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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-55727
D.C. No. 2:19-cv-08507-MRW

[Filed September 20, 2022]

LEON A. BROWN IV,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Michael R. Wilner, Magistrate Judge, Presiding

Argued and Submitted August 3, 2022
Pasadena, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: SILER,[**] CALLAHAN, and H. THOMAS, Circuit Judges.

While serving as a captain in the United States Air Force, Leon Brown IV helped organize and lead a violent gang in Minot, North Dakota. Military prosecutors convened a general court-martial in 2014 and charged Brown with a litany of Uniform Code of Military Justice violations. *See* 10 U.S.C. § 818. The charges included pandering, "dishonorably organizing individuals into a violent gang," providing alcohol to minors, distributing controlled substances (such as heroin, marijuana, methamphetamine, and psychedelic mushrooms), using controlled substances, communicating threats to witnesses, prosecutors, and other members of the armed forces, and sex crimes against minor children. A military judge found Brown guilty on many of those charges and acquitted him on a few others, none of which is at issue here. The court imposed a sentence of 25 years' imprisonment.

Brown appealed (with limited success) to the Air Force Court of Criminal Appeals and to the United States Court of Appeals for the Armed Forces. *See United States v. Brown*, No. ACM 38864, 2017 WL 3311205 (A.F. Ct. Crim. App. 2017); *United States v. Brown*, 78 M.J. 162 (C.A.A.F. 2018). Then he petitioned for a writ of habeas corpus in federal court. 28 U.S.C. § 2241. The district court denied his petition.

[**] The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

I. STANDARD OF REVIEW

In habeas appeals from military courts the scope of our review is "more narrow" than in habeas appeals from civilian-court judgments. *Burns v. Wilson*, 346 U.S. 137, 139 (1953). We ask only two questions: (1) whether the court-martial had jurisdiction over Brown and (2) whether the court-martial "acted within its lawful powers." *Broussard v. Patton*, 466 F.2d 816, 818 (9th Cir. 1972) (quoting *Sunday v. Madigan*, 301 F.2d 871, 873 (9th Cir. 1962)).

II. ANALYSIS

The military courts fully and fairly considered Brown's habeas claims, and they acted well within their lawful powers. *See Burns*, 346 U.S. at 142.

1. The military trial judge found Brown guilty of sexually assaulting GB and FT, two underage girls, and Brown now argues he's actually innocent on both counts, *i.e.*, that he never had sexual relations with either girl. But even if it were appropriate for us to consider the post-trial declarations Brown submitted in support of his habeas petition, those declarations fall far short of what's required for a successful actual-innocence claim. To prevail on an actual-innocence claim, a petitioner must "affirmatively prove" it "is more likely than not that no reasonable [trier of fact] would have found [him] guilty beyond a reasonable doubt." *Jones v. Taylor*, 763 F.3d 1242, 1246–47 (9th Cir. 2014) (citations omitted).

As the Air Force Court of Criminal Appeals explained, testimony from at least four witnesses supported Brown's conviction for sexually assaulting

GB. One witness testified to seeing Brown unclothed and "on top of" GB at a house party. Another witness saw Brown and GB "making out" at the same party; the next morning she saw GB "laying in" Brown's bed, wearing nothing but a sheet. Yet another witness recounted a conversation in which Brown admitted to having sex with GB. And although GB did not remember having sex with Brown, she testified to getting "very, very, very intoxicated" at a house party with Brown. She also remembered being in Brown's bedroom, picking her bra off the bedroom floor, and spending time with Brown in his living room. The Air Force Court of Criminal Appeals considered all this testimony, considered a series of corroborating text messages sent by Brown, and then found sufficient evidence to support Brown's conviction. *Brown*, 2017 WL 3311205, at *3.

The Air Force Court of Criminal Appeals also carefully analyzed the evidence underlying Brown's conviction for sexually assaulting FT. The court considered the relevant witness testimony, including testimony from one witness who claimed she walked into Brown's bedroom and observed his having sex with FT. *Id.* at *4–6. The court also considered the series of incriminating statements made by Brown during his period of pretrial detention; it quoted, for example, one recording where Brown opined that FT "f***** like she was older" than her age (fourteen). *Id.* at *5. After weighing all this and more, the court again found sufficient evidence to support Brown's conviction. *Id.* at *6.

By any measure, the Air Force Court of Criminal Appeals' analysis amounted to a full and fair consideration of Brown's sexual-assault convictions. Brown's post-trial declarations—some of which were filed by Brown's victims—might have inspired a factual dispute at trial, true enough, but by no means would they more likely than not have precluded every reasonable factfinder from voting to convict. Reasonable factfinders could have relied on testimony from the government's trial witnesses and credited that testimony over the post-trial declarations submitted in support of Brown's habeas petition.

2. Next, Brown says investigators violated his Sixth Amendment right to counsel as set forth in *Massiah v. United States*, 377 U.S. 201 (1964), by putting recording devices in his place of pretrial detention and by using jailhouse informants to elicit incriminating statements from him. Brown's *Massiah* claim, however, is procedurally defaulted because he raised it for the first time on collateral review; he never filed a *Massiah*-based suppression motion before the military trial judge, nor did he challenge the admissibility of his jailhouse statements on direct appeal. *See Davis v. Marsh*, 876 F.2d 1446, 1449 (9th Cir. 1989). Even if Brown's *Massiah* claim was not procedurally defaulted, and even if the Sixth Amendment right to counsel applies in general court-martial proceedings, *see generally Middendorf v. Henry*, 425 U.S. 25, 31–42 (1976); *Daigle v. Warner*, 490 F.2d 358, 364 (9th Cir. 1973), his claim fails on the merits. Sixth Amendment rights do not attach until "adversary judicial criminal proceedings" begin. *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) (quoting *United States v. Gouveia*, 467 U.S.

180, 188 (1984)). Here, the government stopped recording Brown's pretrial statements before adversary judicial criminal proceedings began. *See United States v. Harvey*, 37 M.J. 140, 142 (C.M.A. 1993).

3. Brown's habeas petition also raises a series of claims under *Brady v. Maryland*, 373 U.S. 83 (1963). One of his claims concerns Airman Basic Derrick T. Elliott, a government witness who testified at trial. After trial, the government disclosed a 2012 incident where police arrested Elliott for shoplifting and for providing false information to police. The Air Force Court of Criminal Appeals "quickly conclude[d]" the government erred by failing to disclose Elliott's arrest but denied relief under *Brady*'s materiality element because other evidence at trial amply exposed Elliott as "a convicted drug distributor, convicted drug user, and admitted self-serving liar." *Brown*, 2017 WL 3311205, at *15–16. The Air Force Court of Criminal Appeals fully and fairly considered this claim, and its conclusion—that any evidence of Elliott's 2012 arrest "would not have affected the outcome of [Brown's] case" because cross-examination effectively displayed Elliott's proclivity for lying and criminal activity, *id.* at *16—is not a basis for habeas relief.

Brown also claims the government violated *Brady* (1) by not disclosing its cooperation agreements with Elliott, Jarrid Gable, and Ethan Telford and (2) by not disclosing that Elliott, Gable, and Telford requested clemency in exchange for their cooperation. We reject this claim because Brown has not demonstrated how any of this information could have reasonably affected the outcome of his trial. To begin, it's unclear how

Elliott and Gable's cooperation and clemency requests would have affected the military judge's decision to convict Brown, especially since the government corroborated much of its testimony by presenting recordings where Brown admitted to many of the UCMJ violations at issue. Telford's cooperation agreement and clemency request is even less relevant because he never testified at trial; Brown's attorney would therefore have had no occasion to raise his agreement or clemency request on cross-examination.

Brown's brief also mentions a scattering of other evidence allegedly withheld by the government—including a list of photographs, various statements made by witnesses and non-witnesses to military police and military prosecutors, and information about a witness's criminal history—but Brown has not shown "a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

4. Finally, Brown argues his trial counsel performed ineffectively by not moving to suppress the audio recordings made during his period of pretrial detention. We disagree. Two elements comprise a successful ineffective-assistance claim. The claimant must first show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment," and then he must show prejudice—in other words, he must "demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland v. Washington*,

466 U.S. 668, 687, 694 (1984)). Brown's claim fails both elements. For the reasons explained above, it's unlikely that the military judge would have suppressed the incriminating jailhouse recordings because even if the Sixth Amendment applies in general court-martial proceedings, Brown's Sixth Amendment rights hadn't yet attached when the government recorded the incriminating statements at issue. Trial counsel's failure to file a likely-unsuccessful suppression motion did not "amount[] to incompetence under 'prevailing professional norms.'" *Id.* at 105 (citation omitted). Furthermore, Brown has not shown his counsel's failure to file a suppression motion prejudiced him.

AFFIRMED. PETITION DENIED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 19-8507 MRW

[Filed June 29, 2021]

LEON A. BROWN, IV, Petitioner,	)
v.	)
UNITED STATES OF AMERICA, Respondent.	)

ORDER DENYING PETITION FOR HABEAS CORPUS

28 U.S.C. § 2241

SUMMARY OF RULING

Petitioner Brown seeks civilian habeas corpus review of his military court criminal conviction. The Court concludes that Petitioner's claims cannot lead to relief, as they either were subject to full and fair review by military appellate courts or are procedurally defaulted. Alternatively, to the extent that Petitioner is entitled to additional consideration of any issues in

this Court, he fails to convincingly demonstrate a basis for vacating his military conviction.

As a result, the Court denies the petition in its entirety.

FACTS AND PROCEDURAL HISTORY

Military Trial Proceedings

Petitioner Brown formerly was an Air Force officer assigned to a base in North Dakota. He was court-martialed for organizing a type of gang with other Air Force personnel and local residents near the base.

The case went to a military bench trial in December 2014. At trial, the military court heard testimony from, among other witnesses, several teenage girls who stated that Petitioner had sex with them and others during alcohol- and drug-fuelled parties. The court also heard multiple jail recordings in which Petitioner talked with other Air Force personnel about having sex with the girls and distributing drugs.

After the trial, the military judge convicted Petitioner of various drug, child sexual assault, and threat charges. (The military court acquitted Petitioner of more serious rape and other charges.) The military judge sentenced Petitioner to approximately 25 years in custody.

Military Appellate Proceedings

On direct appeal, the U.S. Air Force Court of Criminal Appeals (the intermediate-level appellate court for convictions in this branch of the military)

affirmed most of Petitioner's convictions.[1] In a lengthy, reasoned decision, the appellate court rejected Petitioner's claims regarding the sufficiency of the evidence, the effectiveness of his civilian and military attorneys, and Brady / pretrial evidentiary issues.[2] (The appellate court reversed a minor trespassing conviction and corrected an issue about custody credits.)

The U.S. Court of Appeals for the Armed Forces (the highest-level military appellate body) remanded the matter for consideration of Petitioner's petition for a new trial.[3] On remand, the Air Force appellate court denied Petitioner's new trial request. In a second reasoned decision, the court concluded that Petitioner's "new evidence" (essentially a post-trial declaration from a non-testifying witness to the North Dakota events) was insufficient to warrant relief.[4] The Court of

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[1] Petitioner did not appeal some of his convictions, including those involving drug and threat charges.

[2] United States v. Brown, 2017 WL 3311205 (A.F. Ct. Crim. App. 2017) (the 2017 Decision).

[3] United States v. Brown, 77 M.J. 197 (C.A.A.F. 2018). (The Air Force appellate court later explained that it erred in concluding that it lacked jurisdiction to consider a then-pending new trial motion after Petitioner filed his petition for review of its substantive appellate decision.)

[4] Brown v. United States, 2018 WL 2130778 (A.F. Ct. Crim. App. 2019) (the 2018 Decision).

Appeals for the Armed Forces subsequently denied review without comment.[5]

Federal Habeas Proceedings

This federal action under 28 U.S.C. § 2241 followed.[6] Petitioner filed a petition and lengthy memorandum seeking review of eight claims. (Docket # 21.) The government's response: (a) sought dismissal of several claims on procedural grounds; or (b) argued that relief was not warranted on the merits of the claims.[7] (Docket # 22.) (The government is jointly represented by a military attorney and a local civilian AUSA.)

After filing his reply, Petitioner submitted additional materials (plea and clemency request materials for several military personnel) for this

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[5] United States v. Brown, 78 M.J. 162 (C.A.A.F. 2018).

[6] Petitioner is currently housed at a civilian federal prison in Lompoc in this judicial district. The parties agree that: (a) this Court has jurisdiction over Petitioner's claims under 28 U.S.C. § 2241; and (b) venue for this habeas action in this district is proper. The parties also jointly consented to magistrate judge jurisdiction under 28 U.S.C. § 636. (Docket # 19.)

[7] Petitioner and the government submitted various excerpts of the military court record: charging documents, portions of witness testimony transcripts, interview reports, appellate pleadings, etc. (Docket # 21 at 1-2; # 22 at 2-3.) The Court subsequently directed the government to submit the transcripts of the entire court-martial pursuant to Habeas Rule 5. (Docket # 36-37.) The Court independently reviewed those transcripts and the other materials submitted in this action. Nasby v. McDaniel, 853 F.3d 1049, 1053 (9th Cir. 2017).

Court's review. (Docket # 40, 46, 53.) The government opposed those submissions for various reasons, including a contention that the documents were cumulative and irrelevant. (Docket # 42.)

STANDARD OF REVIEW

Military convictions in habeas proceedings in civilian federal courts are subject to a specific and unique standard: whether the defendant received full and fair review of the conviction in military court.

Habeas review "is limited" and "available only to guard against the military courts exceeding their jurisdiction [ ] and to vindicate constitutional rights." Broussard v. Patton, 466 F.2d 816, 818 (9th Cir. 1972). A district court's inquiry is restricted to considering "whether the military have given fair consideration to each of the petitioner's claims." Id. (quoting Sunday v. Madigan, 301 F.2d 871, 873 (9th Cir. 1962)); Gibbs v. Thomas, 466 F. App'x 646 (9th Cir. 2012) (citing Broussard, district court "properly denied habeas relief because [military appellate courts] fully and fairly considered" claims).

A federal court should not "re-examine and reweigh each item of evidence"; "it is not the duty of the civil courts simply to repeat [the] process" of direct appellate review. Burns v. Wilson, 346 U.S. 137, 143-45 (1953); Gurry v. Butera-Ortiz, 2012 WL 3276983 at *3 (N.D. Cal. 2012) (same). Rather, federal courts "play a supervisory role" over the military justice system that is "even more limited than they play with respect to state courts: Final judgments of the military courts are

not subject to direct review" in federal court. Davis v. Marsh, 876 F.2d 1446, 1449 (9th Cir. 1989).

In assessing the adequacy of military appellate review, federal court relief is appropriate only where:

> (1) the asserted error is of substantial constitutional dimension, (2) the issue is one of law rather than disputed fact, (3) no military considerations warrant a different treatment of constitutional claims, and (4) the military courts failed to give adequate consideration to the issues involved or failed to apply proper legal standards.

Thomas v. U.S. Disciplinary Barracks, 625 F.3d 667, 670-71 (10th Cir. 2010). The last factor is "the most important."[8] Id. at 671.

A prerequisite to civilian habeas review is the presentation of claims in the military justice system. "Military prisoners must exhaust military remedies before seeking relief in federal court." Davis, 876 F.2d at 1449. A military convict's constitutional claims "are waived when not raised on direct appeal in the military

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[8] Consistent with civilian federal habeas review of state convictions under 28 U.S.C. § 2254, this Court "looks through" the silent decisions of the Court of Appeals for the Armed Forces and will review the substantive 2017 and 2018 Decisions of the Air Force Court of Criminal Appeals under this standard. Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991).

Also, given the relative paucity of civilian review of military convictions in this circuit, federal courts regularly cite to decisions from the Tenth Circuit, a court with considerable expertise in analyzing these types of cases.

courts" in the absence of a showing of cause and prejudice for the failures to exhaust. Narula v. Yakabisin, 650 F. App'x 337, 338 (9th Cir. 2016); Tillery v. Shartie, 778 F. App'x 426, 428 (9th Cir. 2019) (same).

* * *

Under the Uniform Code of Military Justice, a military prisoner may not move for a new trial based on newly-discovered evidence more than two years after the end of proceedings. Denedo v. United States, 66 M.J. 114, 121 (C.A.A.F. 2008). However, military courts "have the jurisdiction to entertain coram nobis petitions to consider allegations that an earlier judgment of conviction was flawed in a fundamental respect." United States v. Denedo, 556 U.S. 904, 917 (2009) (affirming C.A.A.F. decision). Coram nobis relief may encompass a situation in which new evidence that could not have been discovered earlier establishes error "of the most fundamental character." Chapman v. United States, 75 M.J. 598, 601 (A.F. Ct. Crim. App. 2016) (quoting Denedo, 66 M.J. at 126).

ANALYSIS OF CLAIMS[9]

Ground Seven – *Brady* Violations

Petitioner alleges two subclaims that military prosecutors improperly withheld impeachment evidence in violation of Brady v. Maryland, 373 U.S. 83

[9] The Court declines to address Petitioner's claims in the somewhat illogical order that he presented them in his petition. Rather, it takes up Petitioner's substantive (and mostly exhausted) claims first.

(1963). Petitioner presented the first subclaim (involving Airman Elliott) on direct appeal. The second subclaim (involving clemency materials for Airmen Elliott, Gable, and Telford) was never reviewed by a military court; Petitioner first presented documents regarding this contention in federal court during habeas proceedings.

Facts and Decision Below

First Subclaim

Airman Elliott testified at the court-martial.[10] His direct examination covered approximately 14 pages of the trial transcript. (Docket # 37; Tr. 645-59.) Elliott was, along with several other incarcerated military personnel, heard talking at great length with Petitioner in pretrial jail recordings that the prosecution played and introduced into evidence at trial.

In his short trial testimony, Elliott acknowledged that he spent time with Petitioner in the community. Elliott testified that he saw Petitioner use drugs and discussed drug trafficking with him. Elliott briefly testified about Petitioner's sexual involvement with young women, but noted – favorably for the defense, at the time – that Petitioner had not discussed that with him. (Tr. 650.) Elliott testified that Petitioner admitted to Elliott that he ran a prostitution ring. (Petitioner

[10] The appellate decisions used initials to identify adult military witnesses and Petitioner's defense lawyers. There is no basis to use pseudonyms in this matter in civilian proceedings. However, the Court will use initials for the underage witnesses discussed below.

was acquitted of these charges.) On direct and cross-examination, Elliott admitted that he had been criminally convicted of serious drug charges, received a bad conduct discharge, and had already served the majority of his lengthy prison sentence.

After Petitioner's conviction, his lawyers learned that the prosecution possessed information regarding an additional arrest of Elliott. Elliott had been arrested several years earlier for shoplifting at a local Walmart and giving a false date of birth to the police. The local charges were ultimately dismissed. The prosecution did not disclose this information to the defense before trial. (2017 Decision at *14.)

* * *

On direct appeal, Petitioner contended that the prosecution's failure to produce information about the Walmart shoplifting incident violated Brady. The Air Force appellate court found no reversible error. The appellate decision expressly cited Brady, military law, and military decisions that "provide a military accused statutory discovery rights that are greater than those afforded by the Constitution." (Id.) The appellate court "quickly conclude[d]" that the material regarding Elliott's Walmart arrest should have been disclosed to the defense. (Id. at *15.) (The government conceded this on appeal, too.)

The court then evaluated "the effect of this nondisclosure on [Petitioner's] trial." (Id.) The court quoted the portions of Elliott's trial testimony in which he was impeached regarding his serious drug offenses. The appellate court noted Elliott's admission of his own

criminal conduct and his acknowledgement that he lied to investigators looking into Petitioner's conduct. The court also stated that Elliott and others involved in the jailhouse recordings discussed the possibility of getting a reduced sentence, which potentially undermined his testimony and statements.

The appellate court concluded that the information about Elliott's arrest was cumulative and immaterial. The appellate decision stated that Elliott's "credibility was directly challenged and his motives to fabricate revealed" during trial in a manner that "would have been self-evident to the military judge." (Id. at 16.) As a result, the court determined that the potential additional impeachment regarding the Walmart theft/false birthday allegation "would not have affected the outcome" of Petitioner's case. Citing another military court decision, the opinion stated that the prosecutor's conduct in failing to produce this material "certainly violated Brady," but did not require reversal of the conviction. Rather, the court concluded that the prosecutor's failure to disclose the information to Petitioner before trial "was harmless beyond a reasonable doubt." (Id. (quotation omitted).)

Second Subclaim

In his second Brady claim, Petitioner contends that the prosecution failed to disclose impeachment material regarding several military personnel.

Airman Gable testified briefly at trial. (Tr. 503-11 (direct examination).) Gable stated that Petitioner admitted to him that Petitioner had sex with girls and used drugs. Gable acknowledged his criminal

conviction and his discharge from the Air Force during his testimony.

Airman Telford did not testify at trial. However, Gable and Telford were among the group of inmates heard on the trial recordings in which Petitioner admitted criminal conduct while in custody.

* * *

After the conclusion of briefing in this post-appellate civilian habeas action, Petitioner filed a set of materials regarding these men. The items (Elliott's plea agreement, clemency requests for Gable and Telford, and related items) suggest that these individuals cooperated with the prosecution in exchange for, or in the hopes of receiving, a lesser prison sentence.

Petitioner never presented these materials to a military court for consideration. Petitioner claims he recently received the materials through post-trial Freedom of Information Act requests. He contends that the failure of the prosecution to disclose the items violated Brady.

Relevant Federal Law

A prosecutor has a constitutional obligation to provide exculpatory evidence to the defense when that evidence is "material" to the defense and in the possession of the government. Brady, 373 U.S. at 87; Giglio v. United States, 405 U.S. 150, 154-55 (1972) (requiring disclosure of impeachment information). The government is obligated to turn over "all material information casting a shadow on a government

witness's credibility," whether substantive or for impeachment purposes. United States v. Bernal-Obeso, 989 F.2d 331, 334 (9th Cir. 1993) (emphasis in original).

Favorable evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. United States v. Bagley, 473 U.S. 667, 682 (1985). Put another way:

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles v. Whitley, 514 U.S. 419, 434 (1995) (citations omitted); Sanders v. Cullen, 873 F.3d 778, 802 (9th Cir. 2017).

The "mere possibility that undisclosed information might have helped the defense, or might have affected the outcome of the trial, is insufficient to establish materiality" on habeas review. Cooper v. Brown, 510 F.3d 870, 925 (9th Cir. 2007). Further, evidence that is "merely cumulative of other evidence that the defense presented to impeach" a witness can be immaterial under Brady. Williams v. Woodford, 384 F.3d 567, 599

(9th Cir. 2002); Hooper v. Shinn, 985 F.3d 594, 618 (9th Cir. 2021) (collecting cases).

Analysis

First Subclaim

The Court concludes that the military courts accorded Petitioner full and fair review of his first subclaim about Elliott's Walmart arrest impeachment information. Broussard, 466 F.2d at 818.

The 2017 Decision expressly laid out the Brady analysis for this claim. The military appellate court concluded that Petitioner failed to demonstrate the materiality of the withheld material. The appellate court was aware of (and listed) the disparaging information about Elliott that was presented during his trial testimony. Based on that, the court concluded that additional questioning about the relatively minor shoplifting / false age allegations would have been cumulative to the previous challenges to the witness's credibility, and would have been immaterial to the result of the case. (2017 Decision at *16.)

The military court clearly applied the proper constitutional principles to Petitioner's circumstance. Thomas, 625 F.3d at 670-71. The court acknowledged the exculpatory nature of the information about an additional minor criminal charge. The court also stated that the prosecution should have disclosed the information, but failed to do so. Brady, 373 U.S. at 87; Giglio, 405 U.S. at 154-55.

However, the court gave a detailed and reasonable explanation as to why this additional information was

not material to the outcome of the court-martial. Bagley, 473 U.S. at 682; Kyles, 514 U.S. at 434; Williams, 384 F.3d at 599; Hooper, 985 F.3d at 618. If anything, the military court applied a materiality standard (harmless error beyond a reasonable doubt v. undermined confidence in verdict) that was more favorable to Petitioner on appellate review.

Petitioner's arguments regarding the alleged significance of Elliott's testimony are unconvincing. (Docket # 21 at 58-62.) The military court's full and fair review of this claim precludes habeas corpus review.[11]

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[11] Petitioner contends that the appellate court ruled that the prosecution violated Brady, and then inappropriately engaged in harmless error analysis. (Docket # 21 at 28; # 29 at 32.) That misreads the appellate decision in a couple of significant ways. Fairly read, when the appellate court stated that the prosecution "violated Brady," that clearly was a shorthand reference to the government's withholding of exculpatory information. (2017 Decision at *16.) However, this was in the same sentence in which the court engaged in the required materiality analysis. Seizing on the court's loose wording is insufficient to establish that constitutional error occurred.

Similarly, Petitioner seriously misperceives the harmless-beyond-a-reasonable-doubt consideration he received in military court. Read in the clear context of the decision, the court obviously analyzed the alleged materiality of the information and found Petitioner's claim to be without merit. That analysis survives civilian constitutional review. Davis v. Ayala, 576 U.S. 257 (2015) (harmless error evaluation under Chapman v. California, 386 U.S. 18, 22 (1967), is itself reviewed deferentially in federal habeas proceedings).

Second Subclaim

Petitioner never presented his second Brady subclaim (withholding of materials regarding Elliott, Gable, and Telford) to a military court. This subclaim is therefore procedurally defaulted and unexhausted.[12] Davis, 876 F.2d at 1449; Tillery, 778 F. App'x at 427. So too are additional allegations about new evidence that Petitioner attempted to shoehorn into his federal petition. (Docket # 21 at 61-64.)

But even if the Court assumed (without deciding) that it could consider Petitioner's unexhausted subclaim, he has not proved that the withheld items establish a material Brady violation. First, the trial court appears to have been well aware of the criminal convictions of Elliott and Gable (the witnesses who testified at trial) – that's why they were in jail at the same time as Petitioner. Petitioner does not explain how additional information about the clemency requests in those cases would have significantly increased the trial court's doubt about the veracity of their trial testimony in a way that could have affected the outcome of Petitioner's case. Kyles, 514 U.S. at 434; Hooper, 985 F.3d at 618.

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[12] The parties argue strenuously about whether this civilian court may properly consider newly-obtained evidence such as Petitioner's impeachment offerings. However, it's apparent that Petitioner did not attempt to seek further military review of the items by coram nobis. Denedo, 556 U.S. at 917. This suggests that the items do not establish error "of the most fundamental character," which a military court does have authority to consider. Chapman, 75 M.J. at 601.

Second, there was no impeachment value to the clemency request of Telford. He didn't testify at trial, so his veracity was not relevant to any issue in the case. Giglio, 405 U.S. at 154-55.

Further, while the Court understands that these three airmen participated in the custodial conversations with Petitioner, issues regarding their credibility were rendered immaterial by the submissions of the recordings themselves. The prosecution offered Petitioner's statements on those recordings against him, and did not rely (save for a relatively insignificant amount of in-court testimony) on the memory of the other inmates to get his statements into evidence. Proof of their motivation to cooperate with prosecutors against Petitioner pales in comparison to his voluntary admissions regarding his conduct. Any attack on the truthfulness of the non-testifying speakers was immaterial to the impact that the recordings could have had on the verdicts. Cooper, 510 F.3d at 925. Were the Court to reach the merits of Petitioner's second subclaim, Petitioner still failed to prove constitutional error that could lead to relief.

Ground Three – Ineffective Assistance of Counsel

Petitioner contends that his trial attorneys provided ineffective assistance during his court-martial. At trial, Petitioner was represented by an Air Force lawyer and a civilian attorney who previously served in the Army and whose law practice "focused on representation of military personnel in defense of court-martials." (Docket # 1-8 at 1, 5.)

On appeal and on habeas review, Petitioner presented a copious list of alleged actions, failures to act, and poor decisions attributable to these attorneys.[13] Quoting Petitioner's brief, the claims broadly challenge the lawyers' performance for allegedly "failing to object to hearsay, failing to locate witnesses, and not investigating anything" regarding Petitioner's case. (Docket # 21 at 32.) Significantly, Petitioner contends that the defense lawyers unreasonably failed to move to suppress the custodial recordings of Petitioner – a claim that Petitioner asserts that the military appeals court "manifestly refused to review." (Docket # 29 at 24 n.2; # 21 at 18.)

Appellate Decision and Lawyer Declarations

The military appellate decision contained a lengthy analysis of Petitioner's claims of ineffective assistance. (2017 Decision at *16-22.) The decision cited Strickland v. Washington, 466 U.S. 668 (1984), for the constitutional standard of "assessing the effectiveness of counsel" in military proceedings. The court enunciated that its evaluation was limited to whether a lawyer's performance fell "measurably below the performance" ordinarily expected of attorneys, and whether that ineffectiveness led to "a reasonable probability" of a different result of the proceedings. (2017 Decision at *17 (quotations omitted).) Citing

[13] Petitioner's current attorney oddly presented the bulk of these arguments in the first claim (broadly alleging that Petitioner failed to receive full and fair review of his allegations of error). (Docket # 21 at 16-25.) The third claim – which also alleges ineffective assistance – repeats many of these claims, but in far less detail. (Id. at 32-35.)

military precedent, the court acknowledged that it would "not second-guess the strategic or tactical decisions" that an attorney made at trial. (Id.)

Turning to the substance of Petitioner's claims, the appellate court noted that Petitioner "compile[d] a list" of alleged inconsistencies and statements in the testimony of seven witnesses that he contended his trial lawyers failed to address on cross-examination. (Id.) Petitioner also complained on appeal about the lawyer's failure to use his texts or additional custody recordings at trial. (Id. at *19.)

The military court received lengthy declarations from both of Petitioner's trial lawyers. The appellate decision noted the explanations of the trial lawyers regarding what they described as "tactical decisions" regarding the case presentation. (Id. at *18.) In their declarations, the lawyers explained that they generally sought to minimize questioning that would focus attention on Petitioner's sexual and drug-based relationships with underage civilian girls.[14] Additionally, to the extent that other military witnesses gave testimony that the lawyers perceived to be favorable to the defense, the lawyers stated that they did not seek to impeach those helpful witnesses with their convictions or clemency requests. (Id. (citing

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[14] One of the lawyers stated that evidence showing that "an Air Force officer [was] involved with any kind of alleged relationships with underage girls, whether said relationships involved sex or drugs, would not be held in high regard by court members or a military judge.[H]is dealings with these underage children would be considered, in all respects, inexcusable" and "quite devastating to him in this case." (Docket # 1-8 at 2.)

and summarizing lawyer declarations at Docket # 1-8 at 1-11).) Similarly, the lawyers explained that presenting further texts and recordings of Petitioner's unfiltered statements would not have been beneficial to him at court-martial.[15] (Id. at *19-20.)

In the declarations, the lawyers specifically explained the decision not to seek suppression of the jail recordings: they concluded that they couldn't. Based on their review of the materials, the lawyers declared that "there was no good faith argument that Capt. Brown was being interrogated about charged offenses" after invoking his right to counsel. Further, the lawyers stated that Petitioner "voluntarily initiated the conversation about his alleged crimes" with the other inmates, which also negated the ability to suppress the recordings." (Docket # 1-8 at 8; 2017 Decision at *19.)

In an additional section of the decision, the appellate court summarized Petitioner's allegations that the defense lawyers failed to properly investigate the case. The court noted claims that the lawyers failed to obtain further potential impeachment material regarding witnesses and photos of his apartment. (2017 Decision at *21.) The lawyers again stated that they would have been unlikely to use this material to avoid

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[15] After listening to the full recordings, the lawyers declared that Petitioner's custodial comments "went way beyond bravado." Rather, Petitioner "randomly used organized gang and racial terminology; he used negative comments towards witnesses, members of his command, and the prosecution team" that were "extremely damaging to his case." (Docket # 1-8 at 3-4.)

emphasizing other aspects of Petitioner's misconduct (supplying drugs to minors, etc.). (Id.)

* * *

The appellate court concluded that the trial lawyers were not constitutionally ineffective. The court found "no reason to second-guess the sound decisions" of the trial lawyers regarding the questioning of witnesses." (Id. at *19.) The military appeals court did not find that the lawyers acted unreasonably in trying to "prevent more evidence about [Petitioner's] sordid relationships with teenage girls from being offered against him" at court-martial. (Id.) The court concluded that Petitioner "failed to show that [the lawyer's] strategic evidentiary decisions fell measurably below the performance ordinarily expected of fallible lawyers." (Id.) The appellate decision also briefly addressed Petitioner's complaint about his lawyers' decision not to move to suppress the inculpatory recordings. The court concluded that the lawyers "reasonably determined" that there was no "good faith claim that [Petitioner's] Sixth Amendment right to counsel had been violated." (Id.)

As to prejudice under Strickland, the appellate court found none. The court stated there was "no reasonable probability that there would have been a different result" at trial had the lawyers acted in the ways that Petitioner claimed. (Id. at *20.) The appellate panel noted that Petitioner was acquitted of several serious offenses (suggesting that his lawyers provided a vigorous defense). Additionally, much of the impeachment or exculpatory evidence that Petitioner described (and for which he claims his lawyers

allegedly provided deficient performance by failing to obtain): was minimal; was unlikely to "have changed the military judge's ruling" in the trial court; or related to witnesses whose credibility "was thoroughly examined" at trial. (Id.)

Relevant Federal Law

To establish ineffective assistance under Strickland, "a defendant must show both deficient performance by counsel and prejudice." Knowles v. Mirzayance, 556 U.S. 111, 122 (2009). "Failure to satisfy either prong of the Strickland test obviates the need to consider the other." Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002).

Deficient performance is defined as representation that falls below an objective standard of reasonableness. Strickland, 466 U.S. at 688. A trial lawyer is "strongly presumed to have rendered adequate assistance," and should not have a reviewing court "second-guess counsel's assistance." Cullen v. Pinholster, 563 U.S. 170, 189 (2011). Put another way, courts are not supposed to engage in "Monday morning quarterbacking" of a lawyer's strategic decisions. Ayala v. Chappell, 829 F.3d 1081, 1102 (9th Cir. 2016).

A lawyer is best positioned to make "[n]umerous choices affecting conduct of the trial, including the objections to make, the witnesses to call, and the arguments to advance." Gonzalez v. United States, 553 U.S. 242, 249-50 (2008). Consequently, an attorney's "tactical decisions at trial, such as refraining from cross-examining a particular witness or from asking a particular line of questions, are given great deference and must [ ] meet only objectively reasonable

standards." Dows v. Wood, 211 F.3d 480, 487 (9th Cir. 2000). This deference includes how "thorough and vigorous" the attorney's examination of a witness was. Id.

A defense lawyer has a duty to conduct a reasonable investigation before trial. Atwood v. Ryan, 870 F.3d 1033, 1057 (9th Cir. 2017). "A lawyer who fails adequately to investigate [a case] renders deficient performance." Reynoso v. Giurbino, 462 F.3d 1099, 1112 (9th Cir. 2006) (citation omitted); Howard v. Clark, 608 F.3d 563, 570-71 (9th Cir. 2010) (failure to interview "star witness" in case was deficient performance). However, when a lawyer has a reason to be believe that "pursuing certain investigations would be fruitless or even harmful," the "failure to pursue those investigations may not later be challenged as unreasonable"; a trial decision made after adequate investigation is "virtually unchallengeable." Strickland, 466 U.S. at 690-91.

As to prejudice, a challenger must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Padilla v. Kentucky, 599 U.S. 356, 366 (2010) (quotation omitted). It is a prisoner's burden to demonstrate that the result of the proceedings would have been different but for the attorney's purported errors. Strickland, 466 U.S. at 694. Speculation that a defendant might have suffered prejudice "is plainly insufficient to establish prejudice." Gonzalez v. Knowles, 515 F.3d 1006, 1016 (9th Cir. 2008).

* * *

"Surmounting Strickland's high bar is never an easy task." Padilla, 559 U.S. at 371. The standard of ineffective assistance established in Strickland "is a general one, so the range of reasonable applications is substantial." Pinholster, 563 U.S. at 196. On appellate review, a reviewing court's analysis "must consider the totality of the evidence before the judge or jury." Strickland, 466 U.S. at 696; Sanchez v. Davis, 994 F.3d 1129, 1140 (9th Cir. 2021) (same).

In the analogous context of habeas review of state convictions under AEDPA, a federal court is obliged to review the state court's application of Strickland deferentially. The Supreme Court has repeatedly stated that the standards created by Strickland and habeas review are both "highly deferential"; when the two apply in tandem, "review is doubly so." Harrington v. Richter, 562 U.S. 86, 105 (2011); Knowles, 556 U.S. at 123, 129 (same); Yarborough v. Gentry, 540 U.S. 1, 4 (2003) (same).

Analysis

The Court cannot conclude that the military appellate court failed to give Petitioner full and fair consideration of his many allegations of ineffective assistance. Thomas, 625 F.3d at 670-71.

The 2017 Decision correctly stated the federal constitutional principles of Strickland and its progeny. The court then devoted a considerable portion of its written opinion to a detailed analysis of the claims. The appellate court helpfully laid out Petitioner's many claims in an orderly manner based on the nature of his allegations. The written decision reflects the appellate

court's knowledge of the testimony and tangible evidence received at trial. It also demonstrated a familiarity with the sworn declarations of the trial lawyers in which they explained their litigation decisions. For these claims, the military reviewing court considered whether the lawyers provided deficient performance (conclusion: no) or prejudiced Petitioner at trial (again, no).

Petitioner does not persuasively demonstrate that the military court's review of his ineffective assistance claims failed to meet the full-and-fair standard. The lengthy decision did not unreasonably apply the general standard under Strickland. Pinholster, 563 U.S. at 196. Yes, as Petitioner suggests, it does appear that the military court deferred to the statements of the defense lawyers about their strategic decisions regarding witness questioning, additional investigation of impeachment evidence for the victims / collaborators, the decision not to seek suppression of the recordings, and Petitioner's other claims. But Petitioner fails to explain how that means that the court "blindly accepted a false version" of the facts as he sees them. (Docket # 21 at 19.) Rather, the military court was constitutionally required not to second-guess the lawyers' reasonable assertions regarding the case, but to give healthy deference to their articulated

decisions.[16] Ayala, 829 F.3d at 1102; Gonzalez, 553 U.S. at 249-50.

The bulk of Petitioner's ineffective assistance claims consists of quite speculative, hindsight assertions about how the strength of the prosecution's case might have been diminished had the matter been defended differently. Gonzalez, 515 F.3d at 1016. That, in turn, would require this Court to reweigh and reevaluate the trial evidence (particularly the inculpatory testimony of the girls at parties). This district court is prohibited from doing so. Burns, 346 U.S. at 143-45. Moreover, as the 2017 Decision emphasized, the proof of Petitioner's misconduct as recorded in his jailhouse statements renders any alleged deficient performance by the experienced trial attorneys immaterial and unlikely to have caused any prejudice. Strickland, 466 U.S. at 696; Sanchez, 994 F.3d at 1140. Habeas relief is not warranted on Petitioner's retrospective compilation of claims of ineffective assistance.

Ground Five – Improper Custodial Questioning

Petitioner contends that the appellate court failed to fully and fairly consider whether the prosecution's decision to record Petitioner's jailhouse conversations violated the Sixth Amendment.

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[16] Petitioner's statement that the appellate court "was required by law to review Petitioner's Sixth Amendment violation claim de novo" – supported by citations to military decisions – advances no understandable argument on constitutional review to this civilian district court.

However, the government correctly and convincingly notes that this claim is procedurally defaulted from civilian review. (Docket # 22 at 50-51.) Petitioner did not seek suppression of the recordings at his court-martial for the reasons stated in his lawyers' post-trial declarations. Further, Petitioner failed to raise this issue on direct appeal – save for the derivative argument that his attorneys were ineffective for not pursuing or preserving the claim at trial.[17]

Notably, in his reply submission, Petitioner did not address the question of procedural default of this claim in any forceful way. (Docket # 29 at 8.) He also made no attempt to demonstrate cause or prejudice regarding the default (save for a circular claim that Petitioner should not be deemed to have waived this argument because he is entitled to "attack [ ] the military court's legal evaluation" of his claims of constitutional error). Id. The claim is procedurally defaulted and waived in this Court. Davis, 876 F.2d at 1449; Tillery, 778 F. App'x at 427.

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[17] As above, Petitioner argues that the appellate court "was required to conduct an analysis de novo" of this claim. (Docket # 21 at 40 (citing United States v. Kosek, 41 M.J. 60 (Ct. Mil. App. 1994) (corrected citation).) However, Petitioner's circumstance is easily distinguishable. In Kosek, the defendant did bring a successful motion to suppress post-arrest statements. The prosecution was then allowed to seek appellate review of the suppression ruling. While the Court of Military Appeals stated that review of the claim was de novo, it never suggested that review was sua sponte – that is, initiated by the Court itself, without the litigant properly preserving and asserting the claim.

Ground Eight – Confrontation Clause / Hearsay Claims

Petitioner broadly complains that the court-martial improperly considered out-of-court statements from testifying and non-testifying witnesses FT, WK, and KH in violation of his Sixth Amendment right to confrontation. (Docket # 22 at 31, 64.)

The government correctly observes that these claims are defaulted, as Petitioner did not exhaust them on appellate review. Davis, 876 F.2d at 1449; Tillery, 778 F. App'x at 427. Petitioner has not demonstrated that he adequately preserved these claims for habeas review.

Moreover, were the Court to reach their merits, Petitioner's explanations of his claims are far too conclusory and frivolous to lead to relief. The contention that FT and WK "did not testify at trial" after having "made testimonial hearsay statements to the police" is not, as Petitioner asserts, itself a constitutional violation; Petitioner fails to explain how it plausibly could be. (Docket # 21 at 31, 64.) Additionally, as the government notes, Petitioner's briefing in this Court does not coherently explain what statements he believes were improperly admitted at trial or how they impacted his conviction.[18] Finally, Petitioner offers no response to

[18] "Judges are not like pigs, hunting for truffles buried in briefs" or other materials. Christian Legal Soc. Chapter of Univ. of Calif. v. Wu, 626 F.3d 483, 488 (9th Cir. 2010) (citation omitted). It is not the Court's responsibility to "comb the record" on behalf of a party to search for relevant information in support of a lawyer's

the government's cogent observation that the extent of WK's out-of-court statement was in furtherance of the alleged conspiracy (regardless of the formal verdict on the conspiracy charge), and was not testimonial under a plain reading of Crawford v. Washington, 541 U.S. 36, 53-54 (2004), or Davis v. Washington, 547 U.S. 813 (2006). (Docket # 22 at 57.) Habeas relief is not warranted on these ill-pled and ill-conceived assertions.

Ground Four – Ambiguous Findings

The Court summarily denies Petitioner's fourth claim that "ambiguity" in the decisions at the court-martial or appellate court level can possibly lead to habeas relief. (Docket # 21 at 35-40.) Petitioner cites to no civilian court ruling establishing that the perceived lack of clarity in a judicial decision violates the U.S. Constitution. It is his obligation on habeas review to demonstrate that the military courts committed an error "of substantial constitutional dimension." Thomas, 625 F.3d at 670-71. Petitioner failed to do so.[19]

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assertion. Carmen v. San Francisco Unified School Dist., 237 F.3d 1026, 1029 (9th Cir. 2001).

[19] In any event, the Court can't make heads or tails of Petitioner's contention that the appellate court's description of his acquittals caused the review of his convictions to be materially unfair. And Petitioner's lawyer provides no meaningful explanation as to how any alleged error in the military courts could possibly have violated double jeopardy. (Docket # 21 at 39.)

Grounds Two and Six – Actual Innocence / New Evidence

In two claims (Two and Six), Petitioner contends that he is actually innocent of the charges of sexually assaulting GB and FT. (Docket # 21 at 29, 52.) The gist of these claims is that the military courts improperly credited the trial testimony of witnesses regarding Petitioner's sexual misconduct over post-trial declarations obtained from the girls. (Docket # 8-32 at 8 (GB), 13 (FT).)

* * *

As an initial matter, the Court easily concludes that Petitioner received full and fair review on direct appeal of the constitutional sufficiency of the evidence supporting these convictions. Broussard, 466 F.2d at 818; Gibbs, 466 F. App'x 646. The 2017 Decision contained a lengthy recitation and analysis of the evidence of Petitioner's guilt on these charges. (2017 Decision at *3-6.) The court noted that the convictions variously rested on the boastful admissions of Petitioner and percipient testimony from attendees at his parties. The appellate court specifically observed that the trial judge likely rejected some of the testimony of a key witness (KW) at trial. (Id. at *6.) But the reviewing court found no support for Petitioner's claims that this "necessarily render[ed] KW's entire testimony unbelievable." (Id.) That's full and fair consideration, especially based on the appellate court's correct legal statement that it was constitutionally required to review the evidence in the light most favorable to the prosecution. (Id. at *2 (citing military progeny of Jackson v. Virginia, 443 U.S. 307,

318-19 (1979) (relevant constitutional issue for a reviewing court 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" (emphasis in original))).)

To the extent that Petitioner claims that new evidence must lead to habeas relief, he falls far short of carrying his high legal burden. Petitioner contends that he is entitled to consideration of this claim (and perhaps others) under Schlup v. Delo, 513 U.S. 298, 327 (1995).[20] That ruling allows consideration of a credible claim of actual innocence based on newly-discovered evidence or a change in law through an equitable "gateway." Significantly, the standard of proof required to demonstrate a claim of actual innocence on habeas review and to get through that gateway is extremely high. A prisoner must

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[20] The Schlup analysis is typically employed to allow consideration of other substantive constitutional claims that a defendant has defaulted. As the government points out, the Supreme Court has never definitively stated that a defendant has the right to pursue a "freestanding" claim of actual innocence. McQuiggin, 569 U.S. at 392; District Attorney's Office for Third Judicial District v. Osborne, 557 U.S. 52, 71 (2009) (whether federal constitutional right to be released upon proof of "actual innocence" exists is "an open question").

Assuming that a cognizable claim of actual innocence exists under the Constitution, "the threshold showing for such an assumed right would necessarily be extraordinarily high." Ayala v. Chappell, 829 F.3d 1081, 1116 (9th Cir. 2016). To prove actual innocence, a prisoner must "go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." Gimenez v. Ochoa, 821 F.3d 1136, 1145 (9th Cir. 2016).

demonstrate that, "in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." McQuiggin v. Perkins, 569 U.S. 383, 386 (2013) (quotation omitted). A claim of new evidence sufficient to establish actual innocence therefore runs up against "a high threshold that is rarely met." Lee v. Lampert, 653 F.3d 929, 945 (9th Cir. 2011) (Kozinski, C.J., concurring); McQuiggin, 569 U.S. at 386 ("tenable actual-innocence gateway pleas are rare").

Regardless of the standard to be applied, the post-trial declarations of the young women are insufficient to establish Petitioner's actual innocence. The 2017 declarations of GB and FT (obtained years after Petitioner's conviction and initial appeal) purport to refute that either of them had sexual contact with Petitioner. (Docket # 8-32 at 8, 13.) GB's declaration goes further by opining that several of the trial witnesses who testified that they saw her having sex with Petitioner are liars. (Id. at 8 (testimony of KW "is false"; KH "is a compulsive liar").)

Yet, at best, all Petitioner can suggest is that there might be a factual / credibility dispute for the finder of fact to have made at trial. That's far from proving that no reasonable juror or judge would have convicted Petitioner at trial. McQuiggin, 569 U.S. at 386. And, as the military appellate court stated when it rejected a different exculpatory declaration from another of Petitioner's victims (2018 Decision at *3), a reviewing court may properly decline to find that such later-acquired evidence can propel a defendant through the

Schlup gateway or demonstrate actual innocence.[21] See, e.g., Jones v. Taylor, 763 F.3d 1242, 1250 (9th Cir. 2014) ("we cannot say that every juror would credit [the victim's] recantation testimony over her trial testimony" years after events); United States v. Quiroz, 706 F. App'x 423, 424 (9th Cir. 2017) ("alleged recantation" of witness was not "reliable evidence that would undermine the jury's finding of guilt").

The after-the-fact declarations that Petitioner obtained from the two young women do not meet the standard – be it "high," "extraordinarily high," or "rare" to meet – necessary to conclude that Petitioner has shown that he is actually innocent of the sexual assault claims. Lee, 653 F.3d at 945; McQuiggin, 569 U.S. at 386; Ayala, 829 F.3d at 1116. The Court denies habeas relief on these claims.

Ground One – Denial of Full and Fair Review

Finally, the Court declines to entertain or grant relief on Petitioner's omnibus first claim. Ground One of the petition does not identify a discrete constitutional error for which Petitioner seeks civilian habeas review. Rather, in a rambling 18-page section of the supporting memorandum (Docket # 21 at 11-29), Petitioner catalogues a series of claims regarding the

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[21] Indeed, the military appellate court appears to have been aware of some of the additional material that Petitioner developed after his conviction regarding additional impeachment of witnesses and the layout of his apartment. (2017 Decision at *21-22.) The court found that evidence to be immaterial to Petitioner's ineffective assistance claims. That further undercuts Petitioner's contentions that this evidence is such important proof of his alleged innocence.

Air Force appellate court decisions that, he contends, demonstrated that the court "did not provide a full and fair review" of Petitioner's convictions. (Id. at 29.)

As noted above, federal civilian review is limited to claims of error of constitutional magnitude in military proceedings. Broussard, 466 F.2d at 818. In this section, though, Petitioner seeks this Court's detailed reconsideration of the credibility of witnesses and the reweighing of evidence. This Court is without jurisdiction to delve that deeply into the military case file.[22] Burns, 346 U.S. at 143-45; Davis, 876 F.2d at 1449.

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[22] Further hindering Petitioner's request are additional grievous overstatements of the record in that his lawyer made this section of his brief. Petitioner contends that, in evaluating his motion for a new trial, the Air Force appellate court "mentions that Petitioner was guilty of 'notorious drug activities.'" (Docket # 21 at 25.) No, it didn't. The only place that this phrase occurs in the decision is when, in evaluating a post-conviction declaration from a witness, the court explained that "Petitioner bragged about his extensive, notorious drug activities" with other witnesses and on audio recordings. (2018 Decision at *3). Similarly, Petitioner falsely asserts that the appellate decision stated that he was convicted of "conspiring to pander" and "engaging in prostitution." (Docket # 21 at 25.) Wrong – the appellate court accurately noted Petitioner's acquittal on these charges. (2018 Decision at *1 n.3)

More outrageously, Petitioner flatly states that the government "conceded that their jailhouse recordings were not reliable evidence" at the trial. (Docket # 21 at 16.) In a case heavily reliant on this recorded evidence, that's an amazing assertion to make. It's also a wild misstatement of the prosecutor's comment in post-trial proceedings. What the prosecutor actually said – in joining a request of Petitioner's trial lawyer to dismiss one specification (military charge) – was that "the audio disagrees" with the testimony of trial witnesses." (Tr. 684.) That's a far cry from Petitioner's formulation in his federal brief, and materially undermines his lawyer's attacks on the judicial process below.

CONCLUSION

For the reasons stated above, the Court denies habeas corpus relief in this action.

Dated: June 29, 2021

/s/ Michael R. Wilner
HON. MICHAEL R. WILNER
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 19-8507 MRW

[Filed June 29, 2021]

LEON A. BROWN, IV,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

JUDGMENT

IT IS ADJUDGED that the petition is denied and this action is dismissed with prejudice.

Dated: June 29, 2021

/s/ Michael R. Wilner
HON. MICHAEL R. WILNER
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-55727
D.C. No. 2:19-cv-08507-MRW
Central District of California, Los Angeles

[Filed November 15, 2022]

LEON A. BROWN IV, Petitioner-Appellant,	)
v.	)
UNITED STATES OF AMERICA, Respondent-Appellee.	)

ORDER

Before: SILER,[*] CALLAHAN, and H.A. THOMAS, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judge Siler recommends the denial of the petition for rehearing and Judge Callahan and Judge H.A. Thomas vote to deny the petition for rehearing en banc. The full court has been advised of the petition for

[*] The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX E

Exhibit 32

DECLARATION OF:
Winona Emelia Keplin

I Winona E. Keplin, do hereby make the following declaration under penalty of perjury pursuant to 28 U.S.C. § 1746:

This statement is for the United States Court of Appeals of the Armed Forces, in the case of United States vs Captain Leon Brown IV. Captain Brown was wrongfully convicted of pandering, in which the Air Force alleged that I was being forced to work as a prostitute for him. He was also accused by Kelsie Wallace of drugging me while prostituting my body to "unknown man". It makes no sense to me that nobody ever tried to ask me if this was true or not, and nobody asked me to testify. Had I known about these false accusations, I would have made the truth known that these allegations are lies. I was never drugged or sold for prostitution, and I never witnessed any such acts committed or encouraged by Captain Brown. If I really am a victim of prostitution, then my version of the truth on these matters needs to be considered.

Finally, I am an eye-witness to the accounts regarding the only interaction between Captain Brown and FT. It is a fact that FT did tell everybody, including Captain Brown, that she was 17 years old. They did not engage in any sexual activity, nor were they ever alone

together. I can personally attest to these facts. Again, I do not understand why nobody attempted to contact me before his Court Martial back in December of 2014, or during the investigation.

I respectfully ask for your court to please consider my eyewitness accounts as stated above.
I declare under penalty of perjury that the foregoing is true and correct.

Executed on: October 7, 2017

/s/ Winona E. Keplin
Winona E. Keplin

Second Declaration of:
Winona Emelia Keplin

I, Winona Keplin, do hereby make the following declaration under penalty of perjury pursuant to 28 U.S.C. § 1746:

I feel very discontent with your court's decision to reject my first declaration. Your military justice system accused me of being a prostitute for Captain Leon Brown IV, and you also believed he was drugging me while doing so. Yet nobody ever tried to ask me if that was true or not, and nobody asked me to testify at his trial. This makes no sense. If I really am a victim of prostitution then why is your court ignoring my right to be heard? I strongly feel that my citizen rights are being violated, as your Air Force has propagated false sexual rumors about me which are not true. It is unethical and mendacious to intentionally ignore the truth.

I WAS NOT DRUGGED OR SOLD FOR PROSTITUTION! My right as a citizen needs to be heard.

Furthermore, I did witness the only interaction between Captain Brown and FT. She told me and everybody that she was 17, they did not have sex, and they were not alone together. Why disregard truth? Just because a witness did not say anything bad about Captain Brown does not justify for them to be ignored.

I ask for your court to please consider my eye-witness accounts.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 9/12, 2017
(date)

/s/ Winona Keplin
Winona Keplin

Declaration

I, GB, 11/11/1996 do hereby make the following declaration under penalty of perjury pursuant to 28 U.S.C SS1746:

I want to submit this letter to the court because I have a right to be heard and the truth needs to finally be clear. An acquaintance of mine Nona recently told me what happened to Captain Leon Brown and how the Air Force twisted my words from his December 2014 trial.

I'm going to say this very clear in plain English: Captain Brown and I did not have sex the night of that party October 2012! Had Captain Brown's attorney actually ask me this during his trial I would have replied NO. I told OSI during multiple interviews that nothing sexual happened between us back then so I assumed this issue was put to rest.

My testimony should have been obvious for you to understand that nobody was in the room with me all night or in the morning. Kelsey Wallace did not barge in to any room I was staying in, I can tell you for a fact. That statement of hers is false. I do remember spilling drinks on myself all through the night so I cleaned myself in the master bathroom and changed shirts before laying down "alone". Obviously my bra had to be off to clean myself off and not feel sticky from spilling drinks. I thought my testimony clarified that no one was with me or else you should have plainly asked me.

Finally I want to make clear that me and Kendra Hoeger are not friends. I have known her since I was 5 years old and she is a compulsive liar. I do remember

being asked at the trial if Kendra came into the room with me the next morning and I specifically said, NO. Nobody was in the room with me and I was wearing all my clothes nothing sexual happened to me all night. I said I was perfectly fine. If these are my own words that I testify to then you have no right to change my version of events. That I said what happened to me: I was never naked in bed with anybody! I did not get pregnant, have any abortions, or take any pills. Had I been asked this I would have told you NO. I hope this letter final sets the truth clear.

I declare under penalty and perjury that the foregoing is true and correct.

Executed on July 31, 2017

/s/ GB
GB

Declaration of Breanna Quarne

I, Breanna Quarne, do hereby make the following declaration under penalty of perjury pursuant to 28 U.S.C. § 1746:

This statement is to put the facts that I personally witnessed on record. I have known Captain Leon Brown IV since early 2013. We shared the same apartment with Winona Keplin in the later months of 2013. Winona and I were the only two women who occupied that residence.

I learned about the accusations surrounding Leon's Court Martial from his family in 2016. I also read the written statement that Kelsie Wallace gave to OSI from 2014. Kelsie said that Leon was drugging me then selling my body to random men for prostitution; that statement is complete fallacy. I never saw any girls who were being drugged or prostituted; Kelsie's statement is a blatant lie. Kelsie never even lived at that apartment with us.

I was with Leon for Halloween, October 2013 when Kelsie uninvitedly came over with FT. They were both loud and very annoying, I did not want them over. FT was trying to flirt with every guy in the house, including Leon who was my boyfriend at that time. I was pretty angry so I told Leon "either they leave or I leave". As a result, Nona helped Leon usher them out the door to avoid any further conflicts. I do specifically remember that FT claimed to be 17 years old. Notably, Leon was not alone with anybody except for me that night. I was with Leon all night.

OSI had an extremely hostile overtone towards me while Leon was confined by the Air Force in 2014. They were trying to scare me into making claims against Leon by threatening that "I would be in a lot of trouble too if I did not help them", or words similar to that effect. That is the reason why I did not want to participate with anything back then. I make this statement now because justice was not done correctly.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 8-17-18, 2017
(date)

Breanna Quarne
/s/ Breanna Quarne

Declaration of Valorie Mattson

I, Valorie Nicole Mattson, do hereby make the following declaration under penalty of perjury pursuant to 28 U.S.C. ss 1746:

I know Captain Leon Brown IV from Minot, North Dakota. I first met Leon at his previous residence at 1303 35th Ave SE during the "Project X" party on October 13-14, 2012. I remember being at Leon's house on that night with other friends of mine including GB, Kelsie Wallace, Kendra Hoeger, and Christopher Mascho. I was at that party all day/ night until it was shut down by the Minot Police Department.

I had interactions with Leon and GB during that night and have personal knowledge of their later formed relationship. I was interviewed by OSI agents on April 17, 2013 at the school that GB and I attended, Minot High School Central Campus Plus. I told OSI (and am now telling you) that GB and Leon did not engage in any sexual activity that night in October 2012. I know this to be a fact because I had observed both of them throughout the entire night, they were not alone together. Towards the end of the night, GB had occupied the upstairs master bedroom by herself, while Leon was in the living room with me and other friends. Nobody had entered the room that GB was in. I had also told OSI that GB and Leon were not in any relationship together until sometime in late- December 2012.

I was not aware of any court martial against Captain Brown during his trial in 2014. Nobody had tried to contact me to become a witness.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 7-9-18
DATE

/s/ Valorie Mattson
Valorie Mattson

Declaration of FT

I, FT (January 14, 1999), do hereby make the following declaration under penalty of perjury pursuant to 28 U.S.C. § 1746:

I want to help make things right by submitting this letter to the military courts, and to correct any past mistakes that were made. I remember back in early 2014 that Kelsie Wallace was angry with Captain Leon Brown IV for a reason unknown to me. She asked me if I would help her cause problems for him with the military. I was 15 years old at that time and I did not fully understand the seriousness of Kelsie's other allegations against him, or the later consequences that came afterwards. I chose not to testify at the trial because it was at that point in time I realized this had gone too far, and I wanted no part of it. I was young at that time and did not truely understand the seriousness of what was said.

I wish to answer the following 3 questions for the record:

1. Yes, I told Leon that I was 17 years old when we met.

2. Nothing sexual ever happened between us.

3. There was never any pregnancy or abortion.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: October 9th, 2017
(DATE)

/s/ FT
FT

Exhibit 22

ARTICLE 39(a) SESSION

MJ: Please be seated. This Article 39(a) Session is called to order.

TC: This court-martial is convened by Special Order A-10, Headquarters, Eighth Air Force, dated 26 December 2013; copies of which have been furnished to the military judge, counsel, and the accused and which will now be inserted at this point in the record.

The charges have been properly referred to this court for trial. The first charge was served on the accused on 6 January 2014. The additional charge was served on the accused on 22 January 2014.

The prosecution is ready to proceed in the case of the *United States versus Senior Airman Derrick T. Elliott.*

The accused and the following persons detailed to this court are present:

Colonel Grant L. Kratz, Military Judge (MJ);

Major Timothy Ward, Trial Counsel (TC);

Captain John Kalis, Trial Counsel (TC); and

Captain Christopher Sanders, Defense Counsel (DC).

[redacted] has been detailed reporter for this court and has been previously sworn.

TC: All members of the prosecution have been detailed to this court-martial by Colonel Robert Booth, 5th Bomb Wing Staff Judge Advocate.

Major Ward has been qualified and certified under Article 27(b) and sworn under Article 42(a), Uniform Code of Military Justice. Captain Kalis is uncertified. No member of the prosecution has acted in any manner which might tend to disqualify us in this court-martial.

MJ: Let me make sure that I understand. You are qualified, but not certified; and therefore not sworn. Is that right?

TC: That is correct, sir.

MJ: Very well; if you could stand and raise your right hand.

* * *

[p. 87]

. . . steroids into their thighs. Airman Elliott had full knowledge of the wrongfulness of what he was doing, and yet chose to take Airman [redacted] down a path that would ultimately ruin the career of the now Airman Basic [redacted].

TC: There was a fourth life that Airman Elliott tore a path of destruction through; [redacted], his co-conspirator in distributing marijuana. The text messages between the two of them tell the story, coordinating all the details of weighing, bagging, pricing, and selling marijuana; and all of it goes right back to the inventory of product, the bricks of pot stashed underneath the mattress.

These are the aggravating facts and circumstances of this case. This is not a buddy distro case. This is not a simple use and possession case. This is no fewer than five different drugs, four lives torn apart, and a *bona fide* drug-dealing operation. If there were ever a drug case that calls out for a dishonorable discharge, this is it.

The second main point about why a dishonorable discharge with four years of confinement is appropriate is that all of our principles of sentencing point to it. When Shylock demanded his pound of flesh from The Merchant of Venice, Shakespeare used it as an opportunity to underscore the importance of grace and mercy. This case, however, is that rare case when the court should not extend grace and mercy, but should rather express the full measure of the Air Force's and society's outrage for what Airman Elliott has done. The price tag of industrial-scale marijuana distribution, of steroid use, of ruining the lives, not only of a fellow Airman, but also of a child; that price tag is dishonorable discharge. It is the message the Air Force sends to its members and the public about how seriously we take these offenses.

But, if we simply kick Airman Elliott out of the front gate and back into society, we are being horribly irresponsible. The Air Force owes society more than that. We have a responsibility to turn Airman Elliott into a decent, trustworthy person, if that is even possible. It took Airman Elliott time to become the kind of criminal he is today. He's been engaged in other criminal behavior for years. Before anything he is being sentenced for today, he was a petty shoplifter. In 2012,

he pled guilty to stealing from Wal-Mart in Minot. He also lied to the sheriff's department about his birth, his driver's license, and even the spelling of his own name. But, did he learn from those mistakes? No. After pleading guilty to stealing, he went on to other, more serious crimes.

Today, he's pleading guilty again. He's saying that he's sorry for what he has done and he is taking responsibility for his actions. Do not mistake this for humility or for honor. This is a calculating criminal who got caught. With a mountain of evidence against him, he's made a plea deal with the government to cut his losses. That is his motivation for admitting his crimes.

The kind of profound, fundamental change he needs to undergo will almost certainly take longer than just a few months. To have any chance to succeed at rehabilitation, Airman Elliott needs to spend four years in confinement.

Given his pattern of escalating wrongdoing from shoplifting to drug dealing, and the variety of people he has harmed along the way, the Air Force also owes it to the rest of society to keep him behind bars for four years where he cannot do anymore damage.

In his unsworn statement Airman Elliott talked a great deal about how he has done reflection and contemplation, and he wants to have time in his life to have focus and discipline developed. Indeed, he does need time to reflect. He does need time to develop focus and discipline, and he needs that time to happen in confinement for four years.

This sends an unmistakable message to Airmen, all Airmen, and to Airman Elliott, specifically, that his actions are beyond the realm of any acceptable behavior. There is a general message of deterrence that Airmen on this base need to see as well. Even with thousands of dollars of marijuana and $600 in cash on-hand, crime does not pay. A dishonorable discharge and four years of confinement sends that message.

But to truly underscore the connection between crime and punishment and send the deterrent message that other Airmen, and indeed Airman Elliott himself needs to see, there must also be the message that comes from total forfeitures of pay and allowances, and a reduction to E-1. That sends . . .

* * *

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[The court-martial opened and was called to order at 1830, 14 February 2014. The parties were present. The members were absent.]

MJ: Please be seated. The court is called to order.

TC: All parties present when the court closed are again present.

MJ: Accused and counsel, please rise.

SENTENCE

MJ: Senior Airman Derrick T. Elliott, this court-martial sentences you:

To be reduced to the grade E-1;
To forfeit all pay and allowances;
To be confined for 32 months; and
To be discharged from the service with a bad-conduct discharge.

MJ: Please be seated.

[The accused and the defense counsel did as directed.]

MJ: Trial Counsel, please hand me the quantum portion of the pretrial agreement. That is Appellate III.

TC: I am handing Appellate Exhibit III to the military judge.

MJ: Appellate Exhibit III states "As consideration for the offer of the accused to plead guilty as set forth in the Offer for Pretrial Agreement, dated 14 January 2014, the Convening Authority will undertake that: He approve no confinement, if confinement is adjudged in excess of 36 months." "There are no restrictions on his ability to approve other forms of punishment that may be adjudged."

This is the original Appendix A submitted with the Offer for Pretrial Agreement.

MJ: Senior Airman Elliott, have I correctly stated the sentencing agreement that you have with the Convening Authority?

ACC: Yes, sir.

MJ: Do counsel for both sides agree?

* * *

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS EIGHTH AIR FORCE (AFGSC)
BARKSDALE AIR FORCE BASE, LOUISIANA

[SEAL] JAN 14 2014

MEMORANDUM FOR AIRMAN FIRST CLASS DERRICK T. ELLIOTT

FROM: 8 AF/CC
345 Davis Ave W
Barksdale AFB LA 71110

SUBJECT: Grant of Testimonial Immunity and Order to Testify

1. An ongoing investigation revealed that you have knowledge of offenses allegedly committed by Captain Leon A. Brown, 91 MW, Minot AFB ND. The offenses in question alleged against Capt Brown include use, possession and distribution of illegal drugs and illegal activities involving minors. These offenses appear to be in violation of Articles 112a, 120b, 133, and 134 of the Uniform Code of Military Justice (UCMJ).

2. By authority vested in me in my capacity as a general court-martial convening authority, by Rule for Court-Martial 704(c)(1), Manual for Courts-Martial, I hereby grant you testimonial immunity and order you to answer any questions posed to you by investigators and counsel pertaining to any offenses alleged against the military member identified above, and to testify at any proceeding held pursuant to the UCMJ (10 U.S.C. § 801, *et seq*.), concerning any offenses alleged against the military member identified above. This grant of immunity takes effect on the day you receive a copy of

it. You will acknowledge receipt of this grant of immunity.

3. Under this immunity, your testimony and statements, as well as information directly or indirectly derived therefrom, may not be used against you in a later trial by court-martial. However, this immunity does not bar the use of your testimony, your statements, or information derived from them, in prosecuting you for perjury, giving a false statement, or otherwise failing to comply with this order to testify.

/s/ Scott A. Vander Hamm
SCOTT A. VANDER HAMM
Major General, USAF
Commander

Place: Minot AFB, North Dakota

Date: 14 January 2014

UNITED STATES	)
	)
v.	)
	)
SrA Derrick T. Elliot, [redacted]	)
5th Maintenance Squadron (AFGSC)	)
Minot AFB, ND	)
	)

APPENDIX A TO OFFER FOR PRETRIAL AGREEMENT

1. As consideration for the offer of the accused to plead guilty as set forth in the Offer for Pretrial Agreement dated 14 January 2014, the Convening Authority will undertake that:

> He will approve no confinement, if confinement is adjudged, in excess of thirty-six (36) months. There are no restrictions on his ability to approve other forms of punishment that may be adjudged.

2. This is the original Appendix A submitted with the Offer for Pretrial Agreement.

/s/ Derrick Elliot — 14 Jan 14
DERRICK T. ELLIOT, SrA USAF — Date
Accused

I certify I advised SrA Elliot of the effect of the foregoing and that the above signature is his voluntary signature to Appendix A.

/s/ Christopher L. Sanders 14 Jan 14
CHRISTOPHER L. SANDERS, Capt, USAF Date
Defense Counsel

I recommend acceptance ~~(rejection)~~ of this Appendix A.

[redacted] _____ 24 Jan 14
[redacted] Col, USAF Date
Staff Judge Advocate

The foregoing Appendix A is approved/~~disapproved~~ in conjunction with the Pretrial Agreement, dated 14 January 2014.

/s/ Scott A. Vander Hamm 25 Jan 14
SCOTT A. VANDER HAMM, Maj Gen, USAF Date
Commander

DEPARTMENT OF THE AIR FORCE
AIR FORCE OFFICE OF SPECIAL INVESTIGATIONS

[SEAL] 24 Jan 14

MEMORANDUM FOR AREA DEFENSE COUNSEL

FROM: AFOSI Det 813
475 Summit Drive, Suite 217
Minot AFB, ND, 58705

SUBJECT: SrA Derrick Elliott Investigative Cooperation

1. On 15 Jan 14, SrA Derrick Elliott provided both oral and written statements, which corroborated information in aid of an active sexual assault and narcotics investigation.

2. SrA Elliott provided his statements voluntarily.

[redacted]
[redacted]
[redacted] SA, USAF
AFOSI, Detachment 813

DEPARTMENT OF THE AIR FORCE
USAF JUDICIARY, AREA DEFENSE COUNSEL (AFLOA)
MINOT AIR FORCE BASE,
NORTH DAKOTA 58705

[SEAL] 8 May 2014

MEMORANDUM FOR CONVENING AUTHORITY

FROM: AFLO/ADC (Capt Sanders)

SUBJECT: Request for Clemency – AB Derrick T. Elliott

1. The Defense respectfully requests that you consider this letter and the letter submitted by AB Elliott when deciding whether to grant clemency in AB Elliott's case.

2. On 13 February 2014, AB Elliott plead guilty at a general court-martial to possessing and distributing some amount of marijuana; use and possession of nandrolone decanoate; possession of methandienone, stanzolo, and testosterone enanthate; and conspiracy to commit an offense. He was sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for 32 months, and a bad conduct discharge.

3. AB Elliott understands that what he did was criminal and that he deserves to be punished; he only asks that you grant him leniency with his confinement time. Prior to and following his court-martial, AB Elliot has assisted the Air Force Office of Special Investigations (OSI) with an investigation against a military officer. AB Elliott voluntarily provided both

oral and written statements and has been completely corporative with the investigators. It is worth noting that AB Elliott voluntary came forward with the information, OSI did not approach him nor did they know that he was a potential witness.

4. AB Elliot requests that you shorten his time in confinement from 32 to 24 months. This will ensure that AB Elliott can provide support, both physically and financially for his child. Two years is still a significant sentence that provides appropriate punishment for the crimes.

5. For these reasons, I respectfully request that you grant AB Elliot's request for clemency. If you have any questions please call me at DSN (b)(6), (b)(7). Thank you for your time.

Very Respectfully,
/s/ Christopher L. Sander
CHRISTOPHER L. SANDER, Capt, USAF
Defense Counsel

Attachment:
Clemency Request of AB Derrick T. Elliott

1 May 2014

MEMORANDUM FOR CONVENING AUTHORITY

FROM: AB DERRICK T. ELLIOTT

SUBJECT: Clemency Request

1. Sir, I am writing this clemency letter hoping that you will grant me leniency by reducing my sentence from 32 months to 24 months confinement

2. Sir, I take full responsibility for what I did. I'm currently serving my punishment for my mistakes. Being in confinement and being under investigation for 10 months while I continued to go to work every day was a very difficult time in my life, but I maintained a positive attitude in everything I did and didn't get in any other trouble during that time. I definitely learned my lesson. I can assure you nothing like this will happen in the future.

3. I think I deserve the leniency because my girlfriend and I are expecting our first child in October. It is already hard on her now and I can't even imagine how hard it will be for her trying to support herself and our child on her own, Before I got sentenced and while I have been in confinement I have helped the Air Force by giving OSI information about another case which I will be testifying in. Before I joined the Air Force I had never gotten in any trouble. I already have a few jobs lined up for when I get out to support my family.

4. As I said before, I regret what happened and I learned my lesson, nothing like this will ever happen again.

5. Thank you for your time and consideration.

Respectfully Submitted,
/s/ Derrick T. Elliott
DERRICK T. ELLIOTT, AB, USAF

ACTION OF THE CONVENING AUTHORITY:

DEPARTMENT OF THE AIR FORCE, HEADQUARTERS EIGHTH AIR FORCE (AIR FORCE GLOBAL STRIKE COMMAND), Barksdale Air Force Base, Louisiana 71110, dated 30 May 2014

In the case of AIRMAN FIRST CLASS JARRID R. GABLE, (b)(6), (b)(7)United States Air Force, 219th Security Forces Squadron, only so much of the sentence as provides for a bad-conduct discharge, confinement for 6 months and reduction to E-1 is approved and, except for the bad-conduct discharge, will be executed. The Air Force Corrections System is designated for the purpose of confinement and the confinement will be served therein or elsewhere as directed by Headquarters Air Force Security Forces Center, Corrections Division. Unless competent authority otherwise directs, upon completion of the sentence to confinement, AIRMAN BASIC GABLE will be required under Article 76a, UCMJ, to take leave pending completion of appellate review.

/s/ Scott A. Vander Hamm
SCOTT A. VANDER HAMM
Major General, USAF
Commander

DEPARTMENT OF THE AIR FORCE
OFFICE OF THE AREA DEFENSE COUNSEL (AFLOA)
GRAND FORKS AIR FORCE BASE, NORTH DAKOTA

[SEAL] 27 May 2014

MEMORANDUM FOR THE CONVENING AUTHORITY THROUGH 5 BW/JA

FROM: AFLOA/ADC
(b)(6), (b)(7)(C)

SUBJECT: Clemency Matters – *United States v. A1C Jarrid R. Gable*

1. The Defense respectfully requests that you grant A1C Gable clemency by not approving the sentenced hard labor without confinement. On 1 February 2014, A1C Gable was found guilty of sexual assault, abusive sexual contact and attempted sexual assault. The panel of officers and enlisted sentenced A1C Gable to reduction to E-1, hard labor without confinement for three months, six months confinement and a bad conduct discharge.

2. Our Military Justice system included this unique process of clemency to ensure that the "commander's prerogative" remains intact. You have the opportunity to right wrongs and set things straight. AB Gable has been convicted and must now register as a sex offender, likely for the rest of his life. AB Gable faces limitations on employment as well as where he can live. The imposition of hard labor without confinement will only prevent AB Gable from starting the hard road back to

being rehabilitated into society. Because AB Gable's sentence includes automatic forfeitures, AB Gable would be forced to perform this hard labor without confinement, without pay. This would be an enormous detriment to him being able to move forward following this conviction. AB Gable is ready to become a productive member of society again but the hard labor confinement would dramatically reduce his ability to do so.

3. For the reasons stated above, I respectfully request that you grant AB Gable's request for clemency. The sentence of reduction to E-1, six months confinement and a bad conduct discharge have already addressed the misconduct of this case. Not approving the hard labor without confinement would allow AB Gable the opportunity to start his new life following confinement. Thank you for considering his clemency request.

/s/ Valerie J. Newman
VALERIE J. NEWMAN, Capt, USAF
Defense Counsel

2 Attachments:
1. AB Gable's Clemency Request. dated 20 May 2014, 2 pages
2. Character letters, various dates, 6 pages

MEMORANDUM FOR CONVENING AUTHORITY

FROM: AB JARRID R. GABLE

SUBJECT: Clemency Request

1. Sir, I am writing this clemency letter hoping that you will grant me leniency by reducing my punishment to exclude the imposition of hard labor without confinement.

2. I am asking for your mercy because even though I have been convicted of very serious offenses, I am not a horrible person. Before I joined the Air Force, I was never in trouble. I was a well behaved student in school, made good grades and kept my mom happy. I grew up on an Indian Reservation and saw first-hand the dangers of alcohol and crime. I wanted so badly to make a good life for myself. I wanted to make my family proud and create a new and better life for myself. For all these reasons, I joined the North Dakota Air Guard.

3. I know that when I am released from confinement I'll face many obstacles to making myself a productive member of society. I'll have to register as a sex offender for the rest of my life. That's going to affect me greatly in the future. It will be hard for me to get a job and will even affect where I can live. My parents are still struggling with dealing with my conviction, but I know that I will need to step-up and make a life for myself. I feel really bad for putting my family through this because they love me so much and have done so much for me.

4. Sir, I want nothing more than to move on forward. Right now, I will be required to perform hard labor without confinement for three months after my release from confinement. I am worried that this duty will further drain my family's resources as it will prevent me from getting a job and making my own way. I do not want to rely on my family for money. Additionally, I am concerned that this duty will drain the resources of my Guard unit. My First Sergeant recently visited me and conveyed that the unit did not want me to have to fulfill this part of my punishment. When I joined, I wanted to help my state and my country. I hate to think of myself as causing more work for the honorable Airmen in my unit.

5. I have done everything I could to be a model prisoner. I even assisted OSI with an investigation of another inmate: I wrote a statement and have agreed to be a witness at court.

6. I have had a lot of time to think about what I will do when I get out of confinement. I am confident that I can become a productive person and contribute to my community. I do not want my convictions to define me but I worry that if I receive the hard labor without confinement I will hit a major road block before I can even start my recovery. Thank you for your time and consideration.

Respectfully submitted,
/s/ Jarrid R. Gable
JARRID R. GABLE, AB, USAF

Attachment 13

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS 5TH BOMB WING (AFGSC)
MINOT AIR FORCE BASE NORTH DAKOTA

[SEAL] 19 September 2014

MEMORANDUM FOR ALL REVIEWING AUTHORITIES

FROM: 5BW/JA (Cap (b)(6), (b)(7)(C)

SUBJECT: Clemency Matters – US v. AB Ethan Telford

1. This memorandum is being provided at the request of AB Telford's ADC, Capt Mooney, to substantiate assistance given by AB Telford to the government.

2. While AB Telford was in the Minot AFB confinement facility, he participated in various conversations with another service member, who is currently in pretrial confinement. The other service member made various admissions to AB Telford about wrongdoing committed by the other service member. AB Telford cooperated with the government by making statements to OSI to document the admissions of the other service member. AB Telford will also cooperate with JA trial counsel by testifying at the trial of the other service member. AB Telford's willingness to testify voluntarily aids the government by negating the necessity to subpoena AB Telford and compel his testimony.

(b)(6), (b)(7)(C)

(b)(6), (b)(7)(C) Capt, USAF
Chief, Military Justice