the purpose of "affirm[ing] only such findings of guilty and the sentence . . . as [we] find correct in law and fact and determine, on the basis of the entire record, should be approved"—which is our fundamental charge and mandate in accordance with the text of Article 66 itself. *See United States v. Gay*, 75 M.J. 264, 268 (C.A.A.F. 2016). *Matthews*, unpub. op. at *17–18 (J. Johnson, C.J., concurring in the result).

I am troubled by the precedent that will be set if a hardline rule is established that Courts of Criminal Appeals cannot consider anything outside of the record for post-trial issues unless an Eighth Amendment or Article 55 issue is raised. Since *United States v. Fagnan*, 30 C.M.R. 192 (C.M.A. 1961), was decided, prison and confinement systems have greatly evolved, post-trial processing has undergone a massive transformation, and most importantly, appellants have changed. The Department of Defense is coming to terms with the racial and gender disparity issues that have existed in our military justice sys tem for quite some time. We have also learned to recognize the need to make accommodations in our confinement systems for certain segments of our military population which

may have been marginalized or ignored, such as those who may identify as gay, lesbian, or transgender.

How these evolving issues will play out in post-punishment context is unknown. Yet, the time to include post-trial matters in the record is nearly irrelevant; gone are the days when an appellant could be in confinement for months before action. Now, depending on how quickly a legal office can process a record, entry of judgment can take place in a matter of days.

Nor do I believe in the notion we could, or should, require our Airmen to seek relief for these issues solely in the federal court system. We have an obligation to be prepared to consider non-traditional post-trial confinement issues as part of our charge. Courts of Criminal Appeals need flexibility in post-trial submissions so that we can continue to reconcile injustices and shortcomings in order to continue to adapt to our ever-changing military population. I agree with the point made by Judge Sparks in his dissenting opinion in *Jessie*, noting:

> The majority is correct that Article 66, UCMJ, instructs the lower courts to review issues "on the basis of the entire record." But it also entrusts the lower court with the weightier responsibility of ensuring an accused's sentence is "correct in law." Confining our review only to the existing record, without exception, would limit the lower court's ability to do this.

Jessie, at 448 (Sparks, J., dissenting).

By closing the door on non-Eighth Amendment and Article 55 claims, we are perhaps closing the door on due process and First Amendment[2] issues (as seen in *Jessie*), and other matters we simply cannot anticipate—matters that were not envisioned when *Fagnan* was decided.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

[2] U.S. CONST. amend. I.

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
Washington, D.C.

United States,
Appellee

USCA Dkt. No. 21-0146/AF
Crim.App. No. 39657

v.

ORDER

Cory J.
Frantz,,
Appellant

On further consideration of the granted issue (81 M.J._____(C.A.A.F. March 23, 2021)), and in view of *United States v. Willman*, 81 M.J._____(C.A.A.F. July 21, 2021**), it is,** by the Court, this 10th day of August, 2021,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ David A. Anderson
Acting Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Bosner)
Appellate Government Counsel (Payne)

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
Washington, D.C.

United States,
Appellee

USCA Dkt. No. 21-0146/AF
Crim.App. No. 39657

v.

ORDER GRANTING REVIEW

Cory J.
Frantz,,
Appellant

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is, by the Court, this 23rd day of March, 2021,

ORDERED:

That said petition is hereby granted on the following issue:

> WHETHER THE LOWER COURT ERRED WHEN IT RULED THAT IT COULD NOT CONSIDER EVIDENCE OUTSIDE THE RECORD TO DETERMINE SENTENCE APPROPRIATENESS UNDER ARTICLE 66(c), UCMJ.

No briefs will be filed under Rule 25.

For the Court,

/s/ Joseph R. Perlak
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Bosner)
Appellate Government Counsel (Payne)

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

No. ACM 39657

UNITED STATES
Appellee

v.

Cory J. FRANTZ
Senior Airman (E-4), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 10 November 2020

Military Judge: Mark W. Milam.

Approved sentence: Dishonorable discharge, confinement for 7 years, and reduction to E-1. Sentence adjudged 19 October 2018 by GCM convened at Aviano Air Base, Italy.

For Appellant: Major Mark J. Schwartz, USAF; Captain David L. Bosner, USAF; Tami L. Mitchell, Esquire.

For Appellee: Lieutenant Colonel Brian C. Mason, USAF; Major Jessica L. Delaney, USAF; Major Peter F. Kellett, USAF; Mary Ellen Payne, Esquire.

Before J. JOHNSON, POSCH, and KEY, *Appellate Military Judges.*

Chief Judge J. JOHNSON delivered the opinion of the court, in which Senior Judge POSCH and Judge KEY joined.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

J. JOHNSON, Chief Judge:

A general court-martial composed of a military judge alone convicted Appellant, contrary to his pleas, of two specifications of committing lewd acts upon a child under the age of 12 years, in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b.[1,2] The military judge sentenced Appellant to a dishonorable discharge, confinement for seven years, and reduction to the grade of E-1. The convening authority approved the adjudged sentence, but deferred automatic forfeitures of pay and

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[1] All references in this opinion to the Uniform Code of Military Justice (UCMJ), Rules for Courts-Martial, and Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2016 ed.).

[2] The military judge found Appellant guilty of Specification 3 of the Charge by exceptions and substitutions. The military judge found Appellant not guilty of two specifications of sexual assault of a child under the age of 12 years in violation of Article 120b, UCMJ.

allowances until action pursuant to Articles 57(a) and 58b, UCMJ, 10 U.S.C. §§ 857(a), 858b, and waived the automatic forfeitures for the benefit of Appellant's dependent child until the earlier of six months or the expiration of Appellant's term of service pursuant to Article 58b, UCMJ.

Appellant raises nine issues on appeal: (1) whether the evidence is legally and factually sufficient to support his convictions; (2) whether the finding of guilty with regard to Specification 3 of the Charge is fatally ambiguous; (3) whether the Government violated Appellant's right to equal access to evidence; (4) whether the military judge abandoned his impartial judicial role and erroneously failed to disqualify himself; (5) whether Appellant's sentence is inappropriately severe; (6) whether the Government's failure to defer and waive automatic forfeitures in accordance with the convening authority's direction warrants relief; (7) whether the Naval Consolidated Brig Miramar (Miramar Brig) policy of preventing Appellant from having contact with his minor son is unconstitutional or violates Article 55, UCMJ, 10 U.S.C. § 855; (8) whether the military judge abused his discretion in declining to admit a defense exhibit; and (9) whether the delay in procuring prescription eyeglasses for Appellant during his confinement constituted cruel and unusual punishment.[3] In

[3] Appellant personally raises issues (8) and (9) pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1992). We have carefully considered issues (8) and (9), and we find they warrant neither further

addition, although not raised by Appellant, we consider two further issues: whether the convening authority's failure to state his reasons for denying Appellant's request to defer his reduction in grade warrants relief; and whether Appellant is entitled to relief for facially unreasonable appellate delay. We affirm the findings, but we find that an error with respect to the convening authority's denial of the requested deferment of the reduction in grade warrants relief with respect to the sentence.

I. BACKGROUND

Appellant met AS, then a divorced mother of three children, in June 2013 when they both lived in the state of Washington. They began dating, and Appellant moved in with AS and her children for a period of time before he departed for Air Force basic training in November 2013. Appellant and AS married in February 2014 after Appellant learned he would be stationed at Aviano Air Base (AB) in Italy. Appellant and AS moved to Italy in July 2014, and AS's children joined them there approximately one month later.

The family eventually settled in a four-story house in a town near Aviano AB. On weekends AS would regularly go to the on-base fitness center, a drive of approximately 30 minutes each way, leaving Appellant with the children, who were nine, five, and

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discussion nor relief. *See United States v. Matias*, 25 M.J.356, 361 (C.M.A. 1987).

three years old at the time. AS noticed that Appellant seemed to favor the oldest child, her daughter JZ, over the other children. For example, Appellant bought clothes for JZ, helped her clean her room, and tucked her into bed at night without doing the same for the other children.

JZ exhibited troubling behavior after she arrived in Italy. She showed no motivation in the on-base school, which assigned a counselor to meet with JZ regularly. At home, JZ resisted bathing, she was aggressive toward her younger brother, and she would spend time alone in a dark room.

In Italy, AS's marriage to Appellant deteriorated. According to AS, the couple frequently argued about the children, finances, and managing the household. Tensions increased in January 2015 when Appellant traveled to Nellis Air Force Base (AFB), Nevada, for several weeks of training. While Appellant was there, AS informed him she did not want to continue the marriage. Soon afterwards, AS found JZ in her bedroom holding a tablet and crying. JZ asked AS to "take back" what she said to Appellant so they would not "have to go." AS looked at the tablet and discovered JZ had been messaging with Appellant via Facebook. AS did not inspect the messages at that point, but replied to Appellant's messages to the effect that he should not contact JZ.

Within a few days, AS inspected the messages more closely. Some of the messages alarmed her. At one point in these messages, JZ wrote, "And I still will

not tell anybody," to which Appellant responded, "Good," before JZ finished her sentence, "About us!" Shortly thereafter, Appellant sent JZ messages asking if she knew how to delete Facebook messages before sending her instructions on how to do so. Later, JZ made cryptic references to the "last night with [Appellant]" when he was "doin the laundry," which "still haunt[ed]" her. JZ asked Appellant if he remembered "the laundry," to which Appellant responded that he did remember "[t]alking to [JZ] while doing laundry." JZ responded with a "thumbs up" symbol, to which Appellant responded with a winking emoji and "[t]hought so." Appellant and JZ shared that each missed the other and liked the other's smile. Coupled with JZ's troubling behavior, the messages led AS to believe that "there was something going on" and she "wanted it to be investigated." Although most of these electronic messages were later lost, AS printed a copy at the time.

AS took the messages to the Family Advocacy office at Aviano AB. Family Advocacy referred AS to the Air Force Office of Special Investigations (AFOSI). However, when the AFOSI interviewed JZ, she denied that Appellant had abused her, and the investigation ended.

AS and the children moved out of the house to stay with friends before Appellant returned from Nellis AFB, and the children never lived with Appellant again. According to AS, Appellant was uncooperative with AS's efforts to return to the United States, and

he refused to provide adequate financial support until she sought assistance from his chain of command. As a result, AS sold most of the family's belongings in order to raise money, which caused further acrimony. AS and her children were eventually able to leave Italy and return to Washington; the divorce became final in March 2016.

In the months that followed their departure from Italy, JZ moved multiple times within Washington between her mother AS, her biological father, and her grandparents. By the beginning of 2017, JZ was 11 years old and again living with AS, who had remarried. Although AS had taken away JZ's tablet, JZ's school had provided her a laptop computer with Internet capability. In early 2017, AS learned that JZ had been communicating again via Facebook with Appellant, who was still stationed at Aviano AB. When confronted, JZ initially denied communicating with Appellant, but soon JZ admitted that she had been doing so, and she permitted AS to read the messages. As AS and her husband reviewed the messages, JZ initially lay quietly on a couch before she covered her head with a blanket and began to cry.

The messages between Appellant and JZ ranged from mundane descriptions of daily activities, to false claims by JZ on such subjects as owning horses and being pregnant, to expressions of mutual affection and attraction. Appellant repeatedly commented that he felt a special bond with JZ, that he thought she was beautiful, and that he wanted to hold and kiss her. One notable early exchange included the following:

[JZ:] remember when mom used to go to the gym on weekends and we would hang out

[Appellant:] Yes

[JZ:] do you remember what we did when we hung out

[Appellant:] Yes

Do you

She didn't like me and you spending time together

[JZ:] Yea I do

Did she know?!

[Appellant:] Idk what you told her or what she thinks she knows I didn't say anything about hanging out

We watched movies

[JZ:] I said the same thing

In later messages, Appellant implied and then expressed his purported sexual attraction to JZ more openly. Appellant told JZ he thought about sex often, had thought about having sex with JZ, and would be willing to have sex with her when she was older, because "that's the legal answer." When JZ told Appellant she would kiss and marry Appellant if she was his age, he responded that JZ was "gorgeous, smart and fun," and he would kiss and marry her too

if they were the same age. Later, Appellant told JZ he could "teach [her] a thing or two" about sex "when she was ready to learn." When JZ asked Appellant if he would send her a picture of his "you know what" if she asked him to, Appellant responded that he "would if [JZ] sent one back." JZ replied that she "would send one" when she was "alone," to which Appellant responded "Damn," "Same." When JZ asked Appellant "on a scale of 1-10 how bad do you want to have sex with me," Appellant told her the answer was ten; JZ responded "same." Then the following exchange ensued:

> [JZ:] I am being for real with this one…It honestly SUCKS that we cant have sex till im 18
>
> [Appellant:] Yeah
>
> Well I think it's 17 with consent If you really wanted to
>
> [JZ:] yeah
>
> [Appellant:] But 18 is just safer
>
> [JZ:] yep for sure
>
> [Appellant:] Does suck
>
> [JZ:] yea if you REALLY wanted to… would you have sex while it is still illegal just questioning
>
> [Appellant:] Maybe

But it's better when you are of age

[JZ:] yup

[Appellant:] Just because it can still come back on me

[JZ:] yea it can

[Appellant:] That's why I said maybe because it's not yes but it's not saying no

[JZ:] true true

[Appellant:] Wish you were of age now

Later, Appellant and JZ joked about JZ taking her pants and underwear off when she came to visit him sometime. When Appellant dared her to do so, JZ asked "Why? What will you do if I do?" Appellant responded, "Idk," "That's hot though." At another point, Appellant suggested JZ might secretly meet Appellant when he came to Washington to visit his father.

Perceiving that some of the messages were sexual in nature, AS asked JZ if Appellant had done anything to her physically while they were in Italy. JZ replied that Appellant had. The following morning AS took JZ to the civilian police in Washington, who began an investigation and contacted the AFOSI.

At trial, JZ testified *inter alia* that Appellant touched her inappropriately when they lived together

in Italy.[4] According to JZ, on multiple occasions when AS was at the gym, Appellant brought JZ to the laundry room while her brother and sister were upstairs watching movies. In the laundry room, Appellant put her on top of the dryer or washing machine and put his hands underneath her shirt. She further testified that "sometimes" he would also pick her up and hold her by her "butt" against the front of his body, and sometimes he "wrapped his hands around [her] waist." JZ further testified that on multiple occasions when AS was away from the house Appellant took JZ to JZ's bedroom, which like the laundry room was on the bottom floor. According to JZ, in the bedroom Appellant inserted his fingers and his tongue in her vagina as she lay on the bed.

The military judge found Appellant guilty of one specification of committing lewd acts on JZ by communicating indecent language to her on divers occasions with the intent to gratify his sexual desire, and one specification of committing a lewd act on JZ by "putting his arms around [JZ], and intentionally touching and holding onto her buttocks with his hands, with an intent to gratify his sexual desire." The military judge found Appellant not guilty of one specification of sexual assault against JZ by penetrating her vulva with his fingers and one specification of sexual assault by penetrating her vulva with his tongue, both with the intent to gratify

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[4] JZ was 13 years old at the time of Appellant's trial.

his sexual desire.

II. DISCUSSION

A. Legal and Factual Sufficiency

1. Law

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (citation omitted). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). As a result, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (alteration in original) (citation omitted).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s

guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (alteration in original) (quoting *Washington*, 57 M.J. at 399), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018). Article 120b(c), UCMJ, provides: "Any person subject to this chapter who commits a lewd act upon a child is guilty of sexual abuse of a child and shall be punished as a court-martial may direct." *Manual for Courts-Martial, United States* (2016 ed.) (*MCM*), pt. IV, ¶ 45b.a.(c). A "child" is "any person who has not attained the age of 16 years." *MCM*, pt. IV, ¶ 45b.a.(h)(4). The term "lewd act" includes, *inter alia*, "any sexual contact with a child" and "intentionally communicating indecent language to a child by any means, including via any communication technology, with an intent to . . . arouse or gratify the sexual desire of any person." *MCM*, pt. IV, ¶ 45b.a.(h)(5). "'Indecent' language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts." *MCM*, pt. IV, ¶ 89.c. "Sexual contact" includes "any touching . . . either directly or through

the clothing, [of] any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person." *MCM*, pt. IV, ¶ 45.a.(g)(2); *see MCM*, pt. IV, ¶ 45b.a.(h)(1).

2. Analysis

Appellant asserts the evidence was legally and factually insufficient to support his conviction for either specification for which the military judge found him guilty. We consider each specification in turn.

a. Intentionally Communicating Indecent Language

On appeal, Appellant does not contest that he in fact sent the messages in question to JZ, that he did so intentionally, or that he knew JZ's age. With respect to the content of the messages, the indecency of a communication depends on "the context in which it is made." *United States v. Green*, 68 M.J. 266, 270 (C.A.A.F. 2010) (citation omitted). In this case, Appellant communicated to an 11-year-old child that he thought about sex a lot, that he desired to have sexual intercourse with her in the future, that his sexual desire for her was a ten out of ten, that it "sucked" that they could not have sex before she was 17 or 18 years old, and that he would "maybe" have sex with her earlier even if it was illegal. In addition, he discussed—albeit hypothetically—sending a photo of his genitals to JZ in return for a photo of hers. The context for these communications included, as the military judge found, that Appellant had previously touched JZ's buttocks and torso with the intent to

gratify his sexual desire, when she was only nine years old and he was her stepfather. We find Appellant sent JZ messages that were "grossly offensive to modesty, decency, or propriety," and therefore indecent. *MCM*, pt. IV, ¶ 89.c.

Without conceding indecency, Appellant contends for purposes of argument that even if we find some of his later messages were indecent, there is insufficient evidence of his intent to gratify his sexual desire, because he told JZ they should wait until she was 18 years old to have sex. We disagree and find ample evidence that Appellant intended to gratify his sexual desire at the time he sent the messages. Again, the context for these messages included that Appellant had touched JZ's body for the purpose of gratifying his sexual desire when they lived in Italy. The nature of the messages and Appellant's comments suggest he found his communications with JZ sexually stimulating. If there were any doubt, his comment that he found contemplating JZ removing her pants and underwear when she visited him to be "hot" would lay it to rest.

b. Sexual Contact

With respect to the specification that Appellant committed sexual contact on JZ by putting his arms around her and putting his hands on her buttocks with the intent to gratify his sexual desire, Appellant contends JZ's testimony is simply not credible enough to sustain his conviction. In fact, there are significant problems with JZ's credibility. She was reluctant to

testify about certain events, notably the sexual acts Appellant allegedly performed on her in her bedroom in Italy. Her testimony was sometimes confusing and incomplete, requiring the counsel and military judge to readdress the same events with her multiple times. More significantly, by her own admission JZ lied about many things from 2015 to 2017. She often lied in her 2017 messages to Appellant about owning horses and having a boyfriend, and she lied to Appellant and others about being pregnant; according to JZ, she did so to get "attention." More problematically, JZ admitted that she had lied to investigators about Appellant's offenses. She lied to the AFOSI in 2015 when she denied Appellant had touched her inappropriately, because she was "young, dumb, and [she] thought [she] would get in trouble." JZ admitted she lied to the civilian police in 2017 when she told them she kicked Appellant when he was touching her, and when she claimed at one point Appellant had threatened to kill her mother AS. JZ testified she did not know why she told these lies. JZ told the military judge she understood it was important to tell the truth in her courtroom testimony, and she indicated she had put her "lying ways" behind her; however, when the military judge asked JZ why he should believe what she said about Appellant when she had "said so many lies in the past," she responded "I don't have an answer to that."

The military judge evidently recognized JZ's credibility problems. He questioned her directly about the importance of telling the truth and confronted her

about her admitted past false statements. Notably, after both parties rested the military judge recalled JZ to give further testimony. Among other questions, the military judge focused JZ on "the first time" Appellant touched JZ, which she confirmed was in the laundry room. JZ described again how Appellant picked her up and put her on the washing machine or dryer. Then Appellant put his hands "in [her] shirt" and "around [her] waist." At another point, he "picked [her] up and held [her] by the butt." She explained:

> So you know how like you hold like a little kid off to the side or like you're holding someone and you kind of like hold them kind of like by the thigh I guess. He had his hands like around my butt.
>
> . . . .
>
> I think he was lifting me off of whatever I was sitting on. And he had picked me up and he was holding me by the butt. And then instead of like having me off to the side kind of on his hip, he kind of had me in front of him.

The military judge found Appellant not guilty of the alleged sexual acts in JZ's bedroom. However, he found Appellant guilty of one instance of alleged sexual contact in the laundry room, in accordance with JZ's recall testimony. Significantly, unlike the alleged bedroom incidents, JZ's contemporary messages to Appellant in 2015 corroborated that something significant occurred between her and

Appellant in the laundry room. In addition, her testimony regarding this incident was more certain, specific, and definite than her description of the bedroom incidents. We are also cognizant that the military judge observed JZ's testimony and evidently carefully considered her credibility. Coupled with Appellant's response of "good" when JZ promised not to "tell anybody" about them in 2015, Appellant immediately sending instructions on how to delete Facebook messages, and other evidence of Appellant's sexual interest in JZ, we conclude the evidence supports the military judge's findings.

c. Conclusion as to Legal and Factual Sufficiency

Drawing every reasonable inference from the evidence of record in favor of the Government, we conclude the evidence was legally sufficient to support Appellant's convictions for sexual abuse of a child by communicating indecent language and by sexual contact. *See Robinson*, 77 M.J. at 297–98. Additionally, having weighed the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt. *See Turner*, 25 M.J. at 325.

B. Ambiguous Finding

1. Additional Background

Specification 3 of the Charge alleged that Appellant:

> [D]id, at or near Fanna, Italy, *on divers*

> *occasions*, between on or about 7 August 2014 and on or about 21 January 2015, commit lewd acts upon [JZ], a child who had not attained the age of 12 years, to wit: intentionally touching her buttocks with his hands, with an intent to gratify his sexual desire.

(Emphasis added).

JZ's initial testimony indicated Appellant touched her on her buttocks and elsewhere multiple times in the laundry room. As described above, after both parties had rested, the military judge exercised his authority under Article 46, UCMJ, 10 U.S.C. § 846, to recall JZ for additional testimony. During that recall testimony, the military judge had JZ focus on "the first time" Appellant touched JZ, which JZ confirmed was in the laundry room. JZ again described how Appellant put his arms around her and held her by her buttocks on that occasion.

The military judge found Appellant guilty of Specification 3 by exceptions and substitutions. According to the modified specification, the military judge found that Appellant:

> [D]id, at or near Fanna, Italy, in the laundry room of the family home, on the day of the first alleged touching incident, between on or about 7 August 2014 and on or about 21 January 2015, commit a lewd act upon [JZ], a child who had not attained the age of 12 years, to wit: putting his arms

> around [JZ], and intentionally touching and holding onto her buttocks with his hands, with an intent to gratify his sexual desire.

2. Law

"Whether a verdict is ambiguous and thus precludes a [Court of Criminal Appeals] from performing a factual sufficiency review is a question of law reviewed de novo." *United States v. Ross*, 68 M.J. 415, 417 (C.A.A.F. 2010) (emphasis and citation omitted).

"One or more words or figures may be excepted from a specification, and, when necessary, others substituted, if the remaining language of the specification, with or without substitutions, states an offense by the accused which is punishable by court-martial." *United States v. Trew*, 68 M.J. 364, 367 (C.A.A.F. 2010) (quoting Rule for Courts-Martial (R.C.M.) 918(a)(1), Discussion).

"[W]hen the phrase 'on divers occasions' is removed from a specification, the effect is that 'the accused has been found guilty of misconduct on a single occasion and not guilty on the remaining occasions.'" *United States v. Wilson*, 67 M.J. 423, 428 (C.A.A.F. 2009) (quoting *United States v. Augspurger*, 61 M.J. 189, 190 (C.A.A.F. 2005)). "If there is no indication on the record which of the alleged incidents forms the basis of the conviction, then the findings of guilt are ambiguous and the Court of Criminal Appeals cannot perform a factual sufficiency review." *Id.* (citing

United States v. Walters, 58 M.J. 391, 396–97 (C.A.A.F. 2003)). "[T]he remedy for a *Walters* violation is to set aside the finding of guilty to the affected specification and dismiss it with prejudice." *United States v. Scheurer*, 62 M.J. 100, 112 (C.A.A.F. 2005) (footnote omitted).

3. Analysis

Appellant was charged with intentionally touching JZ's buttocks on divers occasions. The military judge excepted the "on divers occasions" language and found Appellant guilty of touching JZ on only a single occasion, "on the day of the first alleged touching incident" which occurred "in the laundry room." By specifying in the substituted language the single occasion for which he was finding Appellant guilty, the military judge ensured the record indicated which alleged incident formed the basis of the conviction, and thereby avoided a fa- tally ambiguous finding.

Appellant contends the finding is nevertheless fatally ambiguous because the military judge did not identify the date on which he found the unlawful touching occurred. However, we find nothing in *Walters* or its progeny that requires that a date be used to "reflect the specific instance of conduct upon which [the] modified findings are based." *Walters*, 58 M.J. at 396. In many cases, a witness may provide testimony of sufficient strength to prove guilt beyond reasonable doubt, yet be unable to recall the date of the event with any specificity. In this case, JZ testified specifically to Appellant's actions on the first occasion

that he touched her in the laundry room, and the military judge made clear that single identifiable incident was the basis for his non-divers findings. That is an adequate indication for this court to perform its factual sufficiency review, and it is what *Walters* requires.

C. Equal Access to Evidence

1. Additional Background

At trial, AS testified that when she discovered the first exchange of Facebook messages between Appellant and JZ in 2015, she made screenshots of messages on JZ's Facebook account. AS then emailed these screenshots to herself, printed them out, and provided these printouts to the Family Advocacy office and to the AFOSI at Aviano AB. After AS discovered Appellant's second Facebook exchange with JZ in 2017, she found that the 2015 conversation had been deleted. However, she still had her email to herself from 2015.

At the conclusion of AS's direct examination, trial defense counsel informed the military judge that this was the first time they had learned about her email to herself, which the Defense had not received in discovery, although they had received the screenshots of the messages. Trial defense counsel stated the Defense would not be prepared to cross-examine AS "until we get that discovery from the government." Senior trial counsel explained the email had not been turned over because it was not in the possession of the Government; AS had accessed the email herself. The

military judge recessed the court-martial for 43 minutes in order for AS to provide the email to the parties. Trial defense counsel then proceeded with cross-examination without further delay.

Subsequently, Special Agent (SA) IP of the AFOSI testified regarding various steps he took to investigate the case. On cross-examination, senior trial defense counsel asked SA IP whether he had attempted to download JZ's entire Facebook profile. SA IP testified that he had, through a process offered by Facebook itself which he described as a "dump" of "every single piece of information or activity that [JZ] ever did on Facebook."[5] However, SA IP testified he did not review the entire "dump." He began to review the chat portion, but found "it was hard to tell who [was] sending and who was receiving the messages, because instead of having a name, you had a number." As a result, SA IP decided to rely on screenshots or "snippets" that the agents created from the messages displayed onscreen, because those "would be a good representation of what the communication was." However, these screenshots would not have included any deleted messages. SA IP did not know if the "dump" would have included deleted messages.

In response to questions from the military judge,

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[5] On redirect examination, SA IP explained that AS had provided oral and written consent for the Facebook "dump," although he understood the scope was limited to Facebook messages between Appellant and JZ.

SA IP testified that as of Appellant's trial, AFOSI no longer had the Facebook "dump." He explained that he "never saved it out of the computer that we have, and that computer was giving us a lot of issues and basically broke down a couple of times, and the information was lost." SA IP further testified that the AFOSI could obtain another "dump" from Facebook, but indicated he had not done so because the report of investigation had been closed and delivered to the legal office, which had not made such a request.

At no point during the trial did trial defense counsel object that they had been unaware of the Facebook "dump," request that the Government obtain another "dump," or allege any discovery or production violation or seek any other remedy with respect to the "dump."

2. Law

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The United States Supreme Court has extended *Brady*, clarifying "that the duty to disclose such evidence is applicable even though there has been no request by the accused . . . and that the duty encompasses impeachment evidence as well as exculpatory evidence." *Strickler v. Greene*, 527 U.S. 263, 280 (1999); *see United States v. Claxton*, 76 M.J. 356, 359 (C.A.A.F. 2017).

"A military accused also has the right to obtain favorable evidence under [Article 46, UCMJ] . . . as implemented by R.C.M. 701–703." *United States v. Coleman*, 72 M.J. 184, 186–87 (C.A.A.F. 2013) (footnotes omitted). Article 46, UCMJ, and these implementing rules provide a military accused statutory discovery rights greater than those afforded by the United States Constitution. *See id.* at 187 (additional citation omitted) (citing *United States v. Roberts*, 59 M.J. 323, 327 (C.A.A.F. 2004)). With respect to discovery, R.C.M. 701(a)(2)(A) requires the Government, upon defense request, to permit the inspection of, *inter alia*, any documents "within the possession, custody, or control of military authorities, and which are material to the preparation of the defense." With respect to production, each party is entitled to the production of evidence which is relevant and necessary. R.C.M. 703(f)(1); *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (citation omitted). Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "is of consequence in determining the action." Mil. R. Evid. 401. "Relevant evidence is 'necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue.'" *Rodriguez*, 60 M.J. at 246 (quoting R.C.M. 703(f)(1), Discussion).

Each party to a court-martial must have an equal opportunity to inspect evidence and to obtain witnesses and other evidence. *United States v.*

Stellato, 74 M.J. 473, 483 (C.A.A.F. 2015) (citing R.C.M. 701(e); Article 46, UCMJ). The United States Court of Appeals for the Armed Forces (CAAF) "has interpreted this requirement to mean that the 'Government has a duty to use good faith and due diligence to preserve and protect evidence and make it available to an accused.'" *Id.* (quoting *United States v. Kern*, 22 M.J. 49, 51 (C.M.A. 1986)). "The duty to preserve includes: (1) evidence that has an apparent exculpatory value and that has no comparable substitute; (2) evidence that is of such central importance to the defense that it is essential to a fair trial; and (3) statements of witnesses testifying at trial." *Id.* (citations omitted).

A party's failure to move to compel discovery or for production of witnesses or evidence before pleas are entered constitutes waiver. R.C.M. 905(b)(4); R.C.M. 905(e); *see United States v. Hardy*, 77 M.J. 438, 440–42 (C.A.A.F. 2018) (citations omitted) (concluding that where R.C.M. 905(e) refers to "waiver" it means "waiver" rather than forfeiture).

3. Analysis

Appellant's assignment of error raises three potential issues with respect to discovery and preservation of evidence related to JZ's Facebook account: (1) the Defense's access to the account; (2) the Government's failure to preserve data in the account; and (3) the Government's failure to preserve the information "dump" SA IP obtained from Facebook. We consider each issue in turn.

On appeal, Appellant contends the Government violated his right to equal access to JZ's Facebook account. We generally agree with Appellant that the AFOSI's continued access to JZ's Facebook account during the investigation and trial brought it within the Government's control for purposes of discovery under R.C.M. 701(a). *See Stellato*, 74 M.J. at 484–85 (footnotes omitted). How- ever, we find no support for Appellant's claim that "the [D]efense was never provided access to JZ's Facebook account, or with any opportunity to inspect her Facebook account and to independently verify the authenticity of the messages between JZ and Appellant." What is clear is that, with the possible exception of trial defense counsel's objection to not receiving AS's email to herself from 2015, the Defense never moved to compel discovery or production of this evidence, either before entry of pleas or after. Accordingly, under R.C.M. 905(b)(4), R.C.M. 905(e), and *Hardy*, Appellant waived the purported denial of access he seeks to raise on appeal.

Appellant also suggests the Government failed in its duty to preserve evidence from JZ's Facebook account. He contends it is possible that either AS or JZ could have accessed the account and deleted certain messages, distorting the context and meaning of the apparent exchanges between Appellant and JZ. He notes the AFOSI failed to subpoena Facebook records, obtain a forensic analysis of the account, or seize Appellant's own electronic devices and any evidence therein. However, there is no indication Appellant requested such a subpoena or production of

such a forensic analysis, and Appellant presumably had access to his own Facebook account and electronic devices. Trial defense counsel certainly could, and did, comment in closing argument on alleged deficiencies in the investigation. However, the Defense waived any purported discovery or production violations by failing to move for relief at trial.

We acknowledge the AFOSI's failure to preserve the "dump" of JZ's Facebook account had the potential to violate the Government's obligation to exercise "good faith and due diligence to preserve and protect evidence and make it available to an accused." *Stellato*, 74 M.J. at 483 (quoting *Kern*, 22 M.J. at 51). The fact that SA IP found the report hard to read does not negate its potential significance for the trial. However, once again, the Defense failed to move to compel or seek relief as a result of the loss of the "dump," waiving the issue. On appeal, Appellant argues "the record suggests that the 'dump' did not become known to defense counsel until [SA] IP's testimony." However, the Defense made no such claim at trial, and we find the record suggests the Defense was not at all surprised by this testimony. Senior trial defense counsel specifically asked SA IP whether he had attempted to download JZ's entire Facebook profile, which led directly to SA IP's testimony regarding the "dump"—strongly suggesting this had been covered in pretrial interviews. In notable contrast to AS's testimony about her email in 2015, the Defense made no objection, complaint, or expression of surprise. At no point did the Defense

move for a sanction against the Government, or request a replacement "dump" after SA IP testified in response to the military judge's questioning that such a request was possible.

In general, a valid waiver leaves no error to correct on appeal. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (quoting *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009)). We recognize our authority pursuant to Article 66, UCMJ, 10 U.S.C. § 866, to pierce waiver in order to correct a legal error in the proceedings. *See Hardy*, 77 M.J. at 443. Assuming *arguendo* the AFOSI's failure to preserve the "dump" was an error, we decline to pierce Appellant's waiver in this case. There is no indication the Defense was surprised by SA IP's testimony. Trial defense counsel made no objection and sought no relief. Instead, in closing argument trial defense counsel referred to the AFOSI's failure to review the "dump" in order to impugn the quality of the investigation. Accordingly, we find this assignment of error warrants no relief.

D. Impartiality of the Military Judge

1. Law

We review a military judge's decision not to recuse himself for an abuse of discretion. *See United States v. Sullivan*, 74 M.J. 448, 454 (C.A.A.F. 2015). "A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." *United States v. Ellis*, 68 M.J. 341, 344

(C.A.A.F. 2010) (citing *United States v. Mackie*, 66 M.J. 198, 199 (C.A.A.F. 2008)). However, "[w]hen an appellant…does not raise the issue of disqualification until appeal, we examine the claim under the plain error standard of review." *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011) (citing *United States v. Jones*, 55 M.J. 317, 320 (C.A.A.F. 2001)). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice." *Id*. (citing *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008)).

"An accused has a constitutional right to an impartial judge." *United States v. Wright*, 52 M.J. 136, 140 (C.A.A.F. 1999) (citations omitted). R.C.M. 902 governs disqualification of the military judge. R.C.M. 902(b) sets forth five specific circumstances in which a "military judge shall disqualify himself or herself." In addition, R.C.M. 902(a) requires disqualification "in any proceeding in which th[e] military judge's impartiality might reasonably be questioned." Disqualification pursuant to R.C.M. 902(a) is determined by applying an objective standard of "whether a reasonable person knowing all the circumstances would conclude that the military judge's impartiality might reasonably be questioned." *Sullivan*, 74 M.J. at 453 (citing *United States v. Hasan*, 71 M.J. 416, 418 (C.A.A.F. 2012)).

"There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle." *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001) (citation omitted). A military judge "should not leave [a] case 'unnecessarily.'" *Sullivan*, 74 M.J. at 454 (quoting

R.C.M. 902(d)(1), Discussion). "Although a judge has a duty not to sit when disqualified, the judge has an equal duty to sit on a case when not disqualified." *United States v. Witt*, 75 M.J. 380, 383 (C.A.A.F. 2016) (citing *Laird v. Tatum*, 409 U.S. 824, 837 (1972)).

"[A] military judge must not become an advocate for a party but must vigilantly remain impartial during the trial." *United States v. Ramos*, 42 M.J. 392, 396 (C.A.A.F. 1995). However, "a military judge is not 'a mere referee' but, rather, properly may participate actively in the proceedings." *Id.* (quoting *United States v. Graves*, 1 M.J. 50, 53 (C.M.A. 1975)). "Thus, while a military judge must maintain his fulcrum position of impartiality, the judge can and sometimes must ask questions in order to clear up uncertainties in the evidence or to develop the facts further." *Id.* (citations omitted); *see also* Mil. R. Evid. 614 (permitting the military judge to call and examine witnesses).

2. Analysis

On appeal, Appellant contends that "[t]hroughout the trial, the military judge assisted the Government in proving its case," which created a disqualifying appearance of bias under R.C.M. 902(a). Appellant cites several instances, including *inter alia* occasions on which the military judge: explained why he was sustaining a defense objection to a question calling for speculation and suggested a different line of questioning; interrupted trial defense counsel's cross-examination of JZ to ask his own clarifying questions; encouraged trial defense counsel to move on from an

unsuccessful effort to impeach AS's testimony on cross-examination; questioned JZ about her memory of sending Facebook messages in 2015 in response to a defense objection to the admission of those messages; and interrupted trial counsel's direct examination of JZ to ask his own questions. In addition, Appellant cites two other incidents that warrant more detailed explanation.

First, during the direct examination of JZ, senior trial counsel offered Prosecution Exhibit 5, which was a copy of Facebook messages between Appellant and JZ from 2017. Senior trial defense counsel objected on the basis of authenticity and foundation. In response, senior trial counsel argued JZ had laid an adequate foundation because she "indicated familiarity with the conversation that's captured in the exhibit." In response to questioning by the military judge, senior trial counsel acknowledged the exhibit had been created at the AFOSI detachment. The military judge suggested that JZ's testimony was inadequate to authenticate all 261 pages of the exhibit. When senior trial counsel proposed to "ask [JZ] some additional questions to clarify how a conversation went on for a month," the military judge responded:

> I will just tell you, it would be a lot more helpful for me, maybe this is a hint, if you can bring in an [AFOSI] agent, who took these pictures and told me this is from her Facebook account or [Appellant's] Facebook account and this is what we downloaded with regard to their

> conversation, then I have [JZ] saying yes, we did converse during that month . . . . That's the stuff that's going to help me, but I need to know this is truly the conversation that she had with [Appellant]. She has a memory and I am sure you are going to get to that, what she remembers. I think you're going to need that, but if you want to admit this document, then I need to know where it came from, from somebody, besides [JZ], because she can't remember this entire document. That's what I'm dealing with so, just so I lay it all out on the table, that is my problem.

The military judge then conditionally admitted Prosecution Exhibit 5, pending testimony from a witness who could testify to where the exhibit "came from." The exhibit was ultimately admitted without further objection, following the testimony of the agent and the paralegal who created the images.

The second incident that warrants explanation occurred after the Government recalled AS for additional testimony. Trial defense counsel cross-examined AS about whether she remembered reading certain messages from JZ to Appellant. Senior trial counsel objected to a question on the basis of "improper impeachment." When the military judge asked about the basis, senior trial counsel explained that trial defense counsel's question implied the messages were written in a particular order, although

that order had not been established by AS's testimony. In response, the military judge stated:

> Okay. That is not lost on the court, and you get to come up and ask redirect. This is cross-examination. If defense counsel wants to portray or use their questions to try to trick a witness, that is not lost on the court and it's obviously not lost on you. So, when you get back up, you can clarify. I personally don't think it makes defense counsel look good when they are trying to do that, because I'm trying to understand what's going on. So, shoving words into people's mouths doesn't necessarily help me, but it is cross-examination and that is what he is permitted to do.

Senior trial counsel responded, "Understood, Your Honor." The military judge then added, "And sometimes, [the cross-examination] is very successful in what it gets out. So, enough of the speech. I am overruling the objection." Trial defense counsel then continued with cross-examination.

Appellant did not raise the issue of the military judge's disqualification at trial. Accordingly, we review the military judge's decision not to disqualify himself *sua sponte* for plain error. *See Martinez*, 70 M.J. at 157 (citation omitted). Several factors contribute to our conclusion that the military judge did not commit a plain or obvious error.

First, "[f]ailure to object at trial to alleged partisan

action on the part of a military judge may present an inference that the defense believed that the military judge remained impartial." *United States v. Foster*, 64 M.J. 331, 333 (C.A.A.F. 2007) (citation omitted). We find trial defense counsel's failure to raise the issue at trial to be some indication that the Defense did not believe the military judge was, or appeared to be, biased in favor of the Government.

Second, the military judge also directed explanatory comments on evidence to the Defense. In particular, at one point the military judge assisted senior defense counsel in responding to trial counsel's objection to an exhibit the Defense sought to introduce. Thus, the military judge exhibited a tendency to facilitate the introduction of relevant evidence, regardless of which party was the proponent.

Third, it is highly significant that Appellant elected to be tried by the military judge alone. There were no court members present to observe and potentially be influenced by the manner in which the military judge interacted with the parties. Moreover, as the trier of fact, the military judge had an equal right to the parties to seek evidence, call witnesses, and ask questions. *See* 10 U.S.C. § 846(a). To the extent the military judge, at times, steered counsel toward witnesses and lines of questioning that the military judge believed would be useful, the fact that the military judge could have called the witnesses and asked the questions himself greatly mitigates any perception of a desire to assist one side or another.

We find most of the military judge's actions that the Appellant complains of on appeal to be relatively innocuous, particularly in a judge-alone trial. The military judge was not shy about interjecting to ask his own questions of witnesses or share his thoughts with counsel, but this was generally in aid of developing the evidence in his role as the trier of fact. The fact that the evidence he developed in doing so tended to be helpful to one party or another does not, in itself, evince partiality. *See, e.g.*, *United States v. Acosta*, 49 M.J. 14, 17–18 (C.A.A.F. 1998) (finding no appearance of partiality in a court-martial with members despite the military judge asking questions that "eviscerated [the] appellant's defense of entrapment").

The military judge's comments to senior trial counsel regarding laying a foundation for Prosecution Exhibit 5 warrant an additional comment. In light of the military judge's duty to remain vigilantly impartial, and to appear so, the military judge's suggestion that he was giving a "hint" to the Government as to how to introduce evidence was ill-advised. An observer might interpret such a term to mean the military judge was choosing to assist one of the parties, despite his authority to call witnesses and ask questions himself. Nevertheless, we find that this comment, in the context of the entire trial, would not cause a reasonable observer with knowledge of all the circumstances to doubt the strong presumption the military judge was impartial.

Similarly, we find the military judge's suggestion

that trial defense counsel's cross-examination of AS was "shoving words" into her mouth, which did not make the Defense "look good," also does not breach the presumption of impartiality. "[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky v. United States*, 510 U.S. 540, 555 (1994). The military judge's comments do not suggest hostility toward the Defense, but merely some criticism toward trial defense counsel's cross-examination tactics. Moreover, immediately afterwards the military judge acknowledged such tactics could sometimes be effective, and then overruled the Government's objection. In addition, the context for this comment was not a tirade against the Defense, but an explanation to senior trial counsel as to why her objection to the Defense's questioning was ill-founded. Again, in the context of the entire trial, this comment would not cause an informed reasonable observer to doubt the military judge's impartiality.

Accordingly, we find the military judge's actions that Appellant cites do not, individually or collectively, reasonably call into question the military judge's impartiality. Appellant has thus failed to meet his burden to demonstrate the military judge failed to find *sua sponte* that he was disqualified from presiding at Appellant's court-martial.

E. Sentence Severity

1. Law

We review issues of sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006) (citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). We may affirm only as much of the sentence as we find correct in law and fact and determine should be approved on the basis of the entire record. Article 66(c), UCMJ, 10 U.S.C. § 866(c). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (en banc) (alteration in original) (quoting *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009) (per curiam)). Although we have great discretion to determine whether a sentence is appropriate, we have no authority to grant mercy. *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted).

2. Analysis

Trial counsel recommended the military judge sentence Appellant to a dishonorable discharge, confinement for four years, reduction to the grade of E-1, and total forfeiture of pay and allowances. The military judge sentenced Appellant to a dishonorable discharge, confinement for seven years, reduction to the grade of E-1, and forfeiture of all pay and allowances. Appellant contends the fact that "the military judge sentenced Appellant to more confinement than requested by the trial counsel renders his sentence inappropriately severe," and

requests "appropriate sentencing relief." We disagree.

Trial counsel's recommended sentence is simply that, trial counsel's recommendation; it has no binding effect on the military judge. Appellant suggests his sentence resulted from the military judge improperly using information that arose during the trial, such as emotional problems JZ experienced that were not attributable to Appellant and testimony that Appellant asserts was contrary to other evidence. However, the evidence Appellant cites was not improperly admitted, and there is no indication the military judge considered it outside its proper context. Moreover, "[m]ilitary judges are presumed to know the law and to follow it absent clear evidence to the contrary." *United States v. Rodriguez*, 60 M.J. 87, 90 (C.A.A.F. 2004) (citing *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)). Appellant's conjectures notwithstanding, we find no basis to reach a contrary conclusion in this case.

The test for an inappropriately severe sentence rests not on trial counsel's recommendation or speculation about the military judge's thought process, but is instead based on what the record reveals about "the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *Sauk*, 74 M.J. at 606. In this case, Appellant exploited his access to his nine-year-old stepdaughter, taking advantage of her mother's absence to hold JZ's buttocks and wrap his arms around her body with the intent to gratify his sexual

desire. After AS discovered the suspicious Facebook messages, JZ was too frightened to tell investigators what Appellant had done. Nevertheless, Appellant was not dissuaded from continuing to contact JZ after the divorce, secretly sending indecent communications to the 11-year-old JZ expressing his attraction and sexual desire for her, in order to once again gratify his sexual desires. In an unsworn statement presented through her counsel, JZ described to the military judge how Appellant's actions made her "fear the world." Appellant's offenses were serious and carried a maximum imposable punishment that included confinement for 35 years as well as a dishonorable discharge, reduction, and forfeitures. The defense sentencing case was not particularly strong; Appellant presented information about his life and career,[6] one character statement from a supervisor indicating he performed well at work, and brief telephonic testimony by Appellant's father. The military judge certainly imposed a heavy sentence, but having given individualized consideration to Appellant and all the circumstances of the case, we cannot say the sentence was inappropriately severe as a matter of law.

F. Failure to Pay Deferred and Waived Forfeitures

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[6] At the time of his conviction Appellant had served less than five years in the Air Force. His service included one deployment to Afghanistan, but was somewhat marred by two letters of reprimand.

On 28 January 2019, pursuant to Articles 57(a) and 58b, UCMJ, the convening authority granted Appellant's request to defer automatic forfeitures from 2 November 2018 until action, and to waive automatic forfeitures for the benefit of Appellant's dependent child until the earlier of six months or the expiration of Appellant's term of service.[7] However, in a sworn declaration dated 28 April 2020, Appellant asserted that although the required information had been provided, as of that date Appellant's pay had not been delivered in accordance with the convening authority's direction, despite the efforts of his attorneys.[8] Accordingly, Appellant requested that this court provide sentence relief pursuant to our "power and responsibility" under Article 66(c), UCMJ, 10 U.S.C. § 866(c), to "determine whether the adjudged and approved sentence is appropriate, based on a review of the entire record." *See United States v. Gay*, 74 M.J. 736, 742 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). In response, the Government contends the CAAF's recent decision in *United States v. Jessie*, 79 M.J. 437, 441 (C.A.A.F. 2020), precludes our consideration of Appellant's claim. We agree with the Government.

In *Jessie*, the CAAF explained the general rule

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[7] The convening authority denied Appellant's request to defer his reduction in grade, an issue that is addressed in detail below.

[8] This court granted Appellant's motion to attach his declaration to the record.

"that the [Courts of Criminal Appeals] may not consider anything outside of the 'entire record' when reviewing a sentence under Article 66(c), UCMJ." *Id.* (citation omitted) (quoting *United States v. Fagnan*, 30 C.M.R. 192, 194 (C.M.A. 1961)). The CAAF explained that for purposes of Article 66, UCMJ, the "entire record" includes the "record of trial" and "matters attached to the record" in accordance with R.C.M. 1103(b)(2) and (3), as well as "briefs and arguments that government and defense counsel (and the appellant personally) might present regarding matters in the record of trial and 'allied papers.'" *Id.* at 440–41 (citing *United States v. Healy*, 26 M.J. 394, 396 (C.M.A. 1988)). Appellant's 28 April 2020 factual declaration is not part of the "entire record" as defined in *Jessie*, and is therefore presumptively outside the scope of our Article 66(c), UCMJ, review.

Appellant's reply brief raises two arguments in response. First, he contends the fact that the convening authority's decision granting the deferment and waiver is in the record gives this court "jurisdiction to consider whether the Government is complying with the convening authority's directive." The CAAF in *Jessie* recognized that "some [of its] precedents have allowed the [Courts of Criminal Appeals] to supplement the record when deciding issues that are raised by materials in the record," specifically with affidavits or hearings ordered pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967) (per curiam). *Jessie*, 79 M.J. at 442. In *Jessie*, the CAAF declined to disturb this line of

precedent. *Id*. at 444. However, in order to fall under this exception, we understand *Jessie* to require that the apparent or alleged *error* appears within the record of trial. It is not enough that the alleged error merely relates to a pretrial, trial, or post-trial event that is reflected in the record. Appellant's interpretation would essentially rob the general rule set forth in *Jessie* of its meaning, as seemingly any issue related to an appellant's sentence would be linked to a decision, directive, or event in the record of trial.

Second, Appellant notes that the CAAF in *Jessie* recognized an additional exception in a line of precedent "allow[ing] appellants to raise and present evidence of claims of cruel and unusual punishment and violations of Article 55, UCMJ, even though there was nothing in the record regarding those claims." *Id*. at 444. However, Appellant's assignment of error made no allegation of cruel or unusual punishment in violation of the Eighth Amendment[9] or Article 55, UCMJ; instead, it relied specifically on our Article 66(c), UCMJ, sentence appropriateness review pursuant to *Gay* and *Tardif*. Moreover, even in his reply brief Appellant entirely fails to demonstrate how the Government's failure to make a timely payment in accordance with the convening authority's deferment and waiver resulted in punishment either "'incompatible with the evolving standards of decency

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[9] U.S. CONST. amend. VIII.

that mark the progress of a maturing society' or . . . 'which involve[d] the unnecessary and wanton infliction of pain.'" *United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102–03 (1976)). We find Appellant's fleeting reference to the existence of an exception for the Eighth Amendment and Article 55, UCMJ, inadequate to bring his deferment and forfeiture grievance within the cruel and unusual punishment exception recognized in *Jessie*.[10]

Accordingly, we conclude that under *Jessie* we are without jurisdiction to review Appellant's allegation that the Government wrongfully failed to defer and waive his automatic forfeitures, as directed by the convening authority.

G. Miramar Brig Policy Regarding Contact with Minors

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[10] We do not discount the possibility that depriving an unconfined servicemember of all pay and allowances while requiring him to continue service might in some circumstances violate Article 55, UCMJ, or the Eighth Amendment. *See United States v. Jobe*, 10 C.M.A. 276, 279 (C.M.A. 1959); *United States v. Nelson*, 22 M.J. 550, 551 (A.C.M.R. 1986) (footnote and citation omitted) ("It is *per se* cruel and unusual under contemporary standards of decency . . . to deprive an officer of all pay and allowances without either subjecting him to confinement or immediately releasing him from active duty. . . ."). However, that is not Appellant's situation.

1. Additional Background

In his sworn declaration dated 28 April 2020 to this court, Appellant describes how Miramar Brig policies restricting contact by sex offenders with minors have affected his ability to communicate with his son, who was born in 2017.[11] According to Appellant, Miramar Brig policies generally forbid Appellant to have contact with any minor, including his son. Appellant was able to request specific permission to have contact with his son if he met certain requirements, including *inter alia* obtaining JZ's concurrence. Without JZ's concurrence, the Miramar Brig's clinical therapist would not provide a "favorable recommendation" on the request. In addition, according to Appellant, he was told he cannot have contact with his son until he completes at least six months in the sex offender treatment program at the Miramar Brig. However, in order to enroll in the program Appellant is required to admit that he is guilty of the offenses. Furthermore, other confinees with shorter sentences than Appellant have higher priority for enrollment in the program. As a result, Appellant has not had contact with his son since he arrived at the Miramar Brig.

2. Law

In general, as described above in connection with the preceding issue, un- der Article 66(c), UCMJ, "the [Courts of Criminal Appeals] may not consider anything outside of the 'entire record' when reviewing a sentence under Article 66(c), UCMJ." *Jessie*, 79 M.J.

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[11] AS was not the mother of Appellant's son.

at 441 (citation omitted). The CAAF has recognized two exceptions to this rule. First, "some [of the CAAF's] precedents have allowed the [Courts of Criminal Appeals] to supplement the record when deciding issues that are raised by materials in the record." *Id.* at 442. Second, the CAAF has "allowed appellants to raise and present evidence of claims of cruel and unusual punishment and violations of Article 55, UCMJ, even though there was nothing in the record regarding those claims." *Id.* at 444.

We review de novo whether the conditions of an appellant's confinement violate the Eighth Amendment or Article 55, UCMJ. *United States v. Wise*, 64 M.J. 468, 473 (C.A.A.F. 2007) (citing *United States v. White*, 54 M.J. 469, 471 (C.A.A.F. 2001)).

"Both the Eighth Amendment and Article 55, UCMJ, prohibit cruel and unusual punishment. In general, we apply the Supreme Court's interpretation of the Eighth Amendment to claims raised under Article 55, UCMJ, except where legislative intent to provide greater protections under Article 55, UCMJ, is apparent." *Gay*, 74 M.J. at 740 (citing *United States v. Avila*, 53 M.J. 99, 101 (C.A.A.F. 2000)). "[T]he Eighth Amendment prohibits two types of punishments: (1) those 'incompatible with the evolving standards of decency that mark the progress of a maturing society' or (2) those 'which involve the unnecessary and wanton infliction of pain.'" *Lovett*, 63 M.J. at 215 (quoting *Estelle*, 429 U.S. at 102–03). To demonstrate that an appellant's confinement conditions violate the Eighth Amendment, an

appellant must show:

> (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [his] health and safety; and (3) that he "has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, UCMJ, 10 USC § 938 [2000]."

Id. (omission and second alteration in original) (citations omitted).

3. Analysis

Appellant contends the Miramar Brig policies restricting his contact with his son violate his constitutional interest, protected by the Fifth Amendment[12] Due Process Clause, in the companionship and upbringing of his child. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000) (citations omitted). Appellant applies the four factors articulated in *Turner v. Safley*, 482 U.S. 78, 89–91 (1987), and concludes the restrictions are not "reasonably related to legitimate penological interests." *Id*. at 89.[13] The

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[12] U.S. CONST. amend. V.

[13] These factors include: (1) whether there is "a 'valid, rational connection' between theprison regulation and the legitimate governmental interest put forward to justify it;" (2) "whether there are alternative means of exercising the right that remain open to prison

Government responds that Appellant's declaration which forms the basis for this constitutional claim is outside the "entire record" as the CAAF explained that term in *Jessie*, and therefore this court lacks jurisdiction to consider this constitutional claim. *See Jessie*, 79 M.J. at 440–41(citation omitted).

Again, we agree with the Government. Appellant's argument is similar to the particular argument the appellant made in *Jessie*. *See id*. at 439. In *Jessie*, the appellant, who was confined at the Joint Regional Confinement Facility at Fort Leavenworth, argued a policy restricting sexual offenders from having any contact with minors, and requiring him to accept responsibility for his offenses in order to enroll in sex offender treatment, violated his First Amendment[14] and Fifth Amendment rights. *Id*. The Army Court of Criminal Appeals declined to consider the appellant's constitutional claims. *Id*. The CAAF affirmed, finding the Army court had no authority under Article 66(c), UCMJ, to consider materials from outside the record that were presented in support of these constitutional claims. *Id*. at 444. Similarly, the Miramar Brig policies of which Appellant complains in the instant case are not contained in his court- martial record.

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inmates;" (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources;" and (4) "the absence of ready alternatives" to the regulation in question. *Turner*, 482 U.S. at 89–91 (citations omitted).

[14] U.S. CONST. amend. I.

Under *Jessie*, we lack the authority to consider his 28 April 2020 declaration addressing an issue that is not in the record. *See id.* at 441–43. Accordingly, Appellant cannot prevail on these claims at this court.

However, our review of this issue is not complete. Although Appellant's assignment of error focuses on his "fundamental parental rights," and contains no analysis regarding cruel or unusual punishment or other violation of the Eighth Amendment or Article 55, UCMJ, the heading of this portion of Appellant's brief suggests the Miramar Brig policy violates Article 55, UCMJ.[15] Although we doubt that such a hollow assertion of a violation of Article 55, UCMJ, is sufficient to bring Appellant's claim within the second exception to the general rule explained in *Jessie*, and thereby enable us to consider Appellant's declaration, *see id.* at 444, we will assume *arguendo* that it does so.

We find Appellant's claims to be entirely insufficient to warrant relief under Article 55, UCMJ. Appellant's declaration implicates none of the specific prohibitions enumerated in the article: flogging,

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[15] The heading reads in full:

> THE MIRAMAR BRIG POLICY PREVENTING APPELLANT FROM SEEING HIS TODDLER SON AND REQUIRING HIM TO ADMIT GUILT IN ORDER TO COMPLETE SEX OFFENDER TREATMENT IS UNCONSTITUTIONAL AND/OR A VIOLATION OF ARTICLE 55,UCMJ.

branding, marking, tattooing, or the improper use of irons. *See* 10 U.S.C. § 855. As for the article's prohibition on "other cruel or unusual punishment[s]," *id*., we "apply the Supreme Court's interpretation of the Eighth Amendment." *Gay*, 74 M.J. at 740 (citation omit- ted). Appellant fails to demonstrate punishment "'incompatible with…evolving standards of decency,'" "'unnecessary and wanton infliction of pain,'" or an "act or omission resulting in the denial of necessities." *Lovett*, 63 M.J. at 215 (footnote omitted) (quoting *Estelle*, 429 U.S. at 102–03). Accordingly, even if this court could consider his 28 April 2020 declaration with regard to this issue, Appellant would be entitled to no relief.

In reaching our conclusions, we make no judgment as to the merits of Appellant's constitutional claims. Appellant may have recourse to courts with the authority to address these claims. However, under *Jessie*, this court is not one of them.

H. Denial of Request to Defer Reduction in Grade

1. Additional Background

Appellant was sentenced on 19 October 2018. On 7 November 2018, Appellant requested through counsel that the convening authority defer the adjudged reduction in grade pursuant to Article 57(a)(2), UCMJ, and R.C.M. 1101(c) until action, and that the convening authority waive automatic forfeitures for a period of six months pursuant to Article 58b(b), UCMJ, for the benefit of Appellant's dependent son.

The special court-martial convening authority (SPCMCA) and his staff judge advocate (SJA) both recommended approval of the requested deferment and waiver. On 7 January 2019, Appellant, through counsel, supplemented this request with additional information, and clarified that he sought deferment of the automatic forfeitures in addition to deferment of the reduction in grade. On 24 January 2019, the convening authority's SJA recommended approval of the requested deferment of the reduction and forfeitures as well as the waiver of forfeitures in order "[t]o maximize assistance to [Appellant's] son." A copy of this recommendation, as well as a draft memorandum for the convening authority's signature approving the entire deferment and forfeiture request, was attached to the copy of the SJA's recommendation also dated 24 January 2019 which was served on the Defense.

On 28 January 2019, the convening authority deferred the automatic forfeitures until action, and waived the automatic forfeitures for the benefit of Appellant's dependent son for a period of six months, expiration of Appellant's term of service, or Appellant's release from confinement, whichever occurred first, with the waiver commencing on the date of action. However, the convening authority denied the requested deferment of reduction in rank, and he did not provide any reason or explanation for the denial. The record does not reflect that the convening authority's decision denying the requested deferment of reduction of rank was served on

Appellant.

The convening authority approved the adjudged sentence on 15 February 2019.

2. Law

Article 57(a)(2), UCMJ, authorizes a convening authority, upon application by the accused, to defer a forfeiture of pay or allowances or a reduction in rank until the date the convening authority takes action on the sentence. R.C.M. 1101(c)(3) provides that an accused seeking to have a punishment deferred "shall have the burden of showing that the interests of the accused and the community in deferral outweigh the community's interests in imposition of the punishment on its effective date." The rule outlines several factors which the convening authority may consider in determining whether to grant the request, including *inter alia* the nature of the offenses, the sentence adjudged, the effect of deferment on good order and discipline in the command, and the accused's character, mental condition, family situation, and service record.

We review a convening authority's denial of a deferment request for an abuse of discretion. *United States v. Sloan*, 35 M.J. 4, 6 (C.M.A. 1992) (citing R.C.M. 1101(c)(3)), *overruled on other grounds by United States v. Dinger*, 77 M.J. 447, 453 (C.A.A.F. 2018). "When a convening authority acts on an [appellant]'s request for deferment of all or part of an adjudged sentence, the action must be in writing (with a copy provided to the [appellant]) and must include the reasons upon which the action is based." *Id.* at 7

(footnote omitted); *see also* R.C.M. 1101(c)(3), Discussion ("If the request for deferment is denied, the basis for the denial should be in writing and attached to the record of trial.").

Failure to timely comment on matters in or attached to the SJAR forfeits a later claim of error; we analyze such forfeited claims for plain error. *United States v. Zegarrundo*, 77 M.J. 612, 613 (A.F. Ct. Crim. App. 2018) (citations omitted). "To prevail under a plain error analysis, [an appellant] must persuade this Court that: '(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.'" *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005) (quoting *Kho*, 54 M.J. at 65) (additional citation omitted).

3. Analysis

Under *Sloan*, the convening authority's failure to state his reasons for denying the requested deferment of Appellant's adjudged reduction in rank was an error. *See* 35 M.J. at 7. Because the record does not reflect that the convening authority's decision was attached to the SJA's recommendation or otherwise provided to the Defense prior to Appellant's clemency submission, we find Appellant has not forfeited the error.[16] *See Zegarrundo*, 77 M.J. at 613 (citations

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[16] Appellant did not raise this error in his initial assignments of error. After our review of the record, this court issued an order to the Government to show good cause as to why this court should not grant appropriate relief. The Government submitted a timely

omitted).

The Government concedes the error, but contends Appellant is entitled to no relief in the absence of some evidence that the convening authority acted for an improper reason. *See, e.g.*, *United States v. Winn De*

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response to the order, and at the court's invitation Appellant submitted his own response to the show cause order and to the Government's brief. In his brief, Appellant contends he was unaware that the convening authority had denied the deferment of the reduction until 2 May 2020, when he received a copy as a result of filing an inspector general complaint related to the Government's failure to provide pay in accordance with the deferred and waived forfeitures (see Section II.F., *supra*). Thus, Appellant indicates he was unaware of this denial until after he submitted his initial assignments of error, although before he submitted his reply brief to the Government's answer. Our own review of the record and the Government's erroneous statement in its answer that the convening authority *had* approved the deferment of the reduction both lend some plausibility to this claim; however, Appellant has not provided a factual *declaration* that he was unaware of the denial. In light of our resolution of this issue, we find it unnecessary to further examine whether Appellant was misled as to the status of his request for deferment of the reduction. It is enough that, unlike the SJA's recommendation and draft approval of the deferment, the record discloses no evidence that the convening authority's denial was provided to the Defense.

Leon, No. ACM S32544, 2019 CCA LEXIS 396, at *8 (A.F. Ct. Crim. App. 9 Oct. 2019) (unpub. op.); *United States v. Jalos*, No. ACM 39138, 2017 CCA LEXIS 607, at *6 (A.F. Ct. Crim. App. 5 Sep. 2017) (unpub. op.); *United States v. Eppes*, No. ACM 38881, 2017 CCA LEXIS 152, at *43 (A.F. Ct. Crim. App. 21 Feb. 2017) (unpub op.), *aff'd*, 77 M.J. 339 (C.A.A.F. 2018).[17] However, in this case several factors lead us to conclude that relief is warranted under the circumstances.

First, the convening authority's decision with respect to deferring the reduction was contrary to the recommendation of the SPCMCA, the SPCMCA's SJA, and the convening authority's own SJA. We particularly note the two SJAs, who we may presume to be familiar with the applicable law, including Appellant's burden to demonstrate that deferment is appropriate and the factors the convening authority should consider under R.C.M. 1101(c)(1), agreed the convening authority should approve the request.

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[17] We recognize that these and other unpublished opinions of this court quoted our sister court's published opinion in *United States v. Zimmer*, 56 M.J. 869, 874 (A. Ct. Crim. App. 2002), with approval, and thereby implied that a credible showing of an improper or unlawful reason is a prerequisite to relief for a *Sloan* error. However, no authority binding on this court has made such a holding, and our recent decision in *United States v. Ward*, No. ACM 39648, 2020 CCA LEXIS 305, at *7–13 (A.F. Ct. Crim.App. 3 Sep. 2020) (unpub. op.), declined to apply this particular reasoning in *Zimmer*.

Second, and relatedly, the record does not indicate the convening authority was advised of the factors enumerated in R.C.M. 1101(c)(1) to guide his decision. Notably, Appellant's request for deferment, the SPCMCA SJA's legal review, and the convening authority SJA's legal review all cite Article 57(a)(2), UCMJ, in order to explain the nature of the request, but none cite the specific guidance in R.C.M. 1101(c)(1).

Third, in contrast to the situation in our recent decision in *United States v. Ward*, No. ACM 39648, 2020 CCA LEXIS 305, at *7–13 (A.F. Ct. Crim. App. 3 Sep. 2020) (unpub. op.), the Government has not provided a sworn declaration from the convening authority explaining his decision to deny the request. Although, as we noted in *Ward*, "such *post facto* explanations may, even if unconsciously, be influenced by the benefit of hindsight," *id.* at *11–12 (citations omitted), they nevertheless provide some evidence relevant to determining whether the convening authority abused his discretion. The continued absence of any explanation for the convening authority's decision in this case weighs in favor of granting relief.

Under the particular circumstances of this case, we conclude Appellant has been prejudiced by the convening authority's failure to explain his reasons for denying the requested deferment of the reduction in grade. Appellant was entitled to have this court review the convening authority's decision for an abuse of discretion. As our superior court explained in *Sloan*,

"[j]udicial review is not an exercise based upon speculation, and we will not permit convening authorities to frustrate the lawful responsibility of the [military appellate courts]. . . ." 35 M.J. at 6–7. In this case, where not only has the convening authority not explained his decision, but he acted contrary to the unanimous advice of the SPCMCA and two senior judge advocates, and the record discloses no indication that the convening authority was advised of appropriate considerations under R.C.M. 1101(c)(1), we conclude that under *Sloan* we cannot approve the convening authority's decision without abandoning our "lawful responsibility" to review the decision for an abuse of discretion.

We pause to clarify what we are not deciding here. We do not hold that the convening authority actually abused his discretion by denying the deferment of the reduction, or that he was required to follow the advice of the SJA or anyone else. The error here is not the decision to deny the request; the error is the failure to explain the decision, as *Sloan* requires, which has prejudiced Appellant's right to have the decision reviewed on appeal.

We have considered remanding the record for additional post-trial processing and consideration by the convening authority. However, under the circumstances, we conclude a different remedy is appropriate. We considered that, had events followed their proper course, Appellant would have been served with notice of the denial and the reasons given before he submitted his clemency request. We considered the

practical difficulties of requiring a convening authority to, in effect, review decisions previously made for an abuse of discretion. Furthermore, we have considered the length of the post-trial and appellate proceedings in this case to date. We conclude that, in light of the previously-granted waiver of automatic forfeitures, approving a reduction to the grade of E-3 rather than the grade of E-1 will adequately moot any prejudice resulting from the error. *See United States v. Zimmer*, 56 M.J. 869, 875 (A. Ct. Crim. App. 2002); *see also United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998) ("[T]he Courts of Criminal Appeals have broad power to moot claims of prejudice by 'affirming 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.'" (quoting 10 U.S.C. § 866(c))).

I. Post-Trial Delay

1. Additional Background

Appellant was sentenced on 19 October 2018, and the convening authority took action on 15 February 2019. Appellant's case was docketed with this court 34 days later, on 21 March 2019.

Appellant's civilian appellate defense counsel entered a notice of appearance on his behalf on 6 May 2019. Appellant's assignments of error were originally due on 20 May 2019. Appellant requested and was granted 11 enlargements of time to file his assignments of error, which he submitted on 28 April

2020. The Government submitted a timely answer on 28 May 2020, without requesting an enlargement of time. Appellant submitted a reply to the Government's answer on 16 June 2020, after requesting and being granted a five-day enlargement of time.

On 14 September 2020, this court issued a show cause order with respect to the convening authority's failure to state his reasons for denying Appellant's request for a deferment of his reduction in grade, an issue that was not ad- dressed in the parties' briefs, as described above. The Government filed a timely response on 25 September 2020, and Appellant submitted his reply on 2 October 2020.

Appellant has not made a demand for timely post-trial review or appeal.

2. Law

"We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal." *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citing *Rodriguez*, 60 M.J. at 246; *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003)). In *Moreno*, the CAAF established a presumption of facially unreasonable delay when the convening authority does not take action within 120 days of sentencing, when the case is not docketed with the Court of Criminal Appeals within 30 days of action, and when the Court of Criminal Appeals does not render a decision within 18 months of docketing. 63 M.J. at 142. Where there is such a delay, we

examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice [to the appellant]." *Moreno*, 63 M.J. at 135 (citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). "No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." *Id*. at 136 (citing *Barker*, 407 U.S. at 533).

3. Analysis

Appellant's record was not docketed with this court until 34 days after the convening authority's action, exceeding the *Moreno* standard for a facially unreasonable delay by four days. In addition, this court did not issue its opinion within 18 months of docketing, exceeding the *Moreno* standard. Accordingly, we have considered the *Barker* factors to assess whether Appellant's due process right to timely review has been infringed.

However, the CAAF has held that where an appellant has not shown prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). In *Moreno*, the CAAF identified three types of cognizable prejudice for purposes of an appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2) anxiety and

concern; and (3) impairment of the appellant's ability to present a defense at a rehearing. 63 M.J. at 138–39 (citations omitted). In this case, we find no oppressive incarceration because Appellant's appeal has not resulted in any reduction in his term of confinement. Similarly, where the appeal does not result in a rehearing on findings or sentence, Appellant's ability to present a defense at a rehearing is not impaired. *Id.* at 140. As for anxiety and concern, the CAAF has explained "the appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Id.* Appellant has not asserted such particularized anxiety caused by delay in this case, and we discern none. We acknowledge Appellant has expressed concern over the Government's failure to provide pay for his dependents in accordance with the convening authority's deferment and waiver of the mandatory forfeitures, but as we explained above, under *Jessie*—which the CAAF decided be- fore Appellant filed his assignments of error—this court is without jurisdiction to remedy that asserted error. Accordingly, we do not find any delay in the issuance of this court's opinion contributed to particularized anxiety within the meaning of *Moreno* with respect to that issue.

The action-to-docketing delay in this case exceeded the 30-day *Moreno* standard by only four days. We note the record is of substantial size, comprised of ten

volumes including 969 pages of transcript, and was required to be shipped in multiple copies from Europe to Joint Base Andrews, Maryland. We cannot say this relatively short facially unreasonable delay was so egregious as to undermine confidence in the military justice system.

We are even less troubled by the delay between docketing and the issuance of this court's opinion. The vast majority of the delay was attributable to the defense requests for enlargement of time submitted by or on behalf of Appellant's civilian appellate defense counsel. By the time Appellant filed his assignments of error, more than 13 months had elapsed from the date of docketing. The Government filed a timely answer, without requesting a delay, addressing nine issues Appellant raised on appeal. In addition, this court determined a show cause order and additional briefs from the parties were appropriate to address an additional issue Appellant did not initially raise, but for which he requested relief once it was identified by the court. Moreover, this court is issuing its opinion within two months of the 18-month *Moreno* standard. Considering the totality of the circumstances, we find no violation of Appellant's due process rights.

Recognizing our authority under Article 66(c), UCMJ, we have also considered whether relief for excessive post-trial delay is appropriate even in the absence of a due process violation. *See Tardif*, 57 M.J. at 225. After considering the factors enumerated in *Gay*, 74 M.J. at 744, we conclude it is not.

III. CONCLUSION

We affirm only so much of the sentence as provides for a dishonorable discharge, confinement for seven years, and reduction to the grade of E-3. The approved findings and sentence, as modified, are correct in law and fact, and no other error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and modified sentence are **AFFIRMED**. We direct the publication of a new court-martial order in accordance with our decretal paragraph.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
Washington, D.C.

United States,
Appellee

USCA Dkt. No. 21-0130/AF
Crim.App. No. 39706

v.

ORDER

Clayton W.
Turner,
Appellant

On further consideration of the granted issue (81 M.J._____(C.A.A.F. March 15, 2021)), and in view of *United States v. Willman*, 81 M.J._____(C.A.A.F. July 21, 2021**), it is**, by the Court, this 10th day of August, 2021,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ David A. Anderson
Acting Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Crnkovich)
Appellate Government Counsel (Bobczynski)

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
Washington, D.C.

United States,
Appellee

USCA Dkt. No. 21-0130/AF
Crim.App. No. 39706

v.

ORDER GRANTING REVIEW

Clayton W.
Turner,
Appellant

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is, by the Court, this 15th day of March, 2021,

ORDERED:

That said petition is hereby granted on the following issue:

> WHETHER THE LOWER COURT ERRED WHEN IT RULED THAT IT COULD NOT CONSIDER EVIDENCE OUTSIDE THE RECORD TO DETERMINE SENTENCE APPROPRIATENESS UNDER ARTICLE 66(c), UCMJ.

No briefs will be filed under Rule 25.

For the Court,

/s/ Joseph R. Perlak
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Crnkovich)
Appellate Government Counsel (Bobczynski)

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

No. ACM 39706

UNITED STATES
Appellee

v.

Clayton W. TURNER
Staff Sergeant (E-5), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 25 November 2020

Military Judge: Matthew D. Talcott (arraignment and motions); Rebecca E. Schmidt.

Approved sentence: Bad-conduct discharge, confinement for 8 months, and reduction to E-1. Sentence adjudged 7 March 2019 by GCM convened at Dyess Air Force Base, Texas.

For Appellant: Major Benjamin H. DeYoung, USAF; Major David A. Schiavone, USAF.

For Appellee: Lieutenant Colonel Brian C. Mason, USAF; Major Dayle P. Percle, USAF; Mary Ellen Payne, Esquire.

Before MINK, KEY, and ANNEXSTAD, *Appellate Military Judges.*

Judge KEY delivered the opinion of the court, in which Senior Judge MINK and Judge ANNEXSTAD joined.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

KEY, Judge:

A general court-martial composed of a military judge sitting alone convicted Appellant, contrary to his pleas, of five specifications of assault consummated by a battery in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928.[1,2] He was sentenced to a bad-conduct discharge, confinement for eight months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

On appeal, Appellant raises two issues through counsel: whether his conviction (on all specifications) is legally and factually insufficient; and whether he

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[1] All references in this opinion to the Uniform Code of Military Justice (UCMJ), Rules for Courts-Martial, and Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2016 ed.).

[2] Appellant was acquitted of a sixth specification of assault consummated by a battery.

was subjected to illegal post-trial confinement conditions. Appellant person- ally raises three additional issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). He first alleges the military judge erred in admitting certain expert witness testimony, which Appellant contends exceeded the witness's expertise, and that trial counsel improperly argued as substantive evidence information which had been admitted to show the basis for expert witness testimony. Appellant's second personally raised assertion is that his trial defense counsel were ineffective in not offering evidence of pertinent character traits and in providing incomplete advice on Appellant's choices with respect to whether to be tried by members or by military judge. His third assertion is that trial counsel's findings argument improperly appealed to the military judge's "common sense" and "knowledge of the ways of the world." We have carefully considered Appellant's second and third personally raised claims and have determined they are without basis, and warrant neither discussion nor relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

We find the evidence is factually insufficient to affirm the conviction for one of the specifications of assault consummated by a battery as discussed in greater detail below.[3] We thus set aside the finding of guilt for that specification, dismiss the specification with prejudice, and reassess the sentence. Finding no

[3] Specification 5 of the Charge.

other error, we affirm the remaining convictions and the sentence as reassessed.

I. BACKGROUND

Stationed at Dyess Air Force Base (AFB), Texas, Senior Airman (SrA) BT was scheduled to take her promotion test at 0730 hours on Wednesday, 9 May 2018. She left her on-base house that morning with her 15-month-old son, MT, and went to their babysitter's house. The babysitter noted SrA BT seemed more rushed than usual, as SrA BT seemed "very standoffish" and did not come in the house and sit and talk, as she ordinarily did. SrA BT left the babysitter's house and drove to the building where her test was going to be held and told the proctor she would not be taking her test that morning because she was going to the hospital. From the test site, SrA BT drove off base to the emergency room at Abilene General Medical Center where she reported to medical providers there that she had been physically assaulted by her husband, Appellant.

Medical records from the hospital indicate SrA BT checked in around 0730 hours and told emergency room staff Appellant had hit her with his fist and "a wooden bat or drumstick," and that he had "choked" her. During the visit, which lasted about an hour, SrA BT complained of neck pain, and the treating physician noted she had "a little soft tissue swelling in her left temple area from sustaining an injury there," leading him to diagnose her with a contusion to her head and cervical neck strain. The physician ordered

a CT scan which returned negative findings.

Detective DG from the Dyess AFB Security Forces Squadron learned of the alleged assault and went to the hospital to speak to SrA BT about what had happened. He arrived shortly after 0900, and SrA BT told him she was experiencing "a lot of pain." Detective DG saw "visible injuries" on SrA BT's arms and neck and took pictures of those injuries. He later testified SrA BT appeared "upset," "sad," and "depressed" as she explained to him what had happened.

Shortly thereafter, Appellant was apprehended and brought to Detective DG's office where an investigative photographer took pictures of various injuries on Appellant's body, including marks on his head, back, and arm, and cuts on his face and foot. The same photographer took another set of pictures of SrA BT's injuries later in the day, around 1400 hours, showing dark bruising to her neck, left arm and thigh, as well as a red mark on her lower back. After those pictures were taken, Detective DG and the photographer accompanied SrA BT to her house in order to take photographs of the living room, to include a hole in the wall roughly the size of a human torso. Detective DG met with SrA BT the next day for a follow-up interview.

At Appellant's court-martial, SrA BT testified she met Appellant in February 2016 while they were both stationed in Korea. They began dating, and at the end of May 2016—the day Appellant was leaving Korea for

his new assignment at Dyess AFB—SrA BT discovered she was pregnant, something she and Appellant had not planned on. SrA BT was able to cancel her upcoming assignment to England, and she and Appellant married less than three months later in August 2016. SrA BT joined Appellant at Dyess AFB in September 2016. Their son, MT, was born in January 2017, and the family moved into a house on base the following summer. SrA BT described a turbulent marriage during which the couple frequently had heated arguments about a variety of issues and even physically fought on at least two occasions.

SrA BT testified that on 8 May 2018, the night before her promotion test, she went to sleep upstairs in the bedroom of their two-story house around 2200 hours—early for her—to rest up for the test. Appellant, meanwhile, was still at work, his shift lasting until 2300 hours.

SrA BT woke up around 0100 hours to the sound of the television down- stairs "being too loud." She got up, saw Appellant watching television, and asked him to turn the volume down, which he did. SrA BT woke up again around 0400 hours, as the television was "loud again." She texted Appellant, telling him the television woke her up and asking when he was coming to bed. He responded by telling her "to get off his a[*]s." Frustrated, tired, and unable to go back to sleep, SrA BT got up, got dressed, went downstairs, and began folding clothes next to Appellant while he finished watching a movie. SrA BT testified she was

upset and complained to Appellant she couldn't sleep, describing her demeanor at the time as being "rude" and "snarky." When the movie ended, SrA BT told Appellant he might as well leave the television on, leading Appellant to tell her, "I'm not doing this sh[*]t tonight" before picking up his drink and going upstairs to the bedroom.

SrA BT said she went to the bedroom to talk to Appellant about why she was upset. Appellant was laying on the bed, and SrA BT sat down next to him and put her hands on his shoulders. She testified Appellant was mad and he shoved her away from him, telling her he was tired of her "bitching at him." Appellant then stood up and started yelling at SrA BT, at which point he grabbed her neck with his right hand and shoved her into the wall with his other hand. SrA BT remembered "hitting the wall with [her] head and [her] neck and seeing him face-to-face with [her] and his hands on [her]." SrA BT said she yelled at Appellant to get away from her, and he let her go, but as she tried to walk past him, he accused her of looking for things to throw at him and he shoved her into the wall and then into her vanity. According to her testimony, SrA BT did not fight back and instead told Appellant to leave her alone and to not touch her.

SrA BT gathered a few items from the bedroom and went downstairs while Appellant stayed upstairs. Realizing that MT was awake and crying, SrA BT went back upstairs to get him and brought him downstairs to the couch where she changed his diaper. She then went to the kitchen—leaving MT on the

couch—to throw out the diaper and get MT a drink. SrA BT said she was "yelling" in the kitchen because she was "so upset," and she said out loud she hated Appellant before going back to the couch and putting MT in her lap. As she did so, Appellant came down the stairs telling SrA BT she was "not going to cuss out [their] child" and that SrA BT "wasn't fit to hold [MT] right now."

Appellant and SrA BT continued arguing, and SrA BT testified Appellant took hold of the coffee table in front of the couch and "threw it behind him" so that it was pushed up against a bookshelf, and he demanded SrA BT release MT. When she refused, Appellant grabbed SrA BT—who was still holding MT—by her ankles and pulled her off the couch such that her back and head hit the ground. SrA BT said Appellant tried prying her arms off MT, but she rolled on her side, telling Appellant to stop and leave MT alone. Appellant then grabbed MT's arm, leading SrA BT to release MT. She said, "As soon as he had hands on my son, I let go. I wasn't going to pull." SrA BT agreed with trial defense counsel's characterization that Appellant picked MT up by MT's arm and then "kind of scooped him with the other hand to hold him." Once Appellant took MT from SrA BT, he put MT on the couch.

SrA BT said she stood up, and then Appellant shoved her into a wall with both hands "as hard as he could," leaving a large hole in the drywall. SrA BT was pleading with Appellant to stop and to let her get to MT, but Appellant responded by threatening to punch

her and knock her unconscious. MT, mean- while, climbed off the couch and began walking toward SrA BT, but Appellant would "shove him back and [MT] would fall down," which kept MT from reaching SrA BT. Appellant then began punching SrA BT in her temple and on the back of her head. SrA BT testified that she heard MT cry "as if he was in pain," and Appellant said, "I didn't mean to do it. He got in the way." SrA BT said she "panicked because [she] thought [her] son was hurt," and she started punching back at Appellant. While this was going on, MT crawled towards an adjacent room, and SrA BT picked up and threw a plastic child's chair at Appellant in the hopes of distracting Appellant so that she could get to MT, but Appellant "blocked it."

SrA BT testified that after throwing the chair, she "was trying to figure out something else to do," and she picked up a drumstick and held it in front of her, telling Appellant to stay away from her and "leave us alone," threatening to hit him with it if he did not comply. Appellant, however, "came forward a couple of times," and SrA BT said she hit him on the arms several times with the drumstick "to get him away from [her]," but she did not recall hitting him on his head. Appellant then "lunged forward" and grabbed SrA BT's arms such that she was "back on the floor." Appellant took the drumstick from her and began hitting her in the head with it, "[s]everal times all over [her] temple" as well as "a blow" on the back of her head, calling her a "red-faced Indian" and saying, "You like getting hit in the head with sticks?" SrA BT began

"screaming for help," and then Appellant grabbed her neck again, with two hands at first and then just with his left hand, using his other arm to hold her down. SrA BT testified she could not breathe "for a few moments," but Appellant eventually let go of her neck while still holding her down. SrA BT said she was "screaming at the top of [her] lungs for help," while Appellant told her he would let her go if she would "calm down." SrA BT was able to reach over to a nearby dog kennel and release the dog inside. The dog began barking and circling the two, leading to Appellant letting go of SrA BT such that she was able to get to MT and sit down on the couch with him.

Appellant walked over to the closet, retrieved two guns and some ammunition, and then went upstairs and locked himself in the bedroom. SrA BT began making a plan to go to the emergency room, get her son to his babysitter, and to notify the appropriate personnel she would not be able to take her promotion test. Realizing she needed an additional pair of pants, she unlocked the bed- room door and found Appellant "passed out asleep, his guns on the floor and a loaded magazine on the night stand." She got her pants and walked out of the bedroom, closing the door behind her, and left with MT for the babysitter's house on her way to the test site and then the emergency room.

Later in the day, SrA BT picked MT up from his babysitter who testified she saw bruises on SrA BT's arms and on her throat. SrA BT also met with her first sergeant, Master Sergeant (MSgt) BN, early that afternoon. He reported seeing "visible red marks" on

SrA BT and what "looked like finger imprints on her arms and around her neck." MSgt BN saw SrA BT three days later and noticed that the bruising had become more pronounced. "I've never seen bruising like that before on anybody; black, blue, red, white," he said. "It looked like a half-sleeve bruise on her left arm," and what appeared to be finger marks on SrA BT's left arm and neck "were more distinctive."

By the time of Appellant's court-martial, almost a year later, SrA BT and Appellant were going through divorce proceedings in which the two had been granted joint custody—an "even split"—of MT, although SrA BT conceded she would prefer to have greater custodial rights, and she had sought a protective order against Appellant early in the proceedings. SrA BT had also applied for a "humanitarian" transfer so that she could be closer to her family, a request which was still pending at the time of trial.

On cross-examination, SrA BT acknowledged that when she was first interviewed about the assault the day after it occurred, she told Detective DG that Appellant had only used one hand at a time to choke her, and he never used both hands. SrA BT also admitted she testified in a deposition related to the divorce proceedings that the chair she threw hit Appellant in the back.

Both parties called expert witnesses to offer their opinions about the source and age of the various injuries suffered by SrA BT and Appellant. The

Govern- ment called Dr. DS, an expert in forensic nursing and wound examination with extensive experience in assessing and intervening in instances of domestic violence. The Defense called Dr. RF, an expert in forensic pathology and biomechanics with significant expertise focused on investigating causes of death. The two doctors generally agreed the photographs of SrA BT and Appellant depicted injuries, but disagreed in certain particulars as to whether the injuries were consistent with SrA BT's testimony. With respect to SrA BT, the primary injuries the experts focused on were those to her neck, back, upper left arm, lower right arm, and right thigh.

Photographs of SrA BT's neck depict bruises radiating laterally from her windpipe towards the back of her neck on her right side. No significant bruising was noted on the left side of her neck. Dr. DS concluded the injuries were caused by a combination of bruising and abrasions, consistent with SrA BT being strangled by being grabbed by the neck. He further concluded the abrasions could be caused by a person struggling while being strangled. Dr. RF did not disagree that the bruising appeared to have been caused by someone grabbing SrA BT's neck, but he hypothesized SrA BT would have been grabbed from behind based upon SrA BT's report of pain on the back of her neck, a small crescent-shaped mark he attributed to a fingernail, and the lack of a corresponding thumb-caused bruise on the opposite side of SrA BT's neck. Dr. DS, however, disputed the premise that the crescent-shaped mark came from a

fingernail, concluding it was "just part of the overall presentation of trauma that is a combination of two mechanisms, squeezing mechanism for the bruising with rubbing mechanisms that caused abrasions." He noted the mark was not consistent with other fingernail wounds he had seen, and he also testified that he had seen strangulation cases in which no opposing-side injury was visible to the naked eye.

Photographs of SrA BT's lower back show a roughly rectangular wound ex- tending vertically. Dr. DS testified this type of injury is referred to as a "patterned injury" because it can be matched to a particular object which caused the injury. Dr. DS could not identify the precise object which caused this injury to SrA BT's back, but he said it could have been caused by her being pushed up against the wall or her vanity. Dr. RF said that Dr. DS's explanation was "very reasonable," and that this injury could have been caused by SrA BT being hit by, being pushed into, or falling on something. He added that he did not think the wound was caused when SrA BT was pushed into the downstairs drywall, because the pictures showed the damaged drywall had jagged edges, which was inconsistent with the relatively straight lines of the mark on SrA BT's back.

The inside of SrA BT's upper left arm near her armpit had a large bruise with small darker spots on the outer edges. Dr. DS testified this was consistent with a thumb pressing into SrA BT's arm while being grabbed, and Dr. RF agreed. Dr. RF also noted a corresponding mark on the outside of SrA BT's arm

and hypothesized the injuries could have been caused by someone grabbing her arm to restrain her.

SrA BT's lower right arm showed evidence of bruising which Dr. DS de- scribed as consistent with "a compression bruise or squeeze." Her arm also had abrasions which he said could be caused by being pushed up against a wall or pulled off a couch. SrA BT's right thigh exhibited signs of bruising combined with some abrasion, which Dr. DS said was likely caused by a mix of blunt force and rubbing, which would be consistent with running into something or hitting something.

With respect to Appellant, the experts focused on a scratch near Appellant's nose, a thin two-and-a-half-inch-long red mark on the left side of his head, parallel two-inch-long linear red marks on his right forearm, and two irregular red marks on his back. Dr. DS described the scratch on Appellant's face as "very superficial" and the mark on his head as a scratch which was at least 24 hours old when the picture was taken. Dr. DS said the marks on Appellant's forearm were consistent with being struck by a cylindrical solid object, such as a drumstick. Dr. DS's opinion was that the marks on Appellant's back pre- dated the fight. Dr. RF agreed the marks on Appellant's forearm could have been caused by a drumstick, and he hypothesized it would have likely been a "defensive" injury in which Appellant was hit while "defending his head or some other part of his body." Contrary to Dr. DS's assessment, Dr. RF thought the mark on Appellant's head looked like a "fresh injury" that could

have been caused by "a thin linear object" like a drumstick. Dr. RF testified that the marks on Appellant's back were "certainly well within [the] time range" of the fight and said they "fit the criteria for a good scratch mark," possibly from fingernails. Dr. RF thought the scratch on Appellant's face was more serious than Dr. DS did, characterizing it as a "quite deep abrasion" which was likely caused by "something thin and relatively sharp . . . like a fingernail."

Appellant was charged with four specifications of assault consummated by a battery against SrA BT. The first specification alleged he unlawfully grabbed SrA BT on her neck with his hand on divers occasions. Trial counsel argued Appellant committed this offense when he grabbed her neck and pushed her into the wall upstairs and when he strangled her downstairs. The second specification alleged Appellant pushed SrA BT on her body with his hands on divers occasions, and trial counsel pointed to Appellant pushing SrA BT into the vanity and into the wall downstairs. Under the third specification, Appellant was charged with pulling SrA BT's ankle with his hand, which trial counsel said occurred when Appellant pulled SrA BT off the couch. The fourth specification alleged Appellant struck SrA BT on her head with his hand and with a drum- stick on divers occasions. Trial counsel argued Appellant was guilty of this specification based upon Appellant hitting SrA BT in her temple when she was trying to get to MT and then hitting her on her head with the drumstick Appellant took away from her.

Appellant was also charged with two specifications of assault consummated by a battery against MT. The first specification alleged Appellant "unlawfully pull[ed]" on MT's arm; the second specification—of which Appellant was ac- quitted—alleged Appellant "unlawfully push[ed]" on MT's body. There was no evidence of any physical injury to MT.

The Defense's theory was that SrA BT had instigated the fight, Appellant was defending both himself and MT, and SrA BT had exaggerated Appellant's role in the fight based upon a motive to gain leverage in their divorce and child-custody proceedings. Trial defense counsel sought to impugn SrA BT's testimony by arguing her injuries were inconsistent with her testimony that Appellant brutally attacked her and were, instead, more consistent with Appellant restraining her in self-defense.

II. DISCUSSION

A. Legal and Factual Sufficiency

Appellant argues his conviction on the charge and its specifications is both legally and factually insufficient. In so arguing, he alleges: SrA BT had a motive to fabricate her testimony; her testimony was not credible by virtue of inconsistences in it; and the investigation was insufficient. He further argues that the disagreement between the expert witnesses should undermine our confidence in his conviction with respect to the assaults on SrA BT. We disagree.

With respect to the specification alleging Appellant assaulted MT by pulling on his arm, Appellant argues no assault occurred, because there was neither an offensive touching nor any evidence of unlawful force or violence. We agree with Appellant that the conviction for this specification is factually insufficient.

1. Law

We only affirm findings of guilty that are correct in law and fact and, "on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted).

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). "The term reasonable doubt, how- ever, does not mean that the evidence must be free from conflict." *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018). Circumstantial evidence may suffice. *See United States v. Kearns*, 73 M.J. 177, 182 (C.A.A.F. 2014) (citing *Brooks v. United States*, 309 F.2d 580, 583 (10th Cir. 1962)). "[I]n resolving questions of legal

sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omit- ted). As a result, "[t]he standard for legal sufficiency involves a very low thresh- old to sustain a conviction." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (alteration in original) (citation omitted), *cert. denied*,__U.S.__, 139 S. Ct. 1641 (2019).

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

2. Analysis

In order to find Appellant guilty of assault consummated by a battery, the Government was required to prove beyond a reasonable doubt: (1) that Appellant did bodily harm to a particular person, and (2) that the bodily harm was done with unlawful force or violence in the manner alleged. *See Manual for*

Courts-Martial, United States (2016 ed.) (*MCM*), pt. IV, ¶ 54.b.(2). For the specification pertaining to MT, the Government had to additionally prove MT was under the age of 16 years old. *See MCM*, pt. IV, ¶ 54.b.(3)(c). "Bodily harm" is defined as "any offensive touching of another, however slight," and the act "must be done without legal justification or excuse and without the lawful consent of the person affected." *MCM*, pt. IV, ¶ 54.c.(1)(a). "Unlawful force or violence" is demonstrated if an accused "wrongfully caused the contact, in that no legally cognizable reason existed that would excuse or justify the contact." *United States v. Bonner*, 70 M.J. 1, 3 (C.A.A.F. 2011) (citation omitted).

Self-defense is an affirmative defense to a charge of assault consummated by a battery and has three elements. First, the accused must have apprehended, on reasonable grounds, that bodily harm was about to be inflicted on him; second, the accused must have believed that the force he used was necessary for protection against bodily harm; and, third, the force used by the accused must have been "less than force reasonably likely to produce death or grievous bodily harm." *See* Rule for Courts-Martial (R.C.M.) 916(e)(3). The right to self-defense is lost "if the accused was an aggressor, engaged in mutual combat, or provoked the attack which gave rise to the apprehension, unless the accused had withdrawn in good faith after the aggression, combat, or provocation and before the offense alleged occurred." R.C.M. 916(e)(4). However, an accused who starts an affray is entitled to use

reasonable force in self-defense to defend against an opponent who escalates the level of the conflict. *United States v. Dearing*, 63 M.J. 478, 484 n.24 (C.A.A.F. 2006) (citations omitted). Similarly, defense of another is an affirmative defense so long as an accused uses no more force than the person being defended could lawfully use. R.C.M. 916(e)(5). Once raised, the Government has the burden of proving beyond a reasonable doubt that the defense of self-defense or defense of another did not exist. R.C.M. 916(b)(1).

a. Assault of SrA BT

We conclude a reasonable factfinder could find all the elements of assault consummated by a battery against SrA BT beyond a reasonable doubt. SrA BT went to an emergency room reporting that she had been assaulted by Appellant just a few hours earlier. Medical and law enforcement professionals along with lay witnesses observed visible injuries on her body, which another witness reported grew more pronounced as the week progressed. SrA BT testified that Appellant grabbed her neck twice, pushed her into both her vanity and upstairs and downstairs walls, pulled her ankles, and struck her in the head multiple times. The Defense did not meaningfully impeach SrA BT's credibility, and—based upon her testimony alone—a reasonable factfinder could conclude each of these acts amounted to an offensive touching committed without her consent. Similarly, if a factfinder gives absolute credit to SrA BT's testimony, Appellant would have no viable self-

defense claim, as he was the initial aggressor when SrA BT tried to talk to him in the bedroom and then again when he pulled her off the couch in an effort to get MT away from her. SrA BT said she did punch Appellant, but this was immediately after Appellant was punching her in the head, thus, a rational factfinder could conclude SrA BT was fighting back—that is, exercising her own self-defense rights—rather than initiating an attack or escalating the level of the conflict. SrA BT testified she struck Appellant with the drumstick several times, but this was after she held it out in front of her, telling Appellant to leave her and MT alone. When Appellant advanced toward her, she hit him with the drumstick, but he promptly dis- armed her and proceeded to attack her with the drumstick and then strangle her. A rational factfinder could conclude SrA BT did not escalate the level of the conflict by picking up the drumstick, and instead was trying to defend her- self or de-escalate the conflict. Moreover, a factfinder could readily determine there was no evidence that, once Appellant took the drumstick away from SrA BT, he either reasonably apprehended bodily harm was about to be inflicted on him, or that he actually believed strangling SrA BT was necessary to protect himself.

SrA BT's divorce and child-custody proceedings may have given rise to a motive for SrA BT to exaggerate Appellant's culpability and minimize her own, but there was no evidence such motivations existed at the time SrA BT initially reported the assault, just a few hours after the assault occurred.

According to the record before us, the divorce and child-custody proceedings were not initiated until some later point in time, and a rational factfinder could find implausible the notion that SrA BT devised a plan to achieve a favorable bargaining position in uninitiated litigation in the early morning hours immediately after sustaining significant injuries at Appellant's hands. SrA BT's version of events of the assault remained largely consistent between her initial report and her testimony at trial, and the Defense was only able to point to minor inconsistencies, such as whether Appellant blocked the child's chair with his arms or that it hit his back and whether he briefly had two hands on her neck at one point or he used only one hand to choke her. SrA BT's visible injuries also corroborated her testimony, and the Defense's expert did not dispute SrA BT had been injured or raise any doubt that Appellant had caused those injuries. Notably, Dr. RF did not disagree with the proposition that the marks on SrA BT's neck appeared to have been caused by someone grabbing her neck—his point of contention was simply whether SrA BT was grabbed from the front or the back. A rational factfinder would be free to conclude Dr. DS offered the more credible assessment as to Appellant's position when he strangled SrA BT, an assessment which both matched SrA BT's testimony and the pictures of finger- shaped bruises on SrA BT's neck.

Appellant also argues the investigation into the assault was inadequate in that investigators did not

take any pictures of the upper floor of the house, did not collect the text messages SrA BT said she sent Appellant just prior to the assault, and did not adequately interview the neighbors. Appellant exposed these concerns during the trial. While each of these investigative aspects could have contributed to the overall evidence in the case, a rational factfinder could also conclude their absence does not create reasonable doubt or otherwise undermine SrA BT's testimony, the photographic documentation of her injuries, and the other evidence in the case. Therefore, we find Appellant's conviction for the four specifications alleging assault consummated by a battery against SrA BT to be legally sufficient. After carefully considering the evidence presented at trial, we ourselves are convinced of Appellant's guilt of the first four specifications of the Charge beyond a reasonable doubt. As a result, we conclude his conviction of these four specifications is also factually sufficient.

b. Assault of MT

We are not so convinced with respect to the fifth specification alleging the assault against MT wherein Appellant grabbed MT's arm with one hand and used his other hand to "kind of scoop" MT up in order to hold him before setting him down on the couch. Depending on how one views the evidence, Appellant was either taking MT away from SrA BT because he believed SrA BT was not in the right frame of mind to be holding the child, or he was taking MT away so that he could continue his attack on SrA BT without MT

being caught in the middle. Under either scenario, it is difficult to understand the Government's theory that Appellant did bodily harm to MT with unlawful force or violence by pulling on MT's arm. According to SrA BT's testimony, she let go of MT as soon as Appellant "had hands on" MT, because she did not want to pull on MT. Thus, the evidence in the case is that Appellant tried to pry SrA BT's arms off his son, and then picked him up out of SrA BT's arms when she released him and placed him on the couch.

Given MT's age, we presume he was incapable of manifesting his consent or opposition to his father touching him in this case, so the military judge was required to determine if the touching was offensive to MT based on the sur- rounding circumstances. Moreover, the military judge had to conclude there was no legally cognizable reason justifying Appellant's contact with MT in or- der to find him guilty. Even if a factfinder were to find Appellant's picking up of MT amounted to an offensive touching from MT's perspective, we are still left with the question of a parent's legal rights with respect to handling their small children, an issue that has not been addressed in depth by military courts. In discussing the somewhat analogous issue of the affirmative defense of parental discipline, the United States Court of Appeals for the Armed Forces (CAAF) has highlighted the "inherent tension between the privacy and sanctity of the family, including the freedom to raise children as parents see fit, and the interest of the state in the safety and well-being of

children" and recognized that discipline often has "a physical component." *United States v. Rivera*, 54 M.J. 489, 491 (C.A.A.F. 2001). The CAAF explained it had previously held parents may use force to safeguard or promote the welfare of minors so long as the degree of force used is reasonable. *Id.* (citation omitted). Considering the fact that a parent may use some degree of physical force to protect or to discipline a child, some touching by a parent of a child must be legally permissible outside of a disciplinary context and regardless of the child's consent, even though the same conduct could amount to unlawful bodily harm when carried out against another. *See, e.g.*, *Pleasants v. Town of Louisa*, 524 Fed. Appx. 891, 897 (4th Cir. 7 May 2013) (unpub. op.).

Based on the evidence presented, SrA BT did not want Appellant to take MT from her, but we are unconvinced SrA BT had any greater authority to hold MT than Appellant did. No evidence was adduced that Appellant violently or abusively handled MT or that he picked him up with any sort of intent to harm MT. The Government's evidence was that Appellant grabbed MT's arm, and then took MT out of SrA BT's hands after SrA BT let go of him. In the face of Appellant's right—as MT's father—to non-abusively pick up MT, the Government has failed to prove Appellant did bodily harm to MT with unlawful force or violence. Even if we assume a rational factfinder could conclude the elements of assault consummated by a battery were met in this case, we are not convinced beyond a reasonable doubt Appellant is

guilty, and we therefore find his conviction of this specification factually insufficient.

B. Confinement Conditions

Appellant argues his post-trial confinement conditions violated his rights under the Eighth Amendment to the United States Constitution[4] and Article 55, UCMJ, 10 U.S.C. § 855. Appellant also argues that, even in the absence of an Eighth Amendment or Article 55, UCMJ, violation, his confinement conditions rendered his sentence inappropriately severe, warranting relief under Article 66(c), UCMJ.

1. Additional Background

Once sentenced to confinement at his court-martial, Appellant was incarcerated in Texas at the Taylor County Jail from 7 March 2019 until he was released on 19 September 2019. Appellant submitted matters in clemency prior to the convening authority taking action on 28 May 2019, but Appellant made no reference to any concerns with his confinement conditions in those matters.

On 5 September 2019—two weeks before his release—Appellant made a complaint under Article 138, UCMJ, 10 U.S.C. § 938. In his complaint, Appellant wrote, "After submitting an inmate's request form to officials, pests and vermin were found in immediate living conditions at [the jail]. I asked for the facility to eliminate or minimize the infestation of

[4] U.S. CONST. amend. VIII.

mice, roaches, ants, beetles, crickets, and spiders." He asserted he had woken up "on numerous occasions" to find "ants crawling on [him] in [his] bed," he had managed to trap three mice, and he saw three other inmates receive antibiotics after being bitten by spiders.[5] He further noted that "[p]est control personnel do spray regularly in the facility but to no avail." On 27 September 2019—eight days after Appellant had been released—the commander of the 7th Security Forces Squadron, Major (Maj) MM, sent Appellant a written reply to his complaint. Maj MM wrote that he only learned of Appellant's complaint on 18 September 2019—the day before Appellant's release—and that Appellant's complaint was "being taken with the utmost seriousness." Maj MM asserted that once Appellant informed his staff about insects and rodents, "an immediate investigation was launched to personally inspect [Appellant's] cell by [his] staff." Maj MM further wrote that after that inspection, "[M]y staff offered to you to move to a new cell as a possible immediate resolution to the problem at hand. However, you declined this offer." He went on to write to Appellant, "[Your] unwillingness to move to a new cell prevented us from rectifying your complaint before you were re- leased from confinement."

In support of his appeal, Appellant submitted an

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[5] We may consider matters outside the entire record to resolve allegations of violations of Article 55, UCMJ, 10 U.S.C. § 855, or the Eighth Amendment. *United States v. Jessie*, 79 M.J. 437, 445 (C.A.A.F. 2020).

affidavit in which he reiterated his complaints, adding that he had previously complained to jail staff, and that he never received Maj MM's offer to be moved to a new cell. Appellant did acknowledge Maj MM's staff had investigated Appellant's cell and that Maj MM's staff said they would speak with Taylor County Jail personnel about pest management. Appellant's affidavit expanded upon his Article 138, UCMJ, complaint, explaining that the ants were "sugar ants," and that "[c]rickets, ear- wigs, brown recluse spiders, beetles, mice, and wasps were also common in the facility and individual cells." He further alleged an inmate in a cell next to Appellant had been bitten by a brown recluse spider, causing his nipple to swell "to the size of a tennis ball from infection."

The Government responded with an affidavit from the Dyess AFB corrections officer, Captain (Capt) KF, and an attached memorandum from Senior Airman (SrA) KM, who was performing the duties of the noncommissioned officer in charge of corrections for the base. Capt KF asserts his staff was required to visit Air Force inmates at the jail on a weekly basis, and that his staff offered Appellant the opportunity to transfer to a new cell after seeing "several ants," but Appellant declined.[6] SrA KM's memorandum explains that on 3 September 2019, Appellant "brought up the issue of insects in his cell, and stated he had filed a

[6] The ants were seen near a packet of jelly under the sink in Appellant's cell; SrA KM's memorandum says Appellant claimed insects dragged the packet under the sink.

complaint with Taylor County Jail." She further states two non- commissioned officers asked Appellant if he wanted to move to a new cell, and Appellant responded he did not want to move, but that he would be filing a complaint under Article 138, UCMJ[7]

The Government also provided an affidavit from Sergeant KH, the Taylor County Correctional Facility staff investigator. Sergeant KH explained the jail maintained a formal grievance process, which every prisoner was aware of, and Appellant never submitted a formal complaint regarding any matter during his incarceration. In addition to the grievance process, inmates could submit written requests and make informal complaints. Although the jail records reflect Appellant submitted requests for such matters as obtaining dental floss and having books mailed to him, there was no record of Appellant complaining about any matter.[8]

2. Law

We review de novo whether an appellant has been

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[7] Although the memorandum names the two noncommissioned officers, it does not explain whether they were members of the Dyess Air Force Base corrections staff, Appellant's unit, or some other organization.

[8] Sergeant KH's affidavit states Appellant's earliest request (which pertained to releasing property to his family) was dated 3 May 2019, and his last request (regarding receiving books in the mail) was dated 25 August 2019.

subjected to impermissible post-trial confinement conditions in violation of the Eighth Amendment or Article 55, UCMJ. *United States v. Wise*, 64 M.J. 468, 473 (C.A.A.F. 2007) (citing *United States v. White*, 54 M.J. 469, 471 (C.A.A.F. 2001)). Both the Eighth Amendment and Article 55, UCMJ, prohibit cruel and unusual punishment. In general, we apply "the [United States] Supreme Court's interpretation of the Eighth Amendment to claims raised under Article 55, except in circumstances where . . . legislative intent to provide greater protections under [Article 55]" is apparent. *United States v. Avila*, 53 M.J. 99, 101 (C.A.A.F. 2000) (citation omitted). "[T]he Eighth Amendment prohibits two types of punishments: (1) those 'incompatible with the evolving standards of decency that mark the progress of a maturing society' or (2) those 'which involve the unnecessary and wanton infliction of pain.'" *United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102–03 (1976)). As the Supreme Court has explained, "[t]he Constitution 'does not mandate comfort- able prisons,' but neither does it permit inhumane ones." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349
(1981)).

A violation of the Eighth Amendment is shown by demonstrating:

> (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on

> the part of prison officials amounting to deliberate indifference to [an appellant]'s health and safety; and (3) that [an appellant] "has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, UCMJ . . . ."

Lovett, 63 M.J. at 215 (footnotes omitted) (quoting *United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 1997)).

"[A] prisoner must seek administrative relief prior to invoking judicial intervention" with respect to concerns about post-trial confinement conditions. *Wise*, 64 M.J. at 471 (alteration in original) (quoting *White*, 54 M.J. at 472). "This requirement 'promot[es] resolution of grievances at the lowest possible level [and ensures] that an adequate record has been developed [to aid appellate review].'" *Id.* (alterations in original) (quoting *Miller*, 46 M.J. at 250); *see also United States v. McPherson*, 73 M.J. 393, 397 (C.A.A.F. 2014). "Absent some unusual or egregious circumstance," an appellant must both exhaust the grievance system at the confinement facility as well as petition for relief under Article 138, UCMJ. *Wise*, 64 M.J. at 469 (quoting *White*, 54 M.J. at 472).

Under Article 66(c), UCMJ, we have broad authority and the mandate to approve only so much of the sentence as we find appropriate in law and fact and may, therefore, grant sentence relief, without finding a violation of the Eighth Amendment or Article 55, UCMJ. *United States v. Gay*, 74 M.J. 736,

742 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016); *see United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002). In considering Article 66(c)-based claims, we have declined to require appellants to demonstrate they have previously exhausted administrative remedies prior to seeking judicial relief. *See United States v. Henry*, 76 M.J. 595, 610 (A.F. Ct. Crim. App. 2017). We instead consider the entire record and typically give "significant weight" to an appellant's failure to exhaust those remedies before requesting judicial intervention. *Id.* Unlike claims raised under Article 55, UCMJ, or the Eighth Amendment, we may not consider matters outside the record for a sentence- appropriateness review under Article 66(c), UCMJ, unless those matters amplify information already raised in the record, such as that which is raised to the convening authority as part of a clemency request. *Jessie*, 79 M.J. at 441– 42; *see also United States v. Matthews*, No. ACM 39593, 2020 CCA LEXIS 193, at *13–15 (A.F. Ct. Crim. App. 2 Jun. 2020) (unpub. op.).

3. Analysis

Appellant submitted an Article 138, UCMJ, complaint regarding his confinement conditions, albeit only two weeks before he was released from the Taylor County Jail. Two days before submitting that complaint, Appellant made his concerns known to Dyess AFB corrections personnel and alleged he had filed a separate complaint with the jail—an assertion he styles as "submitting an inmate's request form" in his Article 138 complaint, a request the jail has no

record of. The Government submitted matters in response, but they do not directly dispute Appellant's allegations regarding the presence of bugs and mice in his cell; rather, the government matters focus on the fact that the jail had regular pest-control service, a point which Appellant does not contest. The primary factual dispute between Appellant and the Government is whether Appellant was offered the opportunity to change cells or not, an issue which pertains more to remedial measures pursued than to the conditions of Appellant's confinement. In spite of this difference, we conclude we need not require additional fact finding pursuant to *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997), because "we can determine that the facts asserted, even if true, would not entitle [A]ppellant to relief." *White*, 54 M.J. at 471.

Even if we assume, for the purposes of our analysis, that Appellant exhausted the jail's grievance system, we conclude Appellant has not met his burden under the Eighth Amendment.[9] Appellant has not demonstrated "an objectively, sufficiently serious act or omission resulting in the denial of necessities." Giving his complaint that there were bugs and mice in his cell the maximum credence possible, we cannot conclude such conditions rise to the level of the denial of necessities. Waking up at night to (apparently non-

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[9] Appellant has not argued his confinement conditions should be analyzed under any different standard under Article 55, UCMJ. *See United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006).

biting or stinging) ants is undoubtedly unpleasant, but Appellant has not established this occurred so frequently or in such an aggravated fashion as to amount to more than a relatively minor irritant. He has not complained he suffered any injury or illness caused by ants or other bugs, nor has he explained how they interfered with his daily routine in any form or fashion. The same is true of the mice Appellant encountered, three of which Appellant was able to catch. We note that although Appellant complained to his command about the pests, he did not do so until the very end of his time at the jail, after he had been confined there for nearly six months. The fact he waited so long to raise his concerns is a strong indication the bugs and mice were not as great of a concern as Appellant would now have us find. We also note that occasionally encountering bugs and mice in one's dwelling or workplace is a relatively common feature of even non-incarcerated human existence, further diminishing any force behind Appellant's Eighth Amendment claim. Moreover, Appellant has not shown that the prison officials exhibited a deliberate indifference to Appellant's health and safety, as he acknowledges the jail regularly performed pest-control measures. Without more, Appellant has failed to demonstrate the conditions of his confinement were so severe that they amounted to a constitutional violation, and he is therefore entitled to no relief.

We also decline to grant Appellant relief under our Article 66(c), UCMJ, authority because the matters

Appellant complains of fall outside the record, as he did not raise them in his clemency submission. Although the CAAF has determined the service Courts of Criminal Appeals may consider matters raised outside the record regarding confinement conditions as part of their Article 66(c), UCMJ, review, that is only the case when the record itself contains information about those conditions. *Jessie*, 79 M.J. at 441–42. In this case, Appellant's record contains no information about his post-trial confinement conditions—his concerns were solely raised through his appeal to this court.

C. Expert Witness Testimony and Related Exhibits

Appellant asserts the military judge abused her discretion by allowing a government witness to testify about his opinions regarding the cause of SrA BT's injuries. Appellant also claims the military judge erred in permitting trial counsel to reference statistics from various scholarly articles which had been admitted into evidence and cited during witness testimony.

1. Additional Background

a. Government Expert Qualification

The Government sought to have Dr. DS recognized as an expert in the field of forensic pathology. Trial defense counsel objected to Dr. DS being recognized as a forensic pathologist, as opposed to a forensic nurse. Dr. DS explained that he was "a PhD prepared nurse with a specialty in working with forensic patients and

also injuries and wounds," further describing himself as "an advanced practice forensic nurse" with training and experience "in working with injuries and wounds that deal with reported interpersonal violence." After Dr. DS explained this, trial counsel moved the military judge to recognize Dr. DS as an expert "in the field of forensic nursing and in wound examination," to which trial defense counsel did not object.

During Dr. DS's direct examination, trial counsel asked him his opinion about what could cause a particular injury, leading the Defense to object that Dr. DS's expertise in "forensic nursing" and "wound examination" (as opposed to pathology) would not extend to wound causation. Dr. DS detailed his training and experience, which included more than 500 lectures on forensic wound identification and documentation, including "the mechanisms of injury." He further explained he had co-taught classes with physicians regarding the mechanisms of injuries and was involved with studies specifically related to bruising. Dr. DS had also served as an operating room technician in the Air Force and an emergency room nurse before developing two different family violence intervention programs in which he focused solely on incidents of domestic violence. Dr. DS also served as a state-level abuse investigator in which he had to assess the origin of injuries to group-home residents who could not articulate how they were injured due to cognitive challenges. In addition, he performed the duties of a forensic nurse examiner, focusing on cases of sexual assault and domestic violence, ultimately

conducting examinations numbering "into the thousands." The military judge overruled the Defense's objection, concluding Dr. DS qualified as an expert on injury causation based upon his knowledge, experience, training, and education. She specifically noted Dr. DS had both attended and taught various courses as well as investigated injuries. She explained she found Dr. DS's testimony would be helpful in understanding the photographic evidence, medical records, medical testimony, and lay testimony regarding the injuries involved in the case.

b. Articles Admitted into Evidence

During Dr. RF's testimony, trial defense counsel sought to admit—over Government objection—several academic articles and studies that Dr. RF re- lied on in formulating his opinions, telling the military judge they were not being offered as substantive proof, but rather "as the basis of his opinion" and "facts and data that he relied upon." Trial defense counsel cited Mil. R. Evid. 703 as authority for admitting these documents, and the military judge agreed the documents were admissible, but she questioned whether the documents could be admitted in documentary form, or if the relevant portions of the documents needed to be read aloud in court based upon the "learned treatise" exception to the rule against hearsay under Mil. R. Evid. 803(18). Trial counsel pointed out that this exception would not permit the admission of the documents as exhibits, but would allow portions of them to be read into evidence. Trial defense counsel argued they were only

"trying to admit" the documents under Mil. R. Evid. 703, and not Mil. R. Evid. 803, and that the military judge could limit herself to considering the documents as "non-substantive proof" and admit them as exhibits "with that limiting instruction." At this point, trial counsel and trial defense counsel had an off-the-record conversation after which trial counsel withdrew their objection "to the paper format" of the documents. The military judge then told the parties she would "accept any agreement between the parties as to which portions [they] would like for [her] to consider," and she would "disregard the remainder of the article," if the parties desired. Trial counsel responded, "I don't think there's any need for the Court to impose that sort of limit in this case," and the military judge allowed the Defense to admit the exhibits.

In cross-examining Dr. RF, trial counsel confronted Dr. RF, without objection, with several statistics from the articles admitted as defense exhibits, including that 50 percent of strangulation victims have no visible injuries, and 30 percent have injuries which are too minor to be photographed. In doing so, Dr. RF acknowledged that he relied upon the articles and that he believed the articles were useful and reliable sources. Trial counsel also offered another article as a prosecution exhibit, and trial defense counsel stated, "No objection to it being admitted under the same rule, not as substantive proof, but as something that will be considered by the expert." The military judge responded, "Right, under [Mil. R. Evid.] 703." Trial counsel then restated that

the exhibit was being offered "subject to the same limitation that [trial defense counsel] just described." Trial defense counsel replied, "Under that limitation, no objection, Your Honor." Trial counsel proceeded to offer several additional articles under the same theory of limitation, which trial defense counsel had no objection to. Trial counsel offered more articles in the Government's rebuttal case, and trial defense counsel stated they had no objection to them being admitted as exhibits "pursuant to [Mil. R. Evid.] 703."

During closing argument, trial counsel cited to some conclusions and observations contained in the articles admitted into evidence, such as pointing to the statistic that 50 percent of strangulation victims have no visible injuries. Trial defense counsel objected to trial counsel's argument, asserting that the articles were "not admitted as substantive proof." Trial counsel responded that the information was available for the military judge's use for two reasons: (1) it was "fair commentary on the sources of the expert's testimony," and (2) the statistics "were read into evidence from a learned treatise by an expert on the stand under the hearsay rule." Thus, trial counsel argued, the statistics were "admissible for the truth of the matter asserted under the exception to the hearsay rule, and they were read in without objection." The military judge overruled the defense objection "consistent with [Mil. R. Evid.] 803(18)(A)," pointing to the fact the defense expert testified about these same portions of the exhibits on cross-examination.

2. Law

a. Government Expert Qualification

We review de novo the question of whether a military judge performed the gatekeeping function required by Mil. R. Evid. 702 properly, and we review a military judge's decision to permit a witness to testify as an expert and any limitations placed on the permitted scope of that witness's testimony for abuse of discretion. *United States v. Flesher*, 73 M.J. 303, 311 (C.A.A.F. 2014) (citations omitted). Mil. R. Evid. 702 permits expert testimony when the witness "is qualified as an expert by knowledge, skill, experience, training, or education" so long as the testimony is helpful and based upon adequate facts, reliable principles, and reliable application of the principles to the facts. The United States Court of Military Appeals, predecessor to the CAAF, set out six factors derived from the Military Rules of Evidence for assessing the admissibility of expert testimony: (1) the expert's qualifications; (2) the testimony's subject matter; (3) the testimony's basis; (4) the relevance of the testimony; (5) the testimony's reliability; and (6) whether the probative value is outweighed by other considerations. *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993) (citations omitted). Shortly after *Houser* was decided, the Supreme Court decided *Daubert v. Merrell Dow Pharm., Inc.* 509 U.S. 579 (1993). In *Daubert*, the Supreme Court set out six non-exclusive factors to be considered in whether scientific evidence is reliable and relevant. 509 U.S. at 593–95. The CAAF concluded that *Daubert* is consistent with

Houser, and the *Daubert* decision provides "more detailed guidance on the fourth and fifth *Houser* prongs pertaining to relevance and reliability." *United States v. Griffin*, 50 M.J. 278, 284 (C.A.A.F. 1999). Although Mil. R. Evid. 702 has since been amended, *Houser* and *Daubert* are still employed in military courts to assess the admissibility of expert testimony under that rule. *See, e.g.*, *United States v. Henning*, 75 M.J. 187, 191 (C.A.A.F. 2016). While *Daubert* focused on scientific testimony, its factors may still be considered in cases involving testimony based on technical or other specialized knowledge, but the factors do not necessarily apply in every case. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (citation omitted). The Supreme Court has emphasized that trial judges are afforded broad latitude in deciding how to determine the reliability of expert testimony. *Id*. at 142 (citation omitted).

b. Articles Admitted into Evidence

Under Mil. R. Evid. 702, expert witnesses "may testify in the form of an opinion or otherwise." Such witnesses may base their opinions on facts or data reasonably relied upon by experts in the particular field, even if such facts or data are not admissible in their own rights. Mil. R. Evid. 703. When an expert witness relies on otherwise inadmissible facts or data, that information may only be disclosed to court-martial members upon the military judge's determination that its probative value in helping the members evaluate the opinion substantially outweighs the disclosure's prejudicial effect. *Id.* If a

military judge determines the information may be disclosed, the expert witness may still give his or her opinion without first testifying about those underlying facts or data, but the expert may also be required to disclose the information on cross-examination. Mil. R. Evid. 705. Absent an exception, out-of-court statements offered for the truth asserted in those statements are inadmissible hear- say. Mil. R. Evid. 801, 802. One such exception covers statements in learned treatises, so long as the publication is demonstrated to be a reliable authority and either called to the attention of an expert witness during cross-examination or relied on by the expert during direct examination. Mil. R. Evid. 803(18). One limitation to this exception is that any such statement admitted into evidence may only be read into evidence—the treatise itself may not be received as an exhibit. Mil. R. Evid. 803(18)(B).

3. Analysis

a. Government Expert Qualification

We conclude the military judge did not err in permitting Dr. DS to provide his opinions as to the causation of SrA BT's and Appellant's wounds. Mil. R. Evid. 702 "permits 'anyone who has substantive knowledge in a field beyond the ken of the average court member' to qualify as an expert witness." *United States v. Harris*, 46 M.J. 221, 224 (C.A.A.F. 1997) (quoting *United States v. Stark*, 30 M.J. 328, 330 (C.M.A. 1990)).[10] The touchstone for qualifying an ex-

[10] *See also United States v. Banks*, 36 M.J. 150, 161

pert is whether that person is someone who can be helpful to the factfinder in a court-martial. *Id.* (citation omitted). Here, Dr. DS had significant knowledge about physical wounds, both from a pedagogical perspective as well as from practical experience, such as when he served as an investigator wherein he would seek to determine the origins of wounds on people who did not have the ability to communicate to him how they were injured. Dr. DS demonstrated through his testimony that he relied on a variety of academic studies and scholarly articles which the Defense's own expert acknowledged were reliable sources. Considering the focus of the Defense's theory at trial centered on whether SrA BT's injuries corroborated her testimony, an expert opinion as to how her injuries were caused would be helpful to the factfinder, as the military judge concluded. Trial defense counsel did not identify any notable deficiency with respect to Dr. DS's expertise at trial, and Appellant has failed to do so on appeal.

b. Articles Admitted into Evidence

Although the military judge's admission of various articles relied upon by the expert witnesses as exhibits did not comport with the Military Rules of Evidence, it was the Defense which first sought to admit articles—purportedly under Mil. R. Evid. 703.

(C.M.A. 1992) (footnote and citation omitted) (describing the Military Rules of Evidence as creating "[l]iberal standards" for the admission of expert testimony).

In doing so, Appellant abandoned the right to complain on appeal what the Defense at trial had asked the military judge to permit, thereby waiving any issue with respect to the admission of the documents as exhibits. *See, e.g.*, *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009). Moreover, Appellant similarly waived any issue on appeal about the admission of the articles offered by the Government, as trial defense counsel expressly said the Defense had "no objection" to their admission. *See, e.g.*, *United States v. Campos*, 67 M.J. 330, 332–33 (C.A.A.F. 2009).

Appellant's argument is that trial counsel inappropriately referred to facts and statistics from those exhibits during closing argument, because the documents were only admitted for non-substantive purposes. Contrary to Appellant's claim, the Defense's exhibits were admitted after trial counsel withdrew their objection, not pursuant to a ruling from the military judge that they were being admitted for a limited purpose. As the Government offered additional exhibits, the military judge did not indicate she had adopted the Defense's position that the exhibits were admitted for some purpose other than the substantive information contained within them. Indeed, when the military judge admitted the articles offered by the Defense, she offered the parties the opportunity to limit her consideration to just certain portions of the articles, but they declined her invitation. She did not state she would only consider the articles non-substantively. It is clear from the

record, however, that trial defense counsel believed the information in the exhibits was not to be used substantively, and trial counsel seemed to be operating under the same impression. The military judge never explicitly adopted that limitation, but she arguably implicitly did so by admitting the exhibits after trial defense counsel provided their caveat to their lack of objection.

Setting aside the question of why these articles—if they were not to be considered substantively—were ever offered as exhibits in the first place, we see no indication the information in the articles was used improperly. Subject to the military judge's weighing of the probative value and the prejudicial impact of otherwise inadmissible matters, parties may cross-examine an expert wit- ness regarding such matters in order to test the witness's opinion. Mil. R. Evid. 703, 705. When this occurs in a trial before members, the military judge "should give a limiting instruction" explaining the information is not offered for its truth. *United States v. Neeley*, 25 M.J. 105, 107 (C.M.A. 1993) (citations omitted). One purpose of this construct is to prevent the "smuggling" of inadmissible hearsay "under the guise of testing the basis for expert testimony." *United States v. Schlamer*, 52 M.J. 80, 84 (C.A.A.F. 1999) (citation omitted). When, however, an expert is asked about otherwise *admissible* information— such as matters contained in a learned treatise—that information is available for the factfinder to use for the truth of the matter asserted. Mil. R. Evid. 803(18); *United States*

v. Jackson, 38 M.J. 106, 110 (C.M.A. 1993) (footnote and citation omitted).

Trial defense counsel did not object to trial counsel's cross-examination of Dr. RF with statistics from the articles admitted into evidence, and trial counsel did not preemptively explain on the record whether the cross-examination questions involved the admission of substantive evidence or non-substantive information simply challenging the basis of Dr. RF's opinions.[11] As a result, the question of how the statistics could be used was not discussed until the Defense objected to trial counsel's closing argument. At that point, trial counsel posited the statistics came from learned treatises, and were therefore substantive evidence in the case. The military judge overruled the defense objection "consistent with" Mil. R. Evid. 803(18)(A). Although the military judge did not place much analysis on the record as to her conclusion that the statistics were avail- able as substantive evidence by virtue of them coming from a

[11] Ordinarily, we would test the admission of the information elicited on cross-examination for plain error due to trial defense counsel forfeiting the issue by not timely objecting. *See, e.g.*, *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014). In this case, however, it was trial defense counsel who offered the evidence in the first place, albeitfor a limited purpose, so the analysis is somewhat more complicated, since trial defense counsel likely did not perceive any need to object to their own evidence until trial counsel used it in a manner the Defense did not expect during closing argument.

learned treatise and being elicited during Dr. RF's cross-examination, we see nothing erroneous in her conclusion. Dr. RF testified he had relied on the documents and that he found them to be useful and reliable sources. Mil. R. Evid. 803(18) exempts statements from learned treatises from the ordinary rule against hearsay so long as the treatise is "established as a reliable authority by the expert's testimony," and such statements may be elicited on cross-examination. Under ordinary practice, the treatise would not be admitted as an exhibit. Mil. R. Evid. 803(18)(B). Trial counsel established the foundation required for the documents containing the statistics through Dr. RF's testimony that they were reliable, and we can infer the military judge so concluded based upon her ruling. Once the statistics were admitted as statements from learned treatises, trial counsel was free to argue their substantive import, and Appellant's asserted error is without merit.

D. Sentence Reassessment

Because we set aside and dismiss the specification alleging an assault consummated by a battery upon MT, we will consider whether we can reassess the sentence in lieu of remanding the case for new sentencing proceedings. We have "broad discretion" when reassessing sentences. *United States v. Winckelmann*, 73 M.J. 11, 13 (C.A.A.F. 2013) (citation omitted). If we "can determine to [our] satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity, then a

sentence of that severity or less will be free of the prejudicial effects of error " *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). We consider the totality of the circumstances with the following as illustrative factors: dramatic changes in the penalty landscape and exposure, the forum, whether the remaining offenses capture the gravamen of the criminal conduct, whether significant or aggravating circumstances remain admissible and relevant, and "whether the remaining offenses are of the type that [we as appellate judges] should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial." *Winckelmann*, 73 M.J. at 15–16 (citations omitted). We find the factors in Appellant's case weigh in favor of reassessment rather than rehearing.

We conclude that in the absence of the specification we set aside, Appellant would have received a sentence of at least a bad-conduct discharge, confinement for seven months, and reduction to the grade of E-1. By setting aside the specification, the number of specifications Appellant was convicted of is reduced from five to four, and the maximum sentence to confinement he faced is reduced from four years to two. Although an assault committed upon a child carries a substantially higher maximum sentence than a similar assault com- mitted on an adult, SrA BT was the primary victim in the case, and she suffered significant visible injuries as a result, the most severe of which were inflicted upon her in front of 15-month-old MT. The facts of this case indicate the

various assaults on SrA BT were committed in close temporal proximity to each other in two violent episodes separated by a brief respite when SrA BT took MT downstairs to change his diaper. In contrast, the purported assault on MT was brief and not only resulted in no injury, but was unlikely to cause any injury to MT. We thus conclude the specification we set aside did not significantly contribute to Appellant's sentence.

We have considered this particular Appellant, the nature and seriousness of his offenses, his record of service, and all matters contained in the record of trial, and we determine his reassessed sentence is appropriate. *See United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006) (citing *United States v. Healy*, 26 M.J. 394, 395–96 (C.M.A 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007).

III. CONCLUSION

The finding of guilty of Specification 5 of the Charge is **SET ASIDE** and **DISMISSED WITH PREJUDICE**. We reassess the sentence to a bad-conduct discharge, confinement for seven months, and reduction to the grade of E-1. The remaining findings and the sentence as reassessed are correct in law and fact, and no other error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the remaining findings and sentence as reassessed are **AFFIRMED**.

FOR THE COURT

AARON L. JONES
Deputy Clerk of the Court

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
Washington, D.C.

United States,
Appellee

v.

Derrick O.
Williams,
Appellant

USCA Dkt. No. 21-0243/AF
Crim. App. No. 39746

ORDER

On further consideration of the granted issue (81 M.J. __ (C.A.A.F. June 25, 2021)), and in view of *United States v. Willman*, 81 M.J. __ (C.A.A.F. July 21, 2021**), it is**, by the Court, this 10th day of August, 20,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ David A. Anderson
Acting Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Blyth)
Appellate Government Counsel (Payne)

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
Washington, D.C.

United States,
Appellee

USCA Dkt. No. 21-0243/AF
Crim.App. No. 39746

v.

ORDER GRANTING REVIEW

Derrick O.
Williams,
Appellant

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is, by the Court, this 25th day of June, 2021,

ORDERED:

That said petition is hereby granted on the following issue:

> WHETHER THE AIR FORCE COURT ERRED BY FAILING TO CONSIDER APPELLANT'S ERRONEOUS DEPRIVATION OF PAY WHILE SERVING HARD LABOR WITHOUT CONFINEMENT, PROPERLY RAISED AS AN EIGHTH AMENDMENT VIOLATION, WHEN ASSESSING SENTENCE APPROPRIATENESS.

No briefs will be filed under Rule 25.

For the Court,

/s/ David A. Anderson
Acting Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Blyth)
Appellate Government Counsel (Payne)

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

No. ACM 39746

UNITED STATES
Appellee

v.

Derrick O. WILLIAMS
Staff Sergeant (E-5), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 12 March 2021

Military Judge: Bradley A. Morris (arraignment and motions); John C. Degnan.

Approved sentence: Dishonorable discharge, confinement for 45 days, hard labor without confinement for 3 months, and reduction to E-1. Sentence adjudged 22 March 2019 by GCM convened at Francis E. Warren Air Force Base, Wyoming.

For Appellant: Major M. Dedra Campbell, USAF.

For Appellee: Lieutenant Colonel Brian C. Mason,

USAF; Major Jessica
L. Delaney, USAF; Major Dayle P. Percle, USAF;
Mary Ellen Payne, Esquire.

Before MINK, KEY, and ANNEXSTAD, *Appellate Military Judges*.

Judge KEY delivered the opinion of the court, in which Senior Judge MINK and Judge ANNEXSTAD joined.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

KEY, Judge:

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920.[1] He was sentenced to a dishonorable discharge, confinement for 45 days, hard labor without confinement for 3 months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

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[1] All references in this opinion to the Uniform Code of Military Justice (UCMJ), Rulesfor Courts-Martial, and Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2016 ed.).

On appeal, Appellant raises six issues: (1) whether the military judge erred by excluding statements made by the victim; (2) whether the military judge erred by admitting evidence of Appellant's previous court-martial acquittal; (3) whether the military judge erred by providing the court members an instruction on false exculpatory statements; (4) whether Appellant was denied due process by virtue of the Government pursuing a different theory of guilt than Appellant was charged with; (5) whether Appellant's sentence was rendered unlawfully severe when he was not correctly paid while he served his sentence; and (6) whether the military judge erred by not giving the Defense's requested instruction on consent. Appellant personally raises the fourth and sixth issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). We have carefully considered Appellant's sixth claim and have determined it warrants neither discussion nor relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987). Although not raised by Appellant, we consider whether he is entitled to relief for facially unreasonable post-trial delay. Finding no error prejudicial to the substantial rights of Appellant, we affirm.

I. BACKGROUND

Appellant, a noncommissioned officer, was convicted of sexually assaulting a junior Airman, AM, at a Halloween costume party Appellant hosted at an on- base club on 28 October 2017.

AM went to the Saturday-night party with a married couple, Ms. BW and Ms. JW, who were friends with Appellant.[2] AM said that before she went to the party, she consumed "five or six" shots of cognac despite not having eaten anything all day. The three women arrived at the club around 2100 hours to find approximately 30 others in the ballroom, which was physically separated from the club's bar. Ms. JW testified that at some point "early on" in the party, Appellant told her that AM "is fine." Trial counsel refreshed Ms. JW's recollection that she had originally told investigators that Appellant "was talking about how cute [AM] was" and said he "would f[**]k the sh[*]t out of her," but she did not recall when he said that. Appellant was married, but his wife did not attend the party due to an illness. He was dressed as a gladiator in a costume that primarily consisted of a knee-length tunic.

As time went on, partygoers began leaving the party, and those who remained, to include AM, Ms. BW, and Ms. JW, migrated to the bar area where a surveillance camera captured events there. Portions of recordings taken by this camera and another camera in a nearby hallway were admitted into

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[2] Ms. JW was an active-duty co-worker of Appellant's at the time of the assault, but she separated from the military shortly before Appellant's court-martial. Her militarygrade at the time of the relevant events is not evident from the record.

evidence for the time period running from approximately 2300 hours to 0100 hours. Although Appellant, Ms. BW, and Ms. JW drank while at the party, AM was not served alcohol due to her being under the legal drinking age.

In the surveillance video footage from the bar area, AM, Ms. BW, and Ms. JW are standing at or near the bar from 2313 hours through approximately midnight. During this period, Appellant periodically walks into and out of the camera's view, eventually walking over to AM at 2327 hours and dancing up against her by placing his buttocks near her crotch area. This lasts for about ten seconds, and Appellant does it again shortly thereafter for about twenty seconds. Afterwards, Appellant and AM laugh and hug, and Appellant wanders out of view of the camera. During her testimony at Appellant's court-martial, Ms. JW described the dancing as "like a friendly dance." Other than this dancing with Appellant, AM is seen in the video talking to various party attendees, to include Ms. BW and Ms. JW. Ms. JW described AM as being "drunk at the party," but not loud, "just like more outgoing, like talkative" and slurring her words "just a little." Ms. BW said that at some point in the night AM's "eyes were like red, like bloodshot red," but her speech was unaffected "from what [Ms. BW] could tell."

No footage of the bar from midnight to 0030 hours was admitted at trial, but Ms. JW said she walked into the ballroom to get her purse so that she could close out her bar tab. In the ballroom, she saw Appellant

and AM dancing alone together with Appellant "twerking" on AM by placing his buttocks in her crotch area. Ms. JW testified that this time, AM "was not really present," and that she "was leaning against the wall" with Appellant's buttocks "holding her up." Ms. JW took out her phone and took a short video in which Ms. JW can be heard saying, "kill it, kill it, kill it." The video carries a time stamp of 0031 hours. Ms. JW put her phone away and turned to go back to the bar, and as she was leaving, she turned back around and saw Appellant kiss AM. She did not see AM lean into the kiss and described it as "forced for sure." Ms. JW said she found the episode "weird," but she "wasn't worried."

The surveillance camera footage admitted at trial picks back up at 0033 hours and shows Ms. JW standing by herself at the bar while Ms. BW is at a nearby table with five other people. AM walks into the frame and speaks briefly to Ms. BW before walking over to the bar to talk to Ms. JW for about 30 seconds and then returning to talk to Ms. BW. Approximately 15 seconds later, Appellant walks up to AM and hugs her a couple of times. They separate and speak to other partygoers, then Appellant puts his arm around AM's shoulders, and they walk out of the view of the camera at 0035 hours, at which point the video stops.

At trial, Ms. BW testified she had a conversation with AM in the bar area after which AM "walked away." In her testimony, Ms. BW did not say AM left with Appellant, but she said that after this conversation, Ms. BW and Ms. JW went to the

bathroom together where they stayed for about ten minutes. While in the bathroom, Ms. JW took a picture of the two of them which was admitted into evidence and bears a timestamp of 0044 hours. Realizing they had not seen AM "for ten or fifteen minutes," Ms. BW and Ms. JW left the bathroom to look for AM.

As the two women walked out of the bathroom, they spotted movement in a nearby closet—a closet which had no door. When they looked in to investigate, they saw Appellant on top of AM with Appellant's costume pulled up above his waist such that his buttocks were exposed. AM's pants were pulled down and her legs were up in the air in front of Appellant. Ms. BW testified Appellant's "hips were aligned with [AM's] vagina" and Appellant was "thrusting up and down." She said AM did not appear to be interacting with Appellant, and that she "was just lying there on the floor. Her arms were sprawled out to the sides of her [a]nd her eyes were closed." Ms. JW described the scene in substantially the same way, but neither Ms. JW nor Ms. BW saw Appellant's penis and neither could testify that Appellant's penis penetrated AM's vagina.

The second surveillance camera captured video of the hallway just outside of the closet, but the recording does not show the interior of the closet at all. The video shows Ms. BW and Ms. JW walking up to the closet at 0045 hours. About one minute later, three other partygoers walk by. According to Ms. BW, just after she and Ms. JW found AM and Appellant in

the closet, three people came down the hallway looking for Appellant. Ms. BW diverted the group away from the closet because she "didn't want to embarrass [her] friend." Once the three people were gone, Ms. BW said she turned back around to find Appellant "still thrusting up and down." She testified AM "was still the same, her arms weren't embracing him. They were out to her sides and [she] was still just lying there." Ms. BW then went into the closet, kicked Appellant in his side, and told him to get off AM. Appellant stood up and started adjusting his clothes, and AM's feet fell to the floor. Ms. BW said she helped AM get up "immediately," and AM "started adjusting herself." Ms. BW described AM as "just like discombobulated, like she didn't really have her balance," which Ms. BW ascribed to AM being "so drunk." Ms. BW told AM to meet her in the bathroom, and Ms. BW walked out of the closet. In the surveillance video, Ms. BW leaves the closet about a minute after the three people looking for Appellant walk by, and Appellant walks out about ten seconds later at 0048 hours.

Despite Ms. BW's directions, AM did not go to the bathroom. Instead, Ms. BW said she found AM near the bar area leaning against a wall for support and appearing "super drunk." Ms. BW said she noticed AM's jeans had been ripped at the knee, AM's eyes were red, and she was neither talking to anyone nor making any facial expressions. The surveillance video from the hallway camera, however, shows AM walking up to Ms. BW and Ms. JW near the closet

entrance with a fourth woman at 0050 hours. Shortly thereafter, the group steps partially out of the camera's view, and AM is not visible for the next two minutes, but when she comes back into view, she is standing on her own and interacting with the other women until they all walk away at 0054 hours.

Meanwhile, footage from the bar shows Appellant seated at the bar at 0051 hours, about three minutes after he left the closet, talking to the bartender and the club manager, Technical Sergeant (TSgt) NB, as well as a few other partygoers. TSgt NB—who considered herself good friends with Appellant—noted Appellant had disappeared from the bar for "roughly ten to fifteen minutes" and when he returned to the bar, she asked where he had been. Appellant said he "didn't know" and appeared confused to TSgt NB. She testified that Appellant then said "something to the effect of was [he] being good or did [he] do something bad," and at some point volunteered that his wife keeps him out of trouble. TSgt NB agreed Appellant seemed extremely drunk and described him as "[t]he drunkest [she had] ever seen him." Around this same time, TSgt NB said she saw AM in the hallway "hunched over with [Ms. BW] kind of holding her or helping her." TSgt NB said AM appeared upset and that she was leaning against the wall.

The last bar video shows Ms. BW and Ms. JW walking into the bar just after 0054 hours and Appellant hugging each of them separately, with his mouth near their ears. Ms. JW, whom Appellant hugged first, testified Appellant asked her, "Did I just

f[**]k your friend?" Ms. JW said she told him, "yes, you did," and he then turned to talk to Ms. BW who described Appellant as "talking in [her] ear" in "like a whisper." She testified Appellant said, "please don't tell me that I just had sex with your friend." With her arm around Appellant, Ms. BW told him he had, and Appellant "asked [her] not to say anything." Ms. JW testified she "maybe" hugged Appellant goodbye, but she did not tell him anything was wrong. In the video, AM walks into view at 0056 hours, and then she leaves again with Ms. BW and Ms. JW moments later.

AM, Ms. BW, and Ms. JW were driven by a designated driver to Ms. BW's and Ms. JW's house. In the car ride, Ms. BW said AM "wasn't saying anything" and did not seem to understand what was going on. Once at the house, AM vomited and fell asleep. The next morning, Ms. BW and Ms. JW told AM they saw Appellant having sex with her in the closet at the club. Ms. BW testified AM broke down in tears but did not want to report Appellant out of fear of getting in trouble for drinking underage. Ms. BW, an Air Force civilian employee, told her supervisor about the events at the party the following Monday which, in turn, led to an investigation being initiated by the Air Force Office of Special Investigations (AFOSI).

At Appellant's trial, AM testified she remembered Appellant dancing in front of her at the bar. She said, "I found it funny that a grown man would be kind of bent over in front of me but I really didn't think anything of it." She remembered going to the bathroom at the club at some point, noting that she

was drunk. Her next memory was being on the couch in Ms. BW's and Ms. JW's house, throwing up, and going back to sleep. She testified she woke up at 0600 hours and went to the bathroom and she noticed "a sensation on [her] vagina. . . . It was just sore, throbbing." She also noted her menstrual phase had begun and testified, "Whatever happened probably triggered it." AM said she went back to sleep and next woke up with Ms. BW and Ms. JW on the couch with her. Once they explained what they had seen, AW testified, "I was sad. I was shook. I was just confused. I was just lost, honestly." On cross-examination, trial defense counsel asked AM, "So you don't remember if you actually chose to engage in this intimate activity with [Appellant]?" AM replied, "No."

In the ensuing investigation, Appellant's house was searched by AFOSI agents who found the costume Appellant had been wearing at the party in the washing machine. The costume was the only article of clothing in the machine, and it was wet when the agents found it. One agent testified that it smelled like "a strong cleaner" had been used, because the machine "smelled essentially like a pool, like chlorine." AM also underwent a sexual assault forensic examination, the timing of which is unclear from the record, although one witness said the examination appeared to have been conducted "less than thirty-six hours" after the assault. The examination found no semen or male DNA in samples taken from AM's body, but evidence of the presence of Appellant's DNA was found on the inside of AM's underwear. In an interview with an

AFOSI agent, AM said that after the assault, she felt "pain inside of her vagina."

II. DISCUSSION

A. Evidence Excluded Under Mil. R. Evid. 412[3]

Just prior to Appellant's sexual conduct with AM in the closet at the club, AM had brief conversations with Ms. BW and Ms. JW in the bar area. At trial, Appellant sought to introduce the substance of those conversations, but the Government objected, arguing such evidence was prohibited under Mil. R. Evid. 412. The military judge ruled in the Government's favor, and Appellant asserts on appeal that the military judge's ruling excluding the evidence was erroneous. We disagree.

1. Additional Background

In her conversation with Ms. JW, AM essentially expressed an interest in potentially engaging in sexual conduct with another person.[4] Ms. JW told AM to go talk to Ms. BW about it, which AM briefly did. Ms. BW chalked the conversation up to AM "just drunk talking." Appellant and AM walked out of the bar area together moments later.

The Defense moved to admit the substance of AM's

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[3] This issue was filed under seal and the discussion, *supra*, only reveals that which is necessary to resolve the issue.

[4] This other person was not Appellant.

brief conversations with Ms. BW and Ms. JW under two primary theories: first, that the conversations demonstrated AM's interest in sexual activity, and second, that they showed that AM had the ability to consent to sexual conduct in that she was having conversations about such shortly before being found in the closet with Appellant. The Government opposed, and the military judge denied the motion in a written ruling dated 10 December 2018 after a motions hearing, finding that an interest in sexual activity with persons other than Appellant was "neither relevant nor material to the Defense's case" as it did "not make a fact in issue in this case more or less probable. It has no bearing on whether AM consented to anything with [Appellant]." The military judge further concluded evidence of AM and Appellant dancing together and kissing "pertain[ed] to the issue of consent," and was being admitted, but he did not otherwise address whether the conversations demonstrated AM's ability to consent. Finally, the military judge found "the probative value of this evidence is outweighed by the danger of unfair prejudice and confusion of the issues" without comment as to how he arrived at that conclusion.

Between the hearing and Appellant's trial, a different military judge was detailed, and on 1 March 2019 the Defense sought reconsideration of the ruling. The Defense asserted that the Government's theory in the case was that AM could not consent to sexual conduct with Appellant due to her level of intoxication and, therefore, AM "contemplating sex right before

the alleged assault" was evidence critical to rebutting that theory, as it demonstrated AM's mental capacity "to make important decisions." Trial defense counsel explained they were not trying to demonstrate AM had a general willingness to consent to sexual conduct.[5] The military judge denied the reconsideration motion with- out discussion at the beginning of Appellant's trial on the merits. He issued a written ruling two and a half months after the trial concluded in which he explained that the Defense had not identified any new evidence other than the surveillance videos, the substance of which had been previously documented in the report of investigation.[6] The military judge declined to revisit the prior military judge's ruling based upon a lack of new evidence or change in the law.

During the findings portion of Appellant's trial, while being questioned by the Government, Ms. BW testified about her conversation with AM, describing AM as "just babbling, just talking about random stuff." Ms. BW also noted AM was talking loudly, but

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[5] Trial defense counsel raised other theories of admission at trial; however, Appellant has not asserted them on appeal and we do not address them in this opinion.

[6] Although the Government possessed the surveillance videos prior to the original motion hearing, agents had encountered difficulties transferring the videos to media that could be provided to the Defense. The Defense received the videos shortly before Appellant's trial on the merits began.

her speech was not slurred. Neither party elicited any testimony from Ms. JW about her conversation with AM, and AM did not testify about either conversation.

2. Law

We review a military judge's ruling that excludes evidence under Mil. R. Evid. 412 for an abuse of discretion. *United States v. Erikson*, 76 M.J. 231, 234 (C.A.A.F. 2017) (citation omitted). A military judge abuses his or her discretion when the military judge's "findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. White*, 80 M.J. 322, 327 (C.A.A.F. 2020) (quoting *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008)). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (quoting *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010)).

Under Mil. R. Evid. 412, evidence of an alleged victim's sexual predisposition and evidence that an alleged victim engaged in other sexual behavior is generally inadmissible. Mil. R. Evid. 412(a). The intent of the rule is to "shield victims of sexual assaults from the often embarrassing and degrading cross- examination and evidence presentations common to sexual offense prosecutions." *United States*

v. Ellerbrock, 70 M.J. 314, 318 (C.A.A.F. 2011) (original alteration, internal quotation marks, and citations omitted). One exception to this rule is when exclusion of the evidence would violate an accused's constitutional rights. Mil. R. Evid. 412(b)(1)(C). It is the defense's burden to demonstrate the exception applies. *United States v. Banker*, 60 M.J. 216, 223 (C.A.A.F. 2004). In order to show that the exclusion of evidence would violate an accused's constitutional rights, the defense must show that the evidence is relevant, material, and favorable to his defense, "and thus whether it is necessary." *Id.* at 222 (quoting *United States v. Williams*, 37 M.J. 352, 361 (C.M.A. 1993) (internal quotation marks omitted)). The term "favorable" means the evidence is "vital." *United States v. Smith*, 68 M.J. 445, 448 (C.A.A.F. 2010). Moreover, the probative value of the evidence must outweigh the dangers of unfair prejudice under a Mil. R. Evid. 403 analysis. *United States v. Gaddis*, 70 M.J. 248, 256 (CA.A.F. 2011). Military judges have "wide discretion" in ap- plying the Mil. R. Evid. 403 balancing test; however, military judges are afforded less deference when they do not explain their analysis on the record, and we give them no deference when they do not conduct the analysis at all. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000).

3. Analysis

On appeal, Appellant argues the military judge abused his discretion by excluding the substance of AM's conversations with Ms. BW and Ms. JW be- cause the evidence was constitutionally required

under Mil. R. Evid. 412(b)(1)(C), as it demonstrated that AM was capable of consenting to sexual activity. Appellant further argues that by not being able to present the sub- stance of the conversations, the Government "capitalized" on the situation by portraying AM as "speaking incoherently moments before she was allegedly assaulted." Appellant asserts the initial military judge failed to consider how the evidence pertained to AM's capacity to consent, as he neither made any findings regarding AM's degree of intoxication nor addressed the capacity issue in his analysis. Because the evidence was excluded, Appellant argues his ability to cast doubt on Ms. BW's and Ms. JW's characterization of AM as being unresponsive in the closet was compromised. The Government responds that Appellant was charged under a theory of causing bodily harm to AM without her consent, not to assaulting her while she was incapable of consenting, and that there was "substantial other evidence" showing AM's competence, to include the surveillance video footage and witness testimony about AM's ability to walk, talk, and dance close in time to the assault.

As noted by the Government, Appellant was charged with sexually assaulting AM by causing her bodily harm, a charging decision which required AM's lack of consent to the sexual conduct to be proven beyond a reasonable doubt. The Government's case at trial did not involve any direct evidence AM did not consent. Indeed, trial counsel never asked AM whether she consented or not, and trial defense

counsel elicited AM's concession that she did not remember whether or not she chose to engage in the sexual conduct with Appellant. With- out direct evidence proving AM's lack of consent, the Government elected to focus on circumstantial evidence, a large degree of which centered on AM's apparent lack of ability to consent.

The opening lines of trial counsel's closing argument illustrate the Government's theory of the case, as trial counsel described AM as being "vulnerable and drunk;" "unaware and unable to resist;" "passed out in a closet;" "dead to the world;" and "motionless." Trial counsel asked the members to infer AM did not consent "based on the surrounding circumstances," which trial counsel identified as AM's eyes being closed and her "lying there motionless on the floor." Trial counsel asked, "What actions or words or communication is she giving the accused to know that it is okay to put your penis inside of [her]? Nothing." At the conclusion of his argument, trial counsel told the members: "He found, had her isolated, passed out in a closet, and sexually assaulted her." In his rebuttal argument, trial counsel offered the clearest explanation of his theory on the issue of consent when he told the members, "It was sexual assault because she was unable to consent, she didn't consent, and he performed the sexual act on her." In other words, his argument was AM did not consent be-cause she could not consent.

In light of this theory of Appellant's culpability, AM's ability—or lack thereof—to consent to the sexual

conduct was directly at issue. Therefore, her capacity to carry on a conversation immediately before the alleged assault is plainly relevant to establishing her cognitive abilities at the time. Contrary to Appellant's argument, however, the subject matter of such conversation is far less relevant than the degree to which AM could communicate coherent thoughts and respond to inputs from the other conversation participants. The fact that AM had relayed an interest in potentially engaging in sexual conduct with someone may have shed some light on AM's sexual interests at the time, but those interests did not include Appellant—and there was no evidence Appellant had any knowledge of the conversations at all. As a result, AM's expressed sexual interests amount to the sort of sexual-behavior or sexual-predisposition evidence Mil. R. Evid. 412 is designed to exclude, as the evidence would do little more than paint AM as being generally open to engaging in sexual conduct. We agree with the military judge that the subject of AM's conversations with Ms. BW and Ms. JW was not material to the Defense's case, because AM's interest in sexual conduct with another has no bearing on whether or not AM consented to sexual conduct with Appellant. As such, this evidence cannot rise to the level where its exclusion would violate Appellant's constitutional rights, and the military judge's ruling excluding the evidence was not an abuse of discretion.

While the specific subject matter of AM's conversations with Ms. BW and Ms. JW sheds little

light on AM's capacity to consent, her ability to have those conversations was far more pertinent to countering the Government's trial strategy. The first military judge's ruling, which contained only a single paragraph analyzing the admissibility of these conversations, did not differentiate between the subject matter of the conversations and the fact AM carried on conversations. However, nothing in the ruling indicates counsel were prohibited from introducing evidence about the surrounding circumstances of those conversations. The second military judge denied reconsideration of the motion simply because trial defense counsel did not produce any new evidence, and his summary ruling did not go into any further detail. Yet trial defense counsel did not pursue a line of inquiry with witnesses with respect to AM's ability to cogently participate in the conversations or otherwise seek clarification from the military judge as to whether or not they could ask Ms. BW and Ms. JW about the surrounding circumstances of the conversations without delving into their substance. Government counsel, however, did elicit brief testimony from Ms. BW about her observations of AM's demeanor during their conversation shortly before the alleged assault, but trial defense counsel did not ask any questions on the subject, nor did they ask Ms. JW about her conversation with AM. While Appellant asserts on appeal the Government was able to portray AM as incoherent shortly before the assault—a characterization which some- what overstates Ms. BW's actual testimony—trial defense counsel did not avail themselves at trial of

opportunities to demonstrate AM carried on coherent conversations. The Defense's decision not to do so at trial does not warrant relief on appeal.

B. Evidence of Appellant's Previous Court-Martial

Nearly three years before his conviction in this court-martial, Appellant was acquitted of committing a sexual assault at a previous court-martial in July 2016 held at the same base. Over defense objection, the military judge permitted the Government to introduce evidence of the events supporting the earlier court-martial's charge. Appellant alleges the military judge erred. We disagree.

1. Additional Background

a. Appellant's First Court-Martial

In October 2014, AW—then a Senior Airman—went out to a bar with friends where she ran into another group which included Appellant. AW had three cocktails at the bar, and she and Appellant danced with each other in a style AW characterized as "grinding." The group went to a second bar where AW did not drink, but she and Appellant continued suggestively dancing with each other. Sergeant (Sgt) ML[7]—one of the designated drivers in the group—

[7] Sgt ML was a noncommissioned officer at the time of these events, but he had separated by the time of Appellant's court-martial from which this appeal arises. His specific grade is unclear from the record, as

described AW as "flirting" with Appellant and dancing with him by placing "her rear end in his crotch region." After that bar closed, Appellant, AW, Sgt ML, and Staff Sergeant (SSgt) AS went to Appellant's apartment where Appellant and AW wound up sitting on a couch together while AW rubbed Appellant's head. At some point, SSgt AS went outside to smoke and Sgt ML went with her, leaving Appellant and AW in the apartment alone. Still on the couch, Appellant and AW began kissing each other, and SSgt AS saw them doing so when she opened the door to come back into the house. She told Sgt ML what she had seen, and she and Sgt ML decided to go to Sgt ML's house around the corner rather than interrupt Appellant and AW.

According to AW's testimony, she stopped kissing Appellant "after a little bit" when she "realized what [she] was doing," and she stood up from the couch. AW said she and Appellant then talked about AW's boyfriend until Appellant "lifted [her] up behind the knees" and started carrying her to the back of the house. AW was eventually able to pull free from Appellant's grasp and away from him, and she went outside to look for SSgt AS, only to find SSgt AS was not there and that Sgt ML's car was gone. Due to the cold weather, AW went back into the apartment where Appellant and AW continued to converse. AW said Appellant told her that his wife was out of town and that they were "fighting anyway," and then he picked

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he is only referred to as "Sergeant."

her up again and took her to a bedroom in the back of the apartment.

Once in the bedroom, Appellant set AW down such that she was standing in front of the bed, and Appellant proceeded to take off her pants and underwear. AW laid down on the bed, and Appellant laid on top of her, trying unsuccessfully to digitally penetrate her vagina. Appellant was then able to penetrate AW's vagina with his penis, and after some time passed, he pulled AW on top of him and continued to penetrate her vagina with his penis. AW testified she could not get off Appellant because "[h]is knees were up behind [her]" and he was holding one of her arms "on the bed or the wall." Eventually, Appellant got up and went to the bathroom, and AW dressed herself and went to the living room. When Appellant walked into the living room, AW told him she wanted to go home, and Appellant drove her there. The two conversed during the ride, and AW said Appellant told her, "I didn't know you liked me like that."

Sgt ML testified that the following day he saw AW, and AW and he "were laughing and joking about that night, how she was dancing and what have you." During the subsequent investigation, Appellant admitted to having sexual intercourse with AW, but he maintained the act was consensual. AW, however, said she did not consent to the sexual activity. Appellant was charged with sexually assaulting AW; he was acquitted on 29 July 2016.

b. Appellant's Motion to Exclude Prior Acquittal

Prior to Appellant's trial in the instant case, trial defense counsel moved the military judge to exclude evidence of Appellant's alleged assault on AW under two theories: (1) the members could not find by a preponderance of evidence that Appellant committed the prior offense; and (2) the evidence failed the Mil. R. Evid. 403 balancing test by virtue of dissimilarities between the offense against AW and the offense against AM. The military judge denied the Defense's motion.

In the Government's opening statement, trial counsel told the members they would hear from AW during Appellant's trial explaining,

> [AW], too, was assaulted by [Appellant]. In fact, in October of 2014 [Appellant] used similar tactics and circumstances to isolate [AW] and force her to have sex with him. Now, in that 2014 case, when [Appellant] faced a general court-martial, the members of that panel were not able to find him guilty beyond a reasonable doubt. However, in this case, you will be given the opportunity to consider that event from 2014 in accordance with the instructions the [military] judge is going to give you later on.

Trial counsel did call AW to testify, and the Defense called Sgt ML, SSgt AS, and a special agent involved with the investigation into AW's allegations. Ultimately, the testimonial evidence in Appellant's

trial underlying this appeal spanned 253 pages of the 776-page trial transcript, with 84 of those pages—or 33 percent—being devoted to the allegation pertaining to AW. Prior to closing arguments, the military judge provided the following instructions to the members:

> You heard evidence that [Appellant] may have committed a sexual offense against [AW]. [Appellant] is not charged with this other offense. This evidence may have no bearing on your deliberations, unless you first determine, by a preponderance of the evidence that is more likely than not, this other offense occurred. In regard to your determination of whether or not this other offense occurred, you may consider the fact that [Appellant] was acquitted or found not guilty of the sexual offense involving [AW] at a prior court-martial in 2016.
>
> If you determine, by a preponderance of the evidence, this other offense occurred, you may then consider the evidence of that other offense for its bearing on any matter to which it is relevant only in relation to the Charge and its Specification, or the lesser included offense of attempted sexual assault. You may consider the evidence of this other sexual offense for its tendency, if any, to show [Appellant]'s propensity or predisposition to engage in a sexual offense. You may not, however, convict

> [Appellant] solely because you believe he committed this other offense or solely because you believe [Appellant] has a propensity or predisposition to engage in a sexual offense. In other words, you cannot use this evidence to overcome a failure of proof in the government's case, if you perceive any to exist.
>
> [Appellant] may be convicted of an alleged offense only if the prosecution has proven each element beyond a reasonable doubt. Each offense must stand on its own and you must keep the evidence of each offense separate. The prosecution's burden of proof to establish [Appellant]'s guilt beyond a reasonable doubt re- mains as to each and every element of the offense alleged in the Charge and its Specification, or the lesser included offense of at- tempted sexual assault.

Trial counsel highlighted AW's testimony in his closing argument, eventually telling the members,

> Now I do not want you to convict [Appellant] of this offense just because the other one happened and the military judge's instructions tell you just that. But you can consider it for anything you think is relevant. Anything. So if you want to know does this person have a propensity to commit sexual offenses? Does it tell you

> something about the way he views women? About his respect for another person's body. Does it give you insight into his thought process? That is for you to consider.

The Defense argued to the members that the sexual conduct between AW and Appellant was consensual and that the Government had introduced the conduct simply to "prop up their weak case." In rebuttal argument, trial counsel returned to the issue of AW and argued Sgt ML and SSgt AS had not undermined AW's testimony because they were not at the apartment at the time of the alleged assault.

2. Law

Under Mil. R. Evid. 413, evidence that an accused has committed another sexual offense may be admitted and "considered on any matter to which it is relevant." Mil. R. Evid. 413(a). The term "sexual offense" includes any conduct prohibited by Article 120, UCMJ, which includes the offense of sexual assault. Mil. R. Evid. 413(d)(1). Inherent in the rule is "a general presumption in favor of admission." *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013) (quoting *United States v. Berry*, 61 M.J. 91, 94–95 (C.A.A.F. 2005)). We review a military judge's decision to admit evidence under Mil. R. Evid. 413 for an abuse of discretion. *Id.* (citation omitted).

The three threshold requirements for admitting evidence under Mil. R. Evid. 413 include the accused being charged with a sexual offense, the proffered

evidence being evidence of the accused having committed another sexual offense, and the proffered evidence being relevant to the case being tried. *Berry*, 61 M.J. at 95. In order to conclude there is evidence of another offense, a court must determine that the members could find the other offense occurred by a preponderance of the evidence. *United States v. Wright*, 53 M.J. 476, 483 (C.A.A.F. 2000) (citing *Huddleston v. United States*, 485 U.S. 681, 689–90 (1988)). Once these requirements are met, "it is a constitutional requirement that evidence offered under [Mil. R. Evid.] 413 be subjected to a thorough balancing test under [Mil. R. Evid.] 403." *Id*. The employment of a careful balancing test is required due to "the potential for undue prejudice that is inevitably present when dealing with propensity evidence." *United States v. James*, 63 M.J. 217, 222 (C.A.A.F. 2006). An incorrect ruling risks injecting a court-martial with a "distracting mini-trial on a collateral matter of low probative value." *Solomon*, 72 M.J. at 181. The fact an accused was acquitted of committing the other sexual offense, standing alone, does not prevent its introduction under Mil. R. Evid. 413, but the military judge must give the acquittal "due weight," as it may serve to reduce the strength of the proof of the other offense. *Id*. at 182. Our superior court, the United States Court of Appeals for the Armed Forces (CAAF), has cautioned that "great sensitivity" is called for in determining whether or not to admit evidence of prior acts of which an accused was previously acquitted. *United States Griggs*, 51 M.J. 418, 420 (C.A.A.F. 1999) (analyzing admission of

acquittal for purposes of demonstrating intent and absence of mistake under Mil. R. Evid. 404(b)).

3. Analysis

Because Appellant was charged with committing a sexual assault against AM—a sexual offense under Article 120, UCMJ—and because Appellant's conduct with AW would amount to the same type of offense, the first two threshold requirements of Mil. R. Evid. 413 were met. The third requirement is that the evidence was relevant under Mil. R. Evid. 401. Under that rule, evidence is relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. In his ruling, the military judge said nothing about how the alleged offense regarding AW was relevant to the offense relating to AM; he simply noted, "I find this evidence to be relevant" without elaboration. Notwithstanding the absence of analysis on this point by the military judge, we conclude evidence of Appellant committing a prior sexual assault has at least a marginal tendency to make it more probable he com- mitted a later assault under the theory Appellant had demonstrated some degree of a propensity for committing such offenses.

After meeting the threshold requirements under Mil. R. Evid. 413, the military judge was required to subject the evidence to a thorough and careful balancing test under Mil. R. Evid. 403. Proper application of this rule results in the exclusion of evidence, even though relevant, if its "probative value

is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members." The CAAF has identified various non-exclusive factors to consider in conducting the Mil. R. Evid. 403 balancing test with respect to evidence offered for admission under Mil. R. Evid. 413:

> the strength of the proof of the prior act; the probative weight of the evidence; the potential to present less prejudicial evidence; the possible distraction of the fact-finder; the time needed to prove the prior conduct; the temporal proximity of the prior event; the frequency of the acts; the presence of any intervening circumstances; and the relationship between the parties.

Berry, 61 M.J. at 95 (citing *Wright*, 53 M.J. at 482).

The military judge did consider these factors, although his analysis was fairly perfunctory in most respects. He found the strength of the proof of the offense against AW to be "high," as it was "more than gossip." He noted that Appellant's trial on the offense relating to AW "resulted in less than a conviction," but he was nevertheless "satisfied that the strength of proof is sufficient on this evidence" with no further discussion of how he arrived at this conclusion. He did not explain whether or how the fact Appellant's prior court-martial ended in acquittal factored into his analysis.

Nevertheless, the military judge found the

probative value of the evidence "sufficient" due to similarities in the two offenses, to wit: (1) Appellant's wife was not present; (2) AM and AW were junior Airmen with whom Appellant did not have a notable prior relationship; (3) AM and AW were "extremely intoxicated;" (4) AM and AW "proceeded to dance/kiss with" Appellant; and (5) the assaults occurred in "a private location." The military judge determined "that the temporal proximity and frequency of the acts is sufficiently met" based upon the two incidents occurring "just over three years apart." He did not comment on the frequency of the acts, but he did note AM and AW did not know each other. Finally, the military judge found the evidence would not be a distraction to the members, because trial counsel only intended to call one wit- ness, AW, to testify on the matter, although he did note it was "possible" that the Defense would "seek to admit more to counter AW's testimony." Based upon the foregoing, the military judge concluded the evidence regarding AW was not substantially outweighed by the danger of unfair prejudice, and he denied the Defense's motion.[8]

On appeal, Appellant argues the offense regarding AM was "vastly different" from that involving AW because AW was not so intoxicated that she was either unconscious or that her memory was even impaired. Appellant also argues the military judge erroneously

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[8] The Defense sought reconsideration of this ruling, but this was denied by the second military judge based upon the absence of either new evidence or a change in the law.

concluded the members could find by a preponderance of the evidence Appellant had committed the offense on AW in light of the fact she had been seen flirting with, touching, and kissing Appellant prior to the alleged assault. Appellant also argues the military judge did not consider AW's motive to fabricate the assault allegation, as she purportedly only reported she had been assaulted once she learned rumors were circulating around her workplace about her sexual conduct with Appellant.

The military judge's ruling in this instance does give us pause, as it provides little indication of the careful and thorough Mil. R. Evid. 403 analysis required in analyzing evidence proffered for admission under Mil. R. Evid. 413, an analysis of a constitutional dimension. *See James*, 63 M.J. at 222; *Wright*, 53 M.J. at 483. Because the evidence the Government sought to admit resulted in acquittal, that fact required "great sensitivity" in determining whether the evidence should be allowed. *See Griggs*, 51 M.J. at 420. If the military judge did give this issue the required degree of consideration, such is not evident from his ruling, as the military judge provided only broad and conclusory statements, stating, for example, he was "satisfied that the strength of proof is sufficient on this evidence" without any further explanation. At least one of the military judge's findings of fact—that AW was "extremely intoxicated"—was not just unsupported by the record, but at odds with the evidence presented, thereby amounting to clear error. We are also unclear how the

military judge concluded a closet without a door in an on-base club where a party was underway amounted to "a private location." As a result, we give the military judge's conclusions of law minimal deference. *See Berry*, 61 M.J. at 96.

Even though the military judge did not conduct his analysis with the constitutionally required rigor, and in spite of his erroneous findings of fact, we conclude the military judge ultimately did not err in admitting evidence of Appellant's prior conduct with AW. The evidence regarding that offense is not particularly strong as it hinges entirely upon the credibility a factfinder chooses to attach to the sole witness, AW. Yet, so long as a factfinder concludes AW is credible and that the offense more likely than not occurred without her consent in the manner she described, that factfinder could conclude Appellant committed the offense by a preponderance of the evidence, if not beyond a reasonable doubt. That AW may have acted flirtatiously towards Appellant does not disprove her stated lack of consent to sexual conduct with Appellant, con- duct which occurred after Sgt ML and SSgt AS had left the apartment. Thus, we find the members could conclude, by a preponderance of the evidence, that Appellant sexually assaulted AW, even though an earlier court-martial did not conclude he did so beyond a reasonable doubt—a substantially higher burden of proof.

We further conclude that Mil. R. Evid. 403 would not operate to exclude evidence of Appellant's conduct with AW, although it is an admittedly close call. Both

the conduct regarding AW and that regarding AM involve allegations of Appellant engaging in extramarital sexual intercourse with adult military women without their consent after evenings of drinking and socializing. The similarities largely stop there.[9] The probative value of the evidence regarding AW was that it indicated Appellant had some degree of propensity for engaging in sexual conduct with women without their consent, and the admission of such evidence was highly prejudicial to Appellant in that it portrayed him as a predatory serial offender. The evidence regarding AW *did* result in a mini-trial within Appellant's court-martial, largely re-litigating Appellant's first court- martial.[10] Nonetheless, we conclude the prejudice to Appellant's case regarding AM was not unfair to Appellant insofar as Appellant's acquittal was made known to the members at the outset of his trial, and the probative value of Appellant's predisposition was not *substantially* outweighed by the danger of confusing the issues. Trial counsel told the members in his opening statement the military judge would give them instructions on how to use the evidence, and the military judge later did so, correctly explaining what

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[9] Although both AW and AM were Airmen junior in grade to Appellant, there is no indication this grade differential was a factor in either case.

[10] The Defense's motion to exclude this evidence made it clear the matter would be contested at trial, stating: "Hours of trial time would be spent re-litigating something that was already adjudicated two years ago."

the evidence could be used for and what initial conclusions the members had to make before they could use it. Thus, the military judge's instructions served to minimize, if not eliminate, any potential confusion of the issues at trial. In light of the foregoing, we conclude the military judge did not abuse his discretion in admitting evidence of Appellant's prior offense against AW at the court-martial now before us.

C. Instruction on False Exculpatory Statements

Appellant argues the military judge erred in instructing the members, over defense objection, on the doctrine of false exculpatory statements. We agree that the evidence was insufficient to warrant the military judge's instruction, but this error did not prejudice Appellant.

1. Additional Background

During a hearing outside the presence of the court members, trial counsel requested the military judge provide an instruction on false exculpatory statements based upon the comments Appellant made to Ms. JW and Ms. BW at the end of the party, wherein he asked Ms. JW, "Did I just f[**]k your friend?" and said to Ms. BW, "please don't tell me that I just had sex with your friend." He also asked Ms. BW to "not to say anything." Trial defense counsel objected to the instruction on the grounds that these comments were not capable of being either true or false. To the extent any assertion could be derived from the statements,

trial defense counsel argued it would be that Appellant did not have a clear recollection of whether he had engaged in sexual conduct with AM, and there was no evidence indicating Appellant did have a clear recollection, so the assertions had not been shown to be false or otherwise contradicted by the evidence.

The military judge disagreed, saying,

> I think a legitimate other interpretation is that [Appellant] was caught in the middle of a crime and then fabricating an excuse. . . . I think the members can find that [Appellant] fabricated, and you can call it misleading, you can call it false, you can call it a lie. He made up some story to get himself out of trouble. That's one way of looking at it and I think that's supported by the evidence.

The military judge gave the following instruction to the members:

> There has been evidence that after the offense was allegedly committed [Appellant] may have provided a false explanation about the alleged offense to Ms. [BW] and Ms. [JW]. Conduct of an accused, including statements and acts done upon being informed that a crime may have been committed or upon being confronted with a criminal charge, may be considered by you in light of other evidence in the case in determining the guilt or

> innocence of the accused. If an accused voluntarily offers an explanation or makes some statement tending to establish his innocence, and such explanation or statement is later shown to be false, you may consider whether this circumstantial evidence points to a consciousness of guilt.
>
> You may infer that an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish his innocence. The drawing of this inference is not required. Whether the statement was made, was voluntary, or was false, is for you to decide. You may also properly consider the circumstances under which the statements were given, such as whether they were given under oath, and the environment under which they were given.
>
> Whether evidence as to an accused's voluntary explanations or statement points to a consciousness of guilt, and the significance, if any, to be attached to any such evidence, are matters for determination by you, the court members.

In closing, trial counsel argued to the members,

> Did I just have sex with your friend? Did I just have sex with your friend? Don't tell anyone. He's whispering. He knows what

> happened. He knows that he just had sex with [AM]. And as the military judge instructed you earlier, and you'll have this during your deliberations, is that there are false exculpatory statements. That is an instruction you will have and you may consider whether this evidence points to a consciousness of guilt. You may infer than [sic] an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish his innocence. Again, that is not me telling you this. These are the instructions crafted by the military judge that you can consider.

In response, trial defense counsel sought to portray Appellant's comments as reflecting Appellant's concern that he—a married man—had been caught having sexual intercourse with another woman. Trial counsel did not return to the issue in rebuttal.

2. Law

Rule for Courts-Martial (R.C.M.) 920(a) requires the military judge to provide members appropriate findings instructions, and under R.C.M. 920(c), any party may request the military judge give particular instructions. "Appropriate instructions" under R.C.M. 920(a) are "those instructions necessary for the members to arrive at an intelligent decision concerning appellant's guilt." *United States v. Baker*, 57 M.J. 330, 333 (C.A.A.F. 2002) (citations omitted).

Although military judges have "wide discretion in choosing instructions to give," those instructions must "provide an accurate, complete, and intelligible statement of the law." *United States v. Behenna*, 71 M.J. 228, 232 (C.A.A.F. 2012). In instructing the members, "the military judge should not give undue emphasis to any evidence favoring one party." *United States v. Damatta-Olivera*, 37 M.J. 474, 479 (C.M.A. 1993).

We review the adequacy of a military judge's instructions de novo. *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003). A military judge's determination whether to grant a request for a non-mandatory instruction is reviewed for an abuse of discretion. *United States v. Barnett*, 71 M.J. 248, 249 (C.A.A.F. 2012). When a military judge commits an instructional error, we assess prejudice by viewing the military judge's instructions as a whole. *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996) (citing *United States v. Snow*, 82 F.3d 935, 938–39 (10th Cir. 1996)).

"[E]xculpatory statements by an accused which are successfully contradicted or otherwise shown to be false may be considered as evidence of a 'consciousness of guilt.'" *United States v. Opalka*, 36 C.M.R. 938, 944 (A.F.B.R. 1966) (quoting *United States v. Hurt*, 22 C.M.R. 630 (A.B.R. 1956) (additional citation omitted)). The United States Supreme Court has explained that false statements made by an accused may be considered by the jury as tending to show guilt, because "destruction, suppression or

fabrication of evidence" suggests a consciousness of guilt—a matter "to be dealt with by the jury." *Wilson v. United States*, 162 U.S. 613, 621 (1896).

3. Analysis

The relevant force of a false exculpatory statement derives from the degree to which it demonstrates an accused's consciousness of guilt. As one of our sister courts has noted, "the fabrication of false and contradictory accounts by an accused criminal, for the sake of diverting inquiry or casting off suspicion is a circumstance always indicatory of guilt." *United States v. Elmore*, 31 M.J. 678, 685 (N.M.C.M.R. 1990) (quoting *Commonwealth v. Lettrich*, 31 A.2d 155, 156 (Pa. 1943)). Thus, false exculpatory statements belong to a subset within the larger category of evidence tending to demonstrate a consciousness of guilt. Ordinarily, the false-exculpatory-statement instruction is given when an accused has attempted to mislead investigators with stories later proven to be fabrications[11] or falsely denied committing a

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[11] *See, e.g.*, *United States v. Cool*, No. ACM 39714, 2020 CCA LEXIS 390, at *24–26(A.F. Ct. Crim. App. 26 Oct. 2020) (unpub. op.) (during interview with law enforcement an appellant denied specific facts related to investigation and suggested certain evidence did not exist); *United States v. Baas*, No. 201700318, 2019 CCA LEXIS 173, at *48–49 (N.M. Ct. Crim. App. 15 Apr. 2019) (unpub. op.) (an appellant claimed, *inter alia*, he was conversing with a friend from high school, which was proven to be false); *United States v. Clough*,

particular offense in response to open-ended questioning,[12] which would fall in line with the military judge's instruction that, "an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish his innocence." While we conclude Appellant's statements do not amount to false exculpatory statements, we find they still amount to evidence of consciousness of guilt.

A false exculpatory statement has—by its terms—two fundamental requirements: first, the statement must be false, and, second, it must tend to be exculpatory. In order for a statement to be found to be false, there must ordinarily be some evidence of its falsity. *See, e.g.*, *Fox v. United States*, 421 A.2d 9, 13 (D.C. 1980)

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978 F.3d 810, 819–20 (1st Cir. 2020) (an appellant told investigators about his typical prescription habits in an anti-kickback case, but investigators were able to prove his habits were not as claimed); *United States v. Ath*, 951 F.3d 179, 187 (4th Cir. 2020) (an appellant claimed another person picked up a particular package, but video evidence showed it was the appellant who picked it up); *State v. Hage*, 532 N.W.2d 406, 411 (S.D. 1995) (an appellant, *inter alia*, gave investigators a false name and address and falsely claimed to have arrived at the scene of the crime after leaving a nonexistent job).

[12] *See, e.g.*, *People v. Raymond*, 81 A.D.3d 1076 (N.Y. Ct. App. 2011) (when an appellant was asked why he thought he was being arrested, he responded that he "would never molest [his] kids").

(noting the falsity of exculpatory statements providing an inference of consciousness of guilt is "typically is proven by independent direct evidence").[13] Here, we do not have statements by an appellant who sought to present a false alibi or to mislead investigators with false information. Instead, Appellant asked Ms. JW if he had just had sex with AM; he said to Ms. BW, "please don't tell me that I just had sex with your friend;" and he asked Ms. BW "not to say anything." None of these comments can be either true or false, because none of them asserts any fact subject to such inquiry. For example, the first of these is not a statement at all—it is a question, and questions do not typically assert anything. *See, e.g.*, *United States v. Lewis*, 902 F.2d 1176, 1179 (5th Cir. 1990). The third statement is a request that Ms. BW not reveal what she knew, and there is nothing factually asserted in that request subject to being disproven. The second statement is a combination of direction to Ms. BW to not tell Appellant he had just had sex with AM and a suggestion Appellant did not have a clear recollection of what had just transpired. Even giving this suggestion its greatest assertive value, no evidence was adduced at trial that Appellant had a clear recollection of the events, which means

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[13] *See also United States v. McDougald*, 650 F.2d 532, 533 (4th Cir. 1982) (citing *United States v. Bear Killer*, 534 F.2d 1253, 1260 (8th Cir. 1976)) (exculpatory statements "contradicted by evidence at trial justifies the giving of this jury instruction").

that whatever assertion can be derived from this statement about Appellant's awareness, it was not shown to be false.

In addition to these three comments not making any assertions which were shown to be false, they were not exculpatory. Even if we were to interpret Appellant's second statement as suggesting an incomplete or nonexistent recollection with respect to his conduct, such would not render the comment exculpatory, because voluntary intoxication—much less lack of memory—is no defense to the general intent offense of sexual assault charged here. *See, e.g.*, *United States v. Gonzales*, 78 M.J. 480, 486 (C.A.A.F. 2019); *United States v. McDonald*, 78 M.J. 376, 379 (C.A.A.F. 2019).

Since Appellant's statements were neither false nor exculpatory, the military judge's instruction was untethered to the evidence and unnecessary for the members to arrive at an intelligent decision, and it was error for him to overrule the Defense's objection to the instruction. In spite of this error, however, we are convinced Appellant suffered no prejudice, because evidence of an accused's guilty behavior demonstrating a consciousness of guilt extends well beyond providing false exculpatory statements and even reaches nontestimonial conduct. *See, e.g.*, *United States v. Cook*, 48 M.J. 64, 66 (C.A.A.F. 1998); *United States v. Baldwin*, 54 M.J. 551, 555–56 (A.F. Ct. Crim. App. 2000). Such evidence is admissible under Mil. R. Evid. 404(b) and includes situations in which an

accused solicits false testimony[14] or—closer to Appellant's case—asks a witness not to testify.[15]

Appellant's comments to Ms. BW and Ms. JW could give rise to a host of inferences, some more indicative of a consciousness of guilt than others. For example, the members were free to conclude Appellant was trying to get a sense of what the women had witnessed and whether they would agree to not share that information. This evidence was properly admitted at trial, and trial counsel was free to argue Appellant had demonstrated a consciousness of guilt, which is to say the evidence and the argument was going to be in front of the members regardless of whether the military judge gave the instruction on false exculpatory statements.

Although it was not pertinent to Appellant's case, the military judge's instruction was a correct statement of law. More significantly, the military judge plainly explained to the members that it was up to them to determine whether or not Appellant had made any false statements in the first place after he told the members there was evidence Appellant "*may have* provided a false explanation about the alleged offense" (emphasis added). He reiterated this point when he told the members they were responsible for deciding whether such statements amounted to a

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[14] *United States v. Borland*, 12 M.J. 855, 856–57 (A.F.C.M.R. 1981).

[15] *United States v. Dammerich*, 26 C.M.R. 219, 222 (C.M.A. 1958).

consciousness of guilt, and "the significance, *if any*, to be attached to any such evidence" (emphasis added). Trial counsel only marginally sought to capitalize on the military judge's instruction, largely arguing inferences that would be permissible even in the absence of the instruction. But even in that argument, trial counsel told the members to reference the instruction—an instruction which vested the members with the absolute discretion to determine whether Appellant's statements were indicative of a consciousness of guilt. We conclude Appellant suffered no prejudice, and the military judge's employment of the instruction was therefore harmless.

D. Theory of Culpability

Appellant asks us to set aside his findings and sentence, arguing he was convicted under the theory that he engaged in sexual conduct with AM when she was too intoxicated to consent rather than by causing bodily harm to her, as he was charged. Appellant contends this denied him his due process rights to fair notice, a principle which "mandates that an accused has a right to know what offense and under what legal theory[ ] he will be convicted." *United States v. Tunstall*, 72 M.J. 191, 192 (C.A.A.F. 2013) (internal quotation marks and citations omitted).

Prior to trial, the Defense submitted a motion in limine asking the military judge to bar trial counsel from advancing any argument or theory that AM could not consent based upon either her being incapacitated due to her alcohol consumption or that she was asleep, unconscious, or otherwise unaware

that she was participating in sexual conduct with Appellant. The military judge denied the motion, explaining the Government had to prove AM did not consent, and this would require "examination and consideration of all the facts and circumstances," including AM's level of intoxication, which the military judge concluded amounted to evidence of whether or not AM "effectively consented."

1. Law

The Fifth Amendment's[16] due process clause "does not permit convicting an accused of an offense with which he has not been charged." *Tunstall*, 72 M.J. at 192 (quoting *United States v. Girouard*, 72 M.J. 5, 10 (C.A.A.F. 2011)). A specification tried by court-martial will not pass constitutional scrutiny unless it both gives the accused notice of the charge he or she must defend against and shields him or her from being placed in double jeopardy. *United States v. Turner*, 79 M.J. 401, 404 (C.A.A.F. 2020) (citations omitted). The military is a notice-pleading jurisdiction. *United States v. Gallo*, 53 M.J. 556, 564 (A.F. Ct. Crim. App. 2000), *aff'd*, 55 M.J. 418 (C.A.A.F. 2001). A specification is sufficiently specific if it "informs an accused of the offense against which he or she must defend and bars a future prosecution for the same offense." *Id.* (citations omitted).

Article 120, UCMJ, presents various alternative theories of liability for the offense of sexual assault. Article 120(b)(1)(B), with which Appellant was

[16] U.S. CONST. amend. V.

charged, prohibits the commission of a sexual act by "causing bodily harm," while Article 120(b)(2) addresses sexual acts committed by a person who "knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring." 10 U.S.C. §§ 920(b)(1)(B), 920(b)(2). Article 120(b)(3)(A) further criminalizes sexual acts committed upon a person who is "incapable of consenting to the sexual act due to impairment by any drug, intoxicant or other similar substance" when that incapacitation is either known by, or reasonably should be known by, the perpetrator. 10 U.S.C. § 920(b)(3)(A).

In order to find Appellant guilty of sexual assault under Article 120(b)(1)(B) as charged here, the Government was required to prove beyond a reasonable doubt that: (1) Appellant committed a sexual act upon AM by causing penetration, however slight, of her vulva with his penis, (2) he did so by causing bodily harm to her, and (3) he did so without her consent. *See Manual for Courts- Martial, United States* (2016 ed.) (*MCM*), pt. IV, ¶ 45.b.(3)(b). "Bodily harm" is defined as "any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact." *MCM*, pt. IV, ¶ 45.a.(g)(3). In determining whether a person consented to the conduct at issue, "[a]ll the surrounding circumstances are to be considered," and "lack of consent may be inferred based on the circumstances of the offense." *MCM*, pt. IV, ¶ 45.a.(g)(8)(C). Trial counsel may "argue the evidence

of record, as well as all reasonable inferences fairly derived from such evidence." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000) (citation omitted).

2. Analysis

Based upon both a plain reading of and application of standard legal-construction principles to the three theories of liability under Article 120, UCMJ, discussed above, we conclude the theories are separate and distinct. *See, e.g.*, *United States v. Weiser*, 80 M.J. 635, 640 (C.G. Ct. Crim. App. 2020); *cf. United States v. Sager*, 76 M.J. 158, 161–62 (C.A.A.F. 2017) (finding "asleep," "unconscious," and "otherwise unaware" in Article 120(b)(2) to represent distinct theories of culpability). Of the three, Article 120(b)(1)(B) implicitly requires proof the sexual act in question was nonconsensual in order to meet the definition of "bodily harm" when the bodily harm alleged is the same as the sexual act itself, as is the case here. *See, e.g.*, *United States v. Gomez*, No. 201600331, 2018 CCA LEXIS 167, at *11 (N.M. Ct. Crim. App. 4 Apr. 2018) (unpub. op.), *rev. denied*, 78 M.J. 108 (C.A.A.F. 2018). Moreover, this element of non-consent was expressly alleged in the text of the specification in Appellant's case.

At trial, the military judge gave the members instructions with respect to the requirement that the Government prove AM did not consent. In relevant part, he explained:

> "Consent" means a freely given agreement to the conduct at is- sue by a competent

person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal of [sic] resistance or submission resulting from the use of force, threat of force, or placing another person in fear, does not constitute consent. A current or previous dating or social or sexual relationship by itself, or the manner of dress of the person involved with the accused and the conduct at issue, shall not constitute consent.

Lack of consent may be inferred based on the circumstances. All the surrounding circumstances are to be considered in determining whether a person gave consent or whether a person did not resist or ceased to resist only because of another person's action.

The government has the burden to prove, beyond a reasonable doubt, that consent to the physical act did not exist. Therefore, to find [Appellant] guilty of the offense of sexual assault as alleged in the Charge and its Specification, you must be convinced, beyond a reasonable doubt, that [AM] did not consent to [Appel- lant] penetrating her vulva with his penis.

Evidence concerning consent to the sexual conduct, if any, is relevant and must be considered in determining whether the

> government has proven the elements of the offense beyond a reasonable doubt. Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven every element of the offense.

The military judge was not asked to, and did not *sua sponte*, give any instructions on the concepts of capacity or competency to consent.

As detailed above, the tenor of trial counsel's presentation to the members was that Appellant took advantage of AM while she was unconscious—presumably as a result of her intoxication—and he asked the members in his closing argument to infer AM did not consent. Significantly, AM never testified she did not consent, and she said she had no recollection of whether she did or did not consent. Likely as a result of being confronted with trying a case involving a victim who could not affirmatively tell the members she did not consent to the sexual conduct, trial nearly exclusively focused on AM's apparent inability to consent. Given the Defense's motion to preclude this precise trial strategy (and the military judge's ruling permitting trial counsel to employ the strategy), Appellant can hardly claim he was surprised at trial that the Government's case followed the route it did. The real questions are whether the military judge erred in his ruling and

whether Appellant was convicted of an offense other than the one he was charged with. We answer both of those questions in the negative.

Because Appellant was charged with assaulting AM by causing her bodily harm, the Government was required to prove beyond a reasonable doubt—as the military judge instructed the members—that AM did not consent to the sexual conduct. Trial counsel sought to do so by presenting the improbability that an apparently non-responsive AM actually did consent by focusing on how others perceived her and then asking the members to infer from her non-responsiveness the absence of consent. Requesting members to draw inferences from such circumstantial evidence is a common aspect of court-martial practice. *See, e.g.*, *United States v. Norman*, 74 M.J. 144, 151 (C.A.A.F. 2015). Article 120(g)(8)(C), UCMJ, specifically notes "[l]ack of consent may be inferred based on the circumstances of the offense" and "[a]ll the surrounding circumstances are to be considered in determining whether a person gave consent," a concept we have previously endorsed. 10 U.S.C. § 920(g)(8)(C); *see United States v. Moore*, 78 M.J. 868, 875 (A.F. Ct. Crim. App. 2019), *rev. denied*, 79 M.J. 203 (C.A.A.F. 2019). The military judge's instructions properly stated the Government's obligation in this regard, and trial counsel employed the entirely valid tactic of asking the members to draw a permissible inference from the circumstantial evidence which had been presented. Admittedly, direct evidence that AM did not consent to the sexual act is thin, but it was

Appellant's burden to obtain AM's consent at the time of the sexual conduct, not AM's bur- den to manifest her lack of consent. *See McDonald*, 78 M.J. at 381.

The military judge correctly advised the members that consent "means a freely given agreement to the conduct at issue by a competent person."[17] The military judge did not give further instruction as to the definition of "competent," and trial counsel did not explicitly argue AM was not legally competent to consent, as he only used the word "competent" once in his argument when he repeated the military judge's definition of consent. Trial counsel argued that AM had not, in fact, consented to the sexual conduct, but he asked the members to reach this conclusion by focusing almost entirely on AM's external manifestations of her ability to consent. In doing so, trial counsel explicitly conflated the issue of AM's actual consent with her ability to consent, describing AM as "unaware and unable to resist;" "passed out in a closet;" "dead to the world;" and "unable to consent."[18]

We consider arguments by trial counsel in the

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[17] The CAAF has recently endorsed this exact instruction. *United States v. McDonald*, 78 M.J. 376, 381 (C.A.A.F. 2019).

[18] Although trial defense counsel did not object to these comments by trial counsel when they were made, we do not find the absence of objection operates to forfeit the issue in light of Appellant's unsuccessful pretrial motion to prevent trial counsel from making this very argument.

context of the entire court- martial, and we do not "surgically carve out a portion of the argument with no regard to its context." *Baer*, 53 M.J. at 238. Reviewing his comments in this context, we conclude the overall weight of trial counsel's argument centered on the premise that AM had not actually consented to sexual conduct with Appellant. He arrived at this point by highlighting evidence of AM's apparent inability to consent, which he marshalled as circumstantial evidence that AM did not, in fact, consent. We see nothing infirm with the proposition that a person *did not* consent because that person *could not* consent by virtue of being incapable of consenting; therefore, inability to consent provides strong evidence of a person's lack of actual consent. Demonstrating a lack of ability to consent, however, does not relieve the Government of the burden to prove absence of consent when consent is an element of the charged offense, as is the case here. *Cf. United States v. Riggins*, 75 M.J. 78, 84 (C.A.A.F. 2016) (proof of victim's inability to consent by virtue of being placed in fear is not equivalent to proof of victim's non-consent).

We see no reason why the Government may not use evidence of inability to consent—ordinarily the focal point of a prosecution under Article 120(b)(3), UCMJ—as circumstantial evidence of the lack of actual consent in a prosecution under Article 120(b)(1)(B), UCMJ. Therefore, we conclude evidence tending to show a person *could not* consent to the conduct at issue may be considered as part of the

surrounding circumstances in assessing whether a person *did not* consent, and the military judge did not err in permitting trial counsel to employ this theory at Appellant's court-martial. Trial counsel's argument did not mislead the members or ask them to convict Appellant of any offense other than the one he was charged with committing.

Further, the military judge correctly instructed the members they were required to determine AM had not consented, and absent evidence to the contrary, we presume members follow a military judge's instructions. *United States v. Loving*, 41 M.J. 213, 235 (C.A.A.F. 1994) (citation omitted). Considering trial counsel's overarching argument that there was no evidence AM had consented, along with the military judge's accurate instructions and our recognition that there is a degree of logical evidentiary overlap in the Article 120, UCMJ, offenses, we are confident Appellant was convicted of the offense with which he was charged. We conclude Appellant was not denied due process, and we therefore decline to grant his requested relief.

E. Post-trial Punishment

We find ourselves faced with yet another case of an Airman who says his pay has been miscalculated as a result of military justice processes. Appellant's two-pronged complaint is that: (1) the Defense Finance and Accounting Service (DFAS) erroneously reduced his grade from E-5 to E-1 as of the last day of his court-martial (rather than 14 days later) and (2) he was

later improperly placed in a no-pay status while he was still on active duty and serving his sentence. He argues this deprivation both unlawfully increased his sentence and subjected him to cruel and unusual punishment under the Eighth Amendment[19] and Article 55, UCMJ, 10 U.S.C. § 855, and he asks us to grant him "meaningful sentence relief." We conclude Appellant has not demonstrated any error of constitutional dimension with respect to his pay, and we decline to grant him relief.

1. Additional Background

Appellant's court-martial concluded on 22 March 2019, and we presume he immediately started serving his sentence to 45 days of confinement. According to a declaration he submitted to this court, Appellant asserts DFAS reduced his grade to E-1 for pay purposes effective on 22 March 2019.[20] Because the convening authority did not earlier take action on the sentence, Appellant's reduction in grade should not have been effective until 5 April 2019, 14 days after his sentence was imposed, pursuant to Article 57(a), UCMJ, 10 U.S.C. § 857(a). By operation of law,

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[19] U.S. CONST. amend. VIII.

[20] Appellant submitted copies of his leave and earning statements to the court for the months of April through October 2019 in conjunction with his declaration. The April statement has an annotation which reads, "CHANGE GRADE 190322(101)." Appellant did not submit a leave and earning statement for March 2019, the month he entered confinement.

Appellant was required to automatically forfeit all pay and allowances starting the same day as this statutory reduction in grade, continuing for the remainder of the time he spent in confinement. Article 58b, UCMJ, 10 U.S.C. § 858b.[21] Appellant was released from confinement on a day in May 2019; we cannot determine the precise date from the record.[22] Once released, Appellant should have received his pay at the E-1 rate so long as he remained in a duty status—that is, until he started his appellate leave.

The convening authority took action on 15 July 2019, approximately two months after Appellant was released from confinement, and presumably Appellant began serving his sentence to three months of hard labor without confinement at some point thereafter.[23] Appellant's clemency request, submitted

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[21] Nothing in the record indicates Appellant asked the convening authority to waive these automatic forfeitures for the benefit of his dependents—his wife and daughter—during his time in confinement.

[22] If Appellant immediately entered confinement at the conclusion of his court-martial and remained confined the entire 45 days he was sentenced to, his release date would have been 6 May 2019. In one of the documents Appellant filed with this court, he noted he was released from confinement "in May 2019," but he does not further identify the specific date.

[23] Unlike confinement and forfeitures, a sentence to hard labor without confinement does not begin until the convening authority takes action. Article 57(c), UCMJ, 10 U.S.C. § 857(c).

on 8 July 2019, made no mention of any concerns with his pay.

Appellant asserts that not only did DFAS erroneously demote him 14 days early for pay purposes, that service created an "advance debt" against his pay and began deducting partial payments from his pay, resulting in reduced pay.[24] For example, after deductions for his child-support payment and rent for his on-base house, Appellant's mid-month take-home pay in May 2019 was $11.34, and his end-of-month take-home pay was $254.85. Appellant's take-home pay for the months of April, June, July, and August 2019 ranged from approximately $940.00 in April 2019 to approximately $1,075.00 in August. Some of the variability in his pay was the result of Appellant's child support payments increasing, his change of residency to a state with no income tax, and changes he made to some of his discretionary deductions.

At some point in late August 2019, Appellant's

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[24] The "advance debt" on Appellant's leave and earning statements was created as an entitlement (*i.e.*, added to his gross pay) in April 2019 in the amount of $1,396.86. Another advance debt was created in May 2019 for $88.27. Payments on this debt were then deducted from Appellant's monthly pay in varying amounts, ranging from $338.65 in April and $541.40 in May to $26.87 in September. According to his statements, Appellant paid $1,103.10 of this debt and still owed $382.03 as of the end of September 2019.

enlistment apparently expired, resulting in Appellant being placed in a non-pay status in September and October 2019 despite the fact he remained on active duty in order to serve his court-martial sentence. Appellant received no take-home pay in his September mid-month and end-of-month pay or in his mid-October pay.[25]

In his declaration, Appellant asserts he repeatedly raised his concerns to his first sergeant beginning in the middle of May 2019. Appellant says he sought off-duty employment despite working 12-hour shifts seven days a week during his period of hard labor without confinement, resulting in stress and a lack of adequate sleep. Even with his second job, Appellant says he was unable to make his housing payments for his on-base house or pay child support for his daughter.[26] Exacerbating this situation, Appellant lost his military healthcare benefits, resulting in his

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[25] Despite being in what Appellant refers to as a "no pay" status in September, DFAS did create an entitlement for his regular pay for that month but—after deducting various amounts, such as child support and taxes—placed the remaining balance in a hold status.

[26] Appellant's reference to his unpaid rent relates to the months of September and October 2019, as rent is shown as being deducted from Appellant's leave and earning statements from April through August 2019. Appellant's child support payments were also deducted in all of those statements, as well as from his September 2019 pay.

wife and daughter being unable to obtain prescribed medications.

On 16 October 2019, Appellant filed a complaint under Article 138, UCMJ, 10 U.S.C. § 938, and he received the back pay he was due in two payments which were issued on 24 and 31 October 2019. In this complaint, Appellant asserted he was still serving his hard labor without confinement at the time with "a couple weeks left" to serve. The record does not disclose when Appellant completed this punishment or when he was ultimately placed on appellate leave.

2. Law

We review de novo allegations of cruel and unusual punishment in violation of the Eighth Amendment and Article 55, UCMJ. *United States v. Wise*, 64 M.J. 468, 473 (C.A.A.F. 2007) (citing *United States v. White*, 54 M.J. 469, 471 (C.A.A.F. 2001)). In general, we apply "the Supreme Court's interpretation of the Eighth Amendment to claims raised under Article 55, except in circumstances where . . . legislative intent to provide greater protections under [Article 55]" is apparent. *United States v. Avila*, 53 M.J. 99, 101 (C.A.A.F. 2000) (citation omitted). "[T]he Eighth Amendment prohibits two types of punishments: (1) those 'incompatible with the evolving standards of decency that mark the progress of a maturing society' or (2) those 'which involve the unnecessary and wanton infliction of pain.'" *United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102–03 (1976)).

Once released from confinement, a service member in duty status "may not be deprived of more than two thirds of his or her pay." *United States v. Stewart*, 62 M.J. 291, 293 (C.A.A.F. 2006). *See also* R.C.M. 1107(d)(2), Discussion ("When an accused is not serving confinement, the accused should not be deprived of more than two-thirds pay for any month as a result of one or more sentences by court-martial and other stoppages or involuntary deductions, unless requested by the accused."). Imposing total forfeitures on a service member in a duty status "raises issues" under both the Eighth Amendment and Article 55, UCMJ. *United States v. Warner*, 25 M.J. 64, 66 (C.M.A. 1987).

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c) we have broad authority and the mandate to approve only so much of the sentence as we find appropriate in law and fact and may, therefore, grant sentence relief, without finding a violation of the Eighth Amendment or Article 55, UCMJ. *United States v. Gay*, 74 M.J. 736, 742 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016); *see United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002). Unlike claims raised under Article 55, UCMJ, or the Eighth Amendment, we may not consider matters outside the record for a sentence-appropriateness review under Article 66(c), UCMJ, unless those matters amplify information already raised in the record, such as that which is raised to the convening authority as part of a clemency request. *United States v. Jessie*, 79 M.J. 437, 441–42 (C.A.A.F. 2020); *see also United States v. Matthews*, No. ACM

39593, 2020 CCA LEXIS 193, at *13–15 (A.F. Ct. Crim. App. 2 Jun. 2020) (unpub. op.).

3. Analysis

Appellant's complaint essentially points to two discrete pay-related events. First, he asserts DFAS demoted him 14 days early, resulting in him being paid at the E-1 rate instead of the E-5 rate for the period of 22 March 2019 through 5 April 2019. Second, he asserts his pay was improperly withheld in September and October 2019 due to being placed in a no-pay status.

With respect to the first allegation, we have carefully reviewed Appellant's complaint and the matters he submitted to this court, and we conclude Appellant has not adequately demonstrated a factual basis to support his claim such that we could either find error or assess what, if any, relief is warranted. Appellant's leave and earning statement includes the annotation "CHANGE GRADE 190322(101)," which tends to support Appellant's claim that his reduction to E-1 occurred—for pay purposes, at least—on 22 March 2019. Appellant, however, did not submit any documentation showing what, if any, impact this had on his March 2019 pay. Appellant's April and May 2019 leave and earnings statements establish advance debts totaling just under $1,500.00, but nothing in those statements or any of the other documentation submitted by Appellant explains what that debt was for. Although some amount of that debt was possibly attributed to recouping pay Appellant

may have received at the E-5 rate between 22 March 2019 and 5 April 2019, we think it is more likely the advance debt reflects recoupment of the pay Appellant received from 5 April 2019 through his release from confinement—a period of time in which Appellant continued to receive pay and allowances, all of which was to be forfeited by operation of law.[27]

Appellant's base pay in his April statement is shown as $1,166.19, while each subsequent statement shows his base pay as $1,680.90—a difference of just over $500.00. It is possible that $500.00 difference reflects a recoupment of pay Appellant received at the E-5 grade in March 2019, but we simply cannot tell based upon the information Appellant has provided. We also note Appellant continued to receive his housing allowance of $841.00 while he was in confinement, and we detect no efforts by the Government to recoup that allowance, even though it was subject to forfeiture under the UCMJ. As a result of the foregoing, we are unable to determine whether Appellant was actually deprived of any pay by virtue of DFAS assigning him a date of rank of 22 March 2019, much less how much pay he was deprived of.

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[27] The military judge advised the members that the monthly base pay for an E-1 at thetime of Appellant's court-martial was $1,680.90. At that rate, Appellant would have forfeited approximately $1,400.00 in base pay for the period of 5 April through the end of the month, which is nearly exactly the amount of the advance debt Appellant was assigned for April: $1,396.86.

Importantly, Appellant concedes he was eventually paid his back pay in full, although not until late October 2019. We also note that rather than completely stop Appellant's pay while he was subject to automatic and total forfeitures for nearly all of April 2019, DFAS apparently created an advance debt which allowed Appellant to gradually pay off his forfeitures over a series of monthly installments. This, in turn, allowed him to meet his child support, housing rental, and other financial obligations in April despite being subject to total forfeitures for nearly the entire month. Because we cannot determine what harm Appellant actually suffered, he has failed to demonstrate he was subjected to any punishment due to DFAS's annotation of the change in his date of rank. We therefore cannot conclude he suffered cruel and unusual punishment warranting relief.

Appellant's lack of pay in September and October 2019 is slightly more straightforward. His September 2019 leave and earning statement indicates he entered a "held pay" status on the first of that month. Appellant still received his base pay, his basic allowance for subsistence, and his housing allowance. His child support, taxes, and several other expenses were deducted from his pay and allowances, and the remainder was withheld based upon the "held pay" status, which meant Appellant received no take-home pay. The October 2019 statement Appellant submitted is a mid-month statement with no detail other than that his net mid-month pay was zero; because of this

lack of detail, we cannot determine whether Appellant's child support payment was not paid as he alleges. In any event, Appellant received less pay than he was entitled to beginning with his mid-month pay in September through the end of October when his pay issues were apparently reconciled.

While the Government concedes we have jurisdiction regarding the 14-day grade-reduction issue, it objects to our consideration of Appellant's September and October pay problems under the theory they are collateral to Appellant's conviction. *See, e.g.*, *United States v. Buford*, 77 M.J. 562, 566 (A.F. Ct. Crim. App. 2017). In *Buford*, the appellant was released from confinement and elected to take his accrued leave and receive his pay and allowances during that leave then start his appellate leave afterwards. *Id.* at 563–64. The appellant there never received his pay and he complained to this court his non-payment improperly increased his sentence, a claim we concluded was unrelated to the legality or appropriateness of an approved court-martial sentence and therefore outside of our Article 66(c), UCMJ, authority to grant sentence relief. *Id.* at 565. In this case, however, Appellant asserts his deprivation of pay amounted to violations of the Eighth Amendment and Article 55, UCMJ, matters which we do exercise jurisdiction over. Appellant's pay issues also bear a more direct nexus to his sentence than was the case in *Buford*, as Appellant's term of enlistment was extended for the purpose of him serving out his sentence to hard labor without

confinement, and Appellant was still on duty and serving his court-martial sentence when he was denied pay. In addition, Appellant was serving that punishment in September and October of 2019 due to the timing of the convening authority's action, which occurred three and a half months after Appellant's court-martial. Thus, we conclude we do have jurisdiction over Appellant's complaint.

Although we have jurisdiction, we do not find a violation of either the Eighth Amendment or Article 55, UCMJ. In the context of a prisoner in confinement, the Supreme Court has held an Eighth Amendment violation re- quires an objectively, sufficiently serious deprivation resulting in "the minimal civilized measures of life's necessities." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). In addition, the prison official causing the deprivation must have a "sufficiently culpable state of mind." *Id*. (quoting *Wilson v. Seiter*, 501 U.S. 294 (1991)). Finally, we have required military prisoners to exhaust administrative grievance procedures as well as seek relief under Article 138, UCMJ. *Lovett*, 63 M.J. at 215. Although Appellant was not in confinement when he was denied his pay, we still assess whether the person or persons inflicting the alleged harm had a culpable state of mind, which is to say the degree to which the harm was intended or recklessly permitted.

In this case, Appellant does not allege his pay was intentionally withheld in order to cause him to suffer. Rather, he argues the Government—specifically his

unit leadership—displayed culpable indifference to his plight. The matters Appellant submitted to this court, however, somewhat undercut this claim, as they demonstrate more of a shortage of capability than of concern. From his submission, it is apparent Appellant's first sergeant and finance office personnel were engaged in trying to reconcile his pay issues, albeit ineffectually. Ultimately, the issue was resolved once Appellant made a complaint under Article 138, UCMJ, one indication of the wisdom of requiring complainants to first use that avenue before seeking judicial redress. Although we do not diminish the stressful challenge Appellant faced in maintaining his household without pay from the middle of September 2019 through the end of October 2019, we do not find that this amounts to punishment running afoul of societal decency or constituting unnecessary and wanton infliction of pain. We also note Appellant apparently received all the pay he was entitled to at the end of October 2019, and he has not alleged the denial of his pay for a month and a half has had any enduring impact on him—strong evidence Appellant was not denied "the minimal civilized measures of life's necessities." Based on the evidence before us, Appellant's pay troubles were rooted not in ill intent but in the un- fortunate failure of finance and personnel officials to properly pay an Airman involved in the military justice system. This is insufficient to rise to the level of a violation of the prohibition of cruel and usual punishment under the Eighth Amendment and Article 55, UCMJ.

Appellant's allegations regarding his pay issues were not referenced in his clemency submission to the convening authority and were only raised for the first time in his appeal to this court. For the reasons set out in *Matthews*, we cannot consider Appellant's submissions on the matter in our review of his sentence under Article 66(c), UCMJ. *See* unpub. op. at *15.

F. Post-Trial Delay

Appellant was sentenced on 22 March 2019. The convening authority took action on 15 July 2019, and the case was docketed with this court on 1 August 2019. Appellant filed his initial assignments of error 329 days later on 25 June 2020 after requesting and receiving eight enlargements of time over the Government's objection. The Government filed its answer one month later, on 24 July 2020, to which Appellant replied on 29 July 2020.

"We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal." *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citing *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004); *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003)). In *Moreno*, the CAAF established a presumption of facially unreasonable delay when the Court of Criminal Appeals does not render a decision within 18 months of docketing. 63 M.J. at 142. Where there is such a delay, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3)

the appellant's assertion of his right to a timely review; and (4) prejudice to the appellant. *Moreno*, 63 M.J. at 135 (citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). "No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." *Id.* at 136 (citing *Barker*, 407 U.S. at 533).

This case exceeded the 18-month standard between docketing and appellate decision by just over one month. There are several factors explaining this delay. First, we note the record of trial is not insubstantial, including over 775 pages of transcript, 43 appellate exhibits, and several video recordings. Second, Appellant took nearly a year to file his assignments of error after requesting eight extensions. Third, Appellant asserted six errors, the careful consideration of which has resulted in a lengthy opinion from the court. In the face of these issues, we do not find egregious delay here, especially in light of the fact the bulk of the delay was at Appellant's behest.

Where an appellant has not shown prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). In *Moreno*, the CAAF identified three types of cognizable prejudice for purposes of an appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2)

anxiety and concern; and (3) impairment of the appellant's ability to present a defense at a rehearing. 63 M.J. at 138–39 (citations omitted). Appellant was released from confinement prior to the convening authority taking action on his case, so he has not suffered any oppressive incarceration as a result of appellate delay. Because our opinion does not result in a rehearing, Appellant's ability to prepare for such a hearing has not been impacted. *See id.* at 140. With respect to anxiety and concern, the CAAF has explained "the appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Id.* Appellant has not alleged any particularized anxiety or concern, and we do not discern such from our review of Appellant's case. Where, as here, there is no qualifying prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." *Toohey*, 63 M.J. at 362. On the whole, we do not find the delay so egregious. *Id.*

Recognizing our authority under Article 66(c), UCMJ, we have also considered whether relief for excessive post-trial delay is appropriate even in the absence of a due process violation. *See Tardif*, 57 M.J. at 225. After considering the factors enumerated in *Gay*, 74 M.J. at 744, we conclude it is not.

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court