

No. _____

IN THE
Supreme Court of the United States

D'ANDRE M. JOHNSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

MAJOR SPENCER R. NELSON
Counsel of Record
United States Air Force
Air Force Appellant Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770
spencer.nelson.1@us.af.mil

Counsel for Petitioner

October 2023

QUESTIONS PRESENTED

I.

28 U.S.C. § 1259(3) states that this Court may review “[c]ases in which the Court of Appeals for the Armed Forces granted a petition for review.”

Does 28 U.S.C. § 1259(3) give this Court jurisdiction, as part of the *case*, to consider *issues* raised to, but not granted review by, the Court of Appeals for the Armed Forces?

II.

Is Second Lieutenant Johnson’s conviction for sexually assaulting M.P. legally sufficient?¹

¹ Second Lieutenant Johnson raised Issue II to the Court of Appeals for the Armed Forces, but it did not grant his petition for review on this issue.

PROCEEDINGS

The following is a list of all proceedings related to this case:

(1) *United States v. Johnson*, No. ACM 39676, 2020 CCA LEXIS 364 (A.F. Ct. Crim. App. Oct. 16, 2020)

(2) *United States v. Johnson*, 81 M.J. 451 (C.A.A.F. 2021)

(3) *United States v. Johnson*, No. ACM 39676 (rem), 2022 CCA LEXIS 413 (A.F. Ct. Crim. App. July 19, 2022)

(4) *United States v. Johnson*, No. 22-0280/AF, 2023 CAAF LEXIS 303 (C.A.A.F. May 8, 2023)

Table of Contents

QUESTIONS PRESENTED	i
PROCEEDINGS.....	ii
TABLE OF AUTHORITIES.....	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION.....	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE.....	3
A. Question I	4
B. Question II.....	5
i. Background	5
ii. Legal Sufficiency	8
REASONS FOR GRANTING THE PETITION	10
A. This Jurisdictional Question has Existed Since 1983 and is Ripe for This Court’s Consideration	11
B. This Court Should Grant Review Because Various Canons of Statutory Interpretation Indicate this Court Has Jurisdiction over “Cases” not Just Granted Issues.....	13
i. This Court’s Broad Interpretations of “Case” and “Decision” Weigh in Favor of Jurisdiction.....	14
ii. The Legislative History Indicates that “Cases” did not Mean Granted Issues.....	17
iii. The Surplusage Canon and the Harmonious Reading Canon Weigh in Favor of Jurisdiction.....	18
C. This Court Should Grant Review to Answer Questions that <i>Jackson v. Virginia</i> did not Resolve	19
i. 2d Lt Johnson’s Conviction for Assaulting M.P. Falls Between “No Evidence” and the “Lower Limit” Floor of Legal Sufficiency, Entitling him to Relief	20

ii. <i>Jackson v. Virginia</i> Stated that a Factfinder must Apply the Beyond a Reasonable Doubt Standard Reasonably, Fairly, and Rationally	22
iii. This Case Presents Additional Matters that this Court can Clarify	26
iv. Conclusion: Why Panel Members Convicted	27
CONCLUSION	28
TABLE OF CONTENTS FOR PETITIONER'S APPENDIX.....	000a

TABLE OF AUTHORITIES

STATUTES

10 U.S.C. § 870.....	1, 2
10 U.S.C. § 920.....	3, 8
10 U.S.C. § 920 (2016)	3
28 U.S.C. § 1259 (1983)	1, 2, 10, 11, 13, 17, 19, 28

SUPREME COURT CASES

<i>Alicia</i> , 74 U.S. (7 Wall.) 571 (1869).....	14
<i>Bostock v. Clayton Cnty.</i> , 140 S. Ct. 1731 (2020).....	18
<i>Carcieri v. Salazar</i> , 555 U.S. 379 (2009).....	18
<i>Charles Dowd Box Co. v. Courtney</i> , 368 U.S. 502 (1962)	10
<i>Coleman v. Johnson</i> , 566 U.S. 650 (2012)	11
<i>Di Giovanni v. Camden Fire Ins. Asso.</i> , 296 U.S. 64 (1935)	10
<i>In re Winship</i> , 397 U.S. 358 (1970)	21
<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979)	11, 20, 21, 22, 26, 28
<i>Leary v. United States</i> , 395 U.S. 6 (1969)	25
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803). 14	
<i>Ortiz v. United States</i> , 138 S. Ct. 2165 (2018).....	14
<i>Salinas v. United States RRB</i> , 141 S. Ct. 691 (2021)	15
<i>Smith v. Berryhill</i> , 139 S. Ct. 1765 (2019).....	15
<i>Stack v. Boyle</i> , 342 U.S. 1 (1951).....	15
<i>Thompson v. Louisville</i> , 362 U.S. 199 (1960).....	20
<i>Tibbs v. Florida</i> , 457 U.S. 31 (1982)	20
<i>United States v. Thompson</i> , 251 U.S. 407 (1920)	15
<i>Wilson v. Sellers</i> , 138 S. Ct. 1188 (2018).....	15

COURT OF APPEALS FOR THE ARMED FORCES

United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023) 26

United States v. Piolunek, 74 M.J. 107 (C.A.A.F. 2015) 26

United States v. Pullings, 83 M.J. 205 (C.A.A.F. 2023) 5

United States v. Rosario, 76 M.J. 114 (C.A.A.F. 2017) 26

FEDERAL COURT CASES

United States v. Teffera, 985 F.2d 1082 (D.C. Cir. 1993) 21

RULES AND OTHER AUTHORITIES

Black’s Law Dictionary (6th ed. 1990) 16, 19, 24

Brief for the Respondent in Opposition, *United States v. Briggs*, 141 S. Ct. 467 (2020) (No. 19-108) 10, 12, 13

Brief for the United States in Opposition, *McKeel v. United States*, 549 U.S. 1019 (2006) (No. 06-58).. 12

Brief for the United States in Opposition, *Wiechmann v. United States*, 559 U.S. 904 (2010) (No. 09-418) 12

Evolving Military Justice (2002) 18

H.R. 6298 (1980) 17

Petition for a Writ of Certiorari, *Jonathan M. Martinez, Et Al. v. United States*, No. 22-0165/AF, 2023 CAAF LEXIS 494 (C.A.A.F. July 18, 2023) (23-242) 26

Petition for a Writ of Certiorari, *Larrabee v. United States*, 139 S. Ct. 1164 (2019) (No. 18-306)..... 12

Reading Law: The Interpretation of Legal Texts (2012) 14, 17, 18, 19

Reply Brief for Petitioner, <i>Richards v. Barrett</i> , 140 S. Ct. 2760 (2020) (No. 19-55).....	12
Reply Brief of Michael Briggs, <i>United States v. Briggs</i> , 141 S. Ct. 467 (2020) (19-108).....	13
Reply Brief of Richard Collins, <i>United States v. Briggs</i> , 141 S. Ct. 467 (2020) (19-184).....	13
Reply Brief, <i>Stevenson v. United States</i> , 555 U.S. 816 (2008) (No. 07-1397)	12
S. Rep. No. 98-53 (1983)	17, 28
Stephen M. Shapiro et al., <i>Supreme Court Practice</i> (9th ed. 2007).....	11
SUP. CT. R. 10	10, 11, 27

PETITION FOR A WRIT OF CERTIORARI

Second Lieutenant D'Andre M. Johnson (2d Lt Johnson) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces (CAAF).

OPINIONS BELOW

The decision of the Air Force Court of Criminal Appeals (Air Force Court) is unreported, but available at 2020 CCA LEXIS 364 and reproduced at pages 001a – 048a of the Appendix. The decision of the CAAF is reported at 81 M.J. 451 and reproduced at pages 049a – 050a of the Appendix. The Air Force Court decision on remand is unreported, but available at 2022 CCA LEXIS 413 and reproduced at pages 051a – 061a of the Appendix. The final CAAF decision is reported at 2023 CAAF LEXIS 303 and reproduced at pages 062a – 063a of the Appendix.

JURISDICTION

Article 70(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 870(c) states, “Appellate defense counsel shall represent the accused before . . . the Supreme Court . . . when requested by the accused.”

The CAAF entered its judgment in 2d Lt Johnson’s case on May 8, 2023. On July 24, 2023, the Chief Justice extended the time to file a writ of certiorari until October 5, 2023. The nature of this petition is whether this Court has jurisdiction pursuant to 28 U.S.C. § 1259 (3) (1983)² over Question II when the CAAF granted 2d Lt Johnson’s petition

² Congress made minor updates to this statute in 1989 and 1994 which do not affect the substance of its text or the arguments below.

for review, but not on that specific question. For the reasons set forth below, 2d Lt Johnson avers this Court has jurisdiction over this case.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1259 – Court of Appeals for the Armed Forces; certiorari

Decisions of the United States Court of Appeals for the Armed Forces may be reviewed by the Supreme Court by writ of certiorari in the following cases:

- (1) Cases reviewed by the Court of Appeals for the Armed Forces under section 867(a)(1) of title 10.
- (2) Cases certified to the Court of Appeals for the Armed Forces by the Judge Advocate General under section 867(a)(2) of title 10.
- (3) Cases in which the Court of Appeals for the Armed Forces granted a petition for review under section 867(a)(3) of title 10.
- (4) Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Appeals for the Armed Forces granted relief.

Article 70(c), UCMJ, 10 U.S.C. § 870(c) Appellate Counsel

(c) Appellate defense counsel shall represent the accused before the Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court—

- (1) when requested by the accused;
- (2) when the United States is represented by counsel; or

- (3) when the Judge Advocate General has sent the case to the Court of Appeals for the Armed Forces.

Article 120, UCMJ, 10 U.S.C. § 920(b) (2016)

(b) Sexual Assault. Any person subject to this chapter who—

- (1) commits a sexual act upon another person by—

...

(B) causing bodily harm to that other person . . . is guilty of sexual assault and shall be punished as a court-martial may direct.

(g) Definitions. In this section:

- (1) *Sexual act*. The term ‘sexual act’ means—

(A) Contact between the penis and the vulva or anus or mouth, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or

(B) the penetration, however slight, of the vulva or anus or mouth of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(2) *Bodily harm*. The term ‘bodily harm’ means any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact.

STATEMENT OF THE CASE

Contrary to his pleas, a panel of officer members sitting at a general court-martial convicted 2d Lt Johnson of two specifications of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2016). Pet. App. at

002a. The panel sentenced 2d Lt Johnson to a dismissal, ten years' confinement, and total forfeiture of pay and allowances. *Id.* The Convening Authority approved the adjudged sentence. *Id.*

A. Question I

On direct appeal, 2d Lt Johnson raised three issues to the Air Force Court, and, *sua sponte*, the Air Force Court considered an additional matter. Pet. App. at 002-3a. The Air Force Court found no error materially prejudicial to 2d Lt Johnson, affirmed the findings, and then affirmed the sentence. Pet. App. at 003a.

2d Lt Johnson then asked the CAAF to grant review of five issues, including: (1) whether his conviction for sexually assaulting M.P. was legally sufficient; and (2) whether the Air Force Court erred in failing to consider supplementary evidence of his cruel and unusual punishment allegations. Pet. App. at 071-72a.

The CAAF only granted review of the supplementary evidence issue, affirmed the findings, but reversed as to the sentence, and remanded the case back to the Air Force Court. Pet. App. at 049a. On remand, the Air Force Court affirmed the sentence by a divided vote, finding that 2d Lt Johnson did not suffer cruel and unusual punishment. Pet. App. at 057a.

2d Lt Johnson again petitioned the CAAF for review on whether the Air Force Court's ruling was correct that he did not suffer cruel and unusual punishment. Pet. App. at 062a. 2d Lt Johnson only raised this issue. *Id.* The CAAF granted his petition for review and ordered that no briefs should be filed because review was granted in conjunction with a

similar case, *United States v. Pullings*, 83 M.J. 205 (C.A.A.F. 2023). *Id.* The CAAF subsequently affirmed the Air Force Court’s decision. *Id.*

B. Question II

This Question concerns 2d Lt Johnson’s conviction for digitally penetrating M.P.’s vulva without her consent and by causing bodily harm. Pet. App. at 002a.

i. Background

2d Lt Johnson graduated from the Air Force Academy in 2017 and was assigned to Moody Air Force Base, Georgia. 2d Lt Johnson Clemency Package at 13, 33. He subsequently joined a fitness center in neighboring Valdosta, Georgia, where he met M.P., who managed the gym. R. at 564-65.

2d Lt Johnson and M.P. began conversing over Instagram. Pros. Ex. 4. Over the next several days, their discussions ranged from information about their respective families to flirtatious comments and promises to meet up. Pros. Ex. 4; R. at 577-83. M.P. gave 2d Lt Johnson her phone number and later told him of her plans to go to the Bluewater Bar in Remerton, Georgia, on September 17, 2017. Pros. Ex. 4 at 14, 37; *see also* R. at 442.

Prior to arriving at Bluewater that night, M.P. went to dinner with several friends, including her co-worker, A.M. R. at 548, 551, 570. M.P. had a mixed drink at dinner, while A.M. did not have any alcohol. R. at 551, 593. Thereafter, the group went to a friend’s house, where M.P. had another mixed drink. R. at 594. A.M. consumed “a lot” of alcohol but could not recall how much. R. at 552. At around 2330 hours, the group left for Bluewater. R. at 594.

2d Lt Johnson also drank prior to going out. Starting around 1700 hours, he consumed five or six shots along with five or six beers at another bar. R. at 987. He and his friends eventually made their way to Bluewater, where he had several more shots and beers. R. at 988. 2d Lt Johnson consumed enough alcohol that his friends believed him to be intoxicated. R. at 989, 994.

At some point, 2d Lt Johnson met up with M.P. The pair spent the majority of their remaining time at the bar together, following each other around, “grinding” while dancing, and kissing. R. at 727-29, 995. Shortly before Bluewater closed, several individuals—including 2d Lt Johnson, M.P., and A.M.—decided to walk to the house of J.P., a friend who lived nearby. R. at 738. The group mingled outside for a few minutes after arriving at the house, during which 2d Lt Johnson and M.P. continued kissing. R. at 434, 731. M.P. later asked J.P. if 2d Lt Johnson could stay the night. R. at 1006. From J.P.’s perspective, M.P. appeared to be in control of her faculties and understood what she was doing. R. at 1006-07.

Ultimately, only four people from the group stayed at J.P.’s house: 2d Lt Johnson, M.P., A.M., and Senior Airman (SrA) C.C.—a friend of M.P.’s who A.M. apparently had a romantic interest in. R. at 420, 435, 439. J.P. was also in the house, along with her friend, SrA K.C. R. at 435, 660-61.

By this time, A.M. appeared extremely intoxicated. R. at 438. It was estimated that her blood alcohol content was anywhere from .196 to .267. R. at 892. Following the group’s request, 2d Lt Johnson

carried A.M. to a bedroom, put her in bed, and left her there with SrA C.C. R. at 438-39.

2d Lt Johnson and M.P. then went to the couch in the living room, where they began kissing and touching each other. R. at 661, 1008. J.P. asked M.P. if she was okay or needed a blanket, and M.P. responded that she was fine. R. at 1008. Observing nothing wrong and having no concern for her close friend, J.P. then retreated to her bedroom with SrA K.C. R. at 1008.

According to SrA C.C., he awoke later that morning to find 2d Lt Johnson having sex with A.M. R. at 487. SrA C.C. told 2d Lt Johnson “this is wrong” and tried to get him off her, to which 2d Lt Johnson replied: “It’s okay. It’s [M.P.]” R. at 488-90. 2d Lt Johnson was mistaken about the identity of the person he was having sex with. Pet. App. at 007a. SrA CC corrected 2d Lt Johnson, telling him that he was, in fact, having sex with A.M.—not M.P. *Id.* See also R. at 490. SrA C.C. responded that he needed to get off and pushed him. R. at 490. 2d Lt Johnson—who played fullback for the Air Force Academy’s football team³—did not fight back against SrA C.C.; rather, he said “Oh” and “I’m sorry, I’m sorry” while SrA C.C. escorted him out of the room. R. at 490. A.M. has no recollection of these events. R. at 553-54.

SrA C.C. later called a friend for assistance, and then retrieved M.P. from the couch, where she was sleeping opposite from 2d Lt Johnson. R. at 493-94. Eventually, SrA C.C. and others called an Uber to pick up 2d Lt Johnson, and escorted him from the premises. R. at 498-500. Although these events

³ See Clemency at 44-46.

occurred a few hours after 2d Lt Johnson left Bluewater, he still appeared to be very intoxicated. R. at 689-90.

When the police arrived to investigate the alleged sexual assault against A.M., M.P. also claimed to have been assaulted by 2d Lt Johnson. R. at 744. At no point during the evening or early morning hours did any individual staying at J.P.'s hear any screams, struggling, or calls for help from M.P., or harbor any concerns regarding her well-being with 2d Lt Johnson. R. at 524, 681, 1008-09.

The Government ultimately charged and convicted 2d Lt Johnson of penetrating M.P.'s vulva with his finger, in violation of Article 120, UCMJ, 10 U.S.C. § 920.

ii. Legal Sufficiency

M.P. testified that she did not remember many of the events following her arrival at Bluewater. R. at 571. However, she claimed that she remembered "[w]aking up on the couch with [2d Lt Johnson] on top of [her]." R. at 572. He was wearing a pink shirt and still had his pants on. R. at 573. M.P. said he was kissing her, she "kind of" pushed him off, and then she "went out again." R. at 573. When she next awoke, M.P. attested that 2d Lt Johnson was digitally penetrating her. R. at 573-74. She claimed she pushed him off, curled up, and went back to sleep, and believed he had left at that point. R. at 574. She later awoke "to a sound or something," saw 2d Lt Johnson's outline in the hallway, and realized he was not wearing any clothes. *Id.* She claimed 2d Lt Johnson was then "on top of [her] and he was in [her] face, saying [her] name," but she did not indicate that he thereafter touched her inappropriately. *Id.* M.P.'s

blood alcohol content was estimated to be anywhere from .15 to .262. R. at 893.

Analyzing M.P.'s testimony alongside 2d Lt Johnson's mistake of fact as to consent defense and other evidence adduced at trial, the Air Force Court deemed the timing of the incidents involving A.M. and M.P. as "critical to determining factual and legal sufficiency." Pet. App. at 015a. Noting that SrA C.C. testified he last sent a text message at 0302 hours, fell asleep, and was awoken by 2d Lt Johnson's assault on A.M., the Air Force Court determined that there was no indication of any mal-intent by 2d Lt Johnson prior to this time. *Id.* Instead, it opined that M.P. had been "somewhat, if not very, interested" in 2d Lt Johnson. *Id.* The Air Force Court added that, based on the evidence, "[h]ad M.P. alleged a sexual assault occurring before SrA [C.C.] fell asleep at 0302," 2d Lt Johnson would have a "viable argument" regarding mistake of fact. *Id.* But the Court then highlighted how A.M.'s DNA was found inside M.P.'s underwear, SrA C.C. saw 2d Lt Johnson naked during A.M.'s assault, M.P. saw 2d Lt Johnson naked in the hallway, and SrA C.C. found 2d Lt Johnson in his underwear on the couch with M.P. around 0345 hours. *Id.* Based on these facts, the Air Force Court held that the evidence "supports a conclusion that [2d Lt Johnson] sexually assaulted [M.P.] *after* he penetrated [A.M.] and before SrA [C.C.] saw [M.P.] and [2d Lt Johnson] on the couch around 0345." *Id.* (emphasis in original).

The Air Force Court's analysis did not address the nature of the DNA evidence, in that the Government recovered only non-semen, epithelial DNA; a form relating to skin, saliva, touch, etc. R. at 868-69. Likewise, the Air Force Court did not factor in

how 2d Lt Johnson had previously touched A.M., when he carried her to one of the house's bedrooms. R. at 438-39. The lack of any damage to M.P.'s clothes and the lack of any significantly corroborating injuries was also missing from the Air Force Court's holding.

REASONS FOR GRANTING THE PETITION

This Court should grant this Petition because the scope of this Court's jurisdiction is an "important question of federal law." *See* SUP. CT. R. 10(c). *See also Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 505 (1962) (acknowledging that whether federal courts are the "exclusive arbiters" of certain contract disputes is an "important question of federal law"); *Di Giovanni v. Camden Fire Ins. Asso.*, 296 U.S. 64, 66 (1935) ("This Court granted certiorari to settle an important question of federal law affecting the jurisdiction of federal courts.").

This is not only an important federal question, but it is also one that has festered "for nearly three decades" without this Court deciding it. Brief for the Respondent in Opposition at 4, *United States v. Briggs*, 141 S. Ct. 467 (2020) (No. 19-108). This case is the ideal vehicle to resolve the question presented because it is the primary issue: Without resolving the first question, this Court cannot reach the second question. Additionally, an analysis of the canons of statutory interpretation indicate that this Court does, in fact, have jurisdiction to hear "cases" under 28 U.S.C. § 1259 and not just granted issues. This further supports why this Court should grant this Petition.

Finally, 2d Lt Johnson maintains his innocence even though the CAAF did not grant review on his legal sufficiency issue. Although this Court "rarely" grants review when there is a "misapplication of a

properly stated rule of law,” this Court should grant review given that this issue is inextricably linked to a consequential jurisdictional question. SUP. CT. R. 10. Even though legal sufficiency is not a common issue presented to this Court, it is one of great importance to 2d Lt Johnson; one that can address important, unanswered legal sufficiency questions; and one that this Court can easily resolve. *See Coleman v. Johnson*, 566 U.S. 650 (2012); *Jackson v. Virginia*, 443 U.S. 307 (1979).

A. This Jurisdictional Question has Existed Since 1983 and is Ripe for This Court’s Consideration

In his authoritative book *Supreme Court Practice*, Stephen M. Shapiro recognized the question this Petition presents:

It is an unresolved question whether, once the Armed Forces court grants a petition for review on some issues, the Supreme Court has the power to consider other issues in the case that were not granted review. The Solicitor General has taken the position that review of those issue is unavailable.

STEPHEN M. SHAPIRO ET AL., *Supreme Court Practice* § 2.14 at 128 n. 103 (9th ed. 2007) (citing Brief for the United States in Opposition 6, *McKeel v. United States*, cert. denied, 127 S. Ct. 554 (2006)). Not only did Mr. Shapiro identify the question, but he also recognized that the Solicitor General has opposed this Court’s jurisdiction—despite the plain language of 28 U.S.C. § 1259.

This question is important to military practitioners and they have pushed back against the

Solicitor General’s attempt to limit this Court’s jurisdiction (i.e., its narrow reading of “cases” in 28 U.S.C. § 1259(3)).⁴ In a recent twist, however, the Solicitor General had to engage in jurisdictional gymnastics to soften its viewpoint when it became the appellant-petitioner. *Compare* Brief for the Respondent in Opposition at 4, *United States v. Briggs*, 141 S. Ct. 467 (2020) (No. 19-108) (“First, the

⁴ Brief for the Respondent in Opposition at 4, *United States v. Briggs*, 141 S. Ct. 467 (2020) (No. 19-108) (“To that end, for nearly three decades (and as recently as this January), the government has consistently maintained that this Court lacks jurisdiction under § 1259 to review any questions ‘not resolved by CAAF’s decision in this case.’”); Reply Brief for Petitioner, *Richards v. Barrett*, 140 S. Ct. 2760 (2020) (No. 19-55) (“Congress intended only to limit the number of cases heard by this Court, not the scope of its review.”); Petition for a Writ of Certiorari at 23, *Larrabee v. United States*, 139 S. Ct. 1164 (2019) (No. 18-306) (“Despite the clear text of § 1259(3), the Solicitor General has previously contended that this Court’s jurisdiction under that provision does not extend to issues on which CAAF did not grant a discretionary petition for review.”); Brief for the United States in Opposition at 7 n.2, *Wiechmann v. United States*, 559 U.S. 904 (2010) (No. 09-418) (“28 U.S.C. 1259 limits this Court’s review to ‘[d]ecisions’ of the CAAF. The CAAF granted review only on petitioner’s Sixth Amendment claim (Pet. App. 2a), and decided that issue only.”); Reply Brief at *3-4, *Stevenson v. United States*, 555 U.S. 816 (2008) (No. 07-1397) (“Respondent neither contests the plain language of section 1259(3), nor challenges the plain meaning of ‘case.’ Rather, it argues (Opp. Br. 8) that Article 67a(a), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867a(a), confines the Court’s authority to reviewing only ‘claims’ granted by the CAAF.”); Brief for the United States in Opposition at 3, *McKeel v. United States*, 549 U.S. 1019 (2006) (No. 06-58) (“While the CAAF granted a petition for review on petitioner’s claim that he was entitled to transactional immunity, it refused to grant a petition to review his Sixth Amendment claim. Under the terms of Section 867a(a), the Court may not review the CAAF’s action in refusing to grant review of that claim.”)

government itself has long argued that this Court lacks jurisdiction to consider most of [the issues].”) *with* Reply Brief of Richard Collins at *6, *United States v. Briggs*, 141 S. Ct. 467 (2020) (19-184) (“In no way is the government attempting to inject into this case at the certiorari stage an issue that was not central to the appellate proceedings and the CAAF decision affirming them.”) *and* Reply Brief of Michael Briggs at *8, *United States v. Briggs*, 141 S. Ct. 467 (2020) (19-108) (“Respondent’s current noncommittal suggestion (Br. in Opp. 1) of a jurisdictional “question” accordingly identifies no actual impediment to plenary review of the entire question presented.”). The Government should not be able to have it both ways on a question of this Court’s jurisdiction.

Although previous petitioners have discussed this issue in their petitions for a writ of certiorari, this case is the first to explicitly raise the question as a stand-alone issue. *Supra* note 4. As such, this Court should choose this case to resolve the question because it is a clean vehicle where the question is squarely in front of the Court.

B. This Court Should Grant Review Because Various Canons of Statutory Interpretation Indicate this Court Has Jurisdiction over “Cases” not Just Granted Issues

The crux of the question presented is whether the word “[d]ecisions” in 28 U.S.C. § 1259 narrows the statute’s five later uses of the word “cases,” to the point that this Court can only review issues that the CAAF granted on. There is no such limitation. This Court has already interpreted the words “cases” and “decisions” in such a manner that this Court should have jurisdiction, the legislative history shows that

congress rejected “issues” in favor of “cases,” and giving effect to every word in the statute results in a harmonious reading of the relevant provisions of the statute that renders them compatible, not contradictory.

i. This Court’s Broad Interpretations of “Case” and “Decision” Weigh in Favor of Jurisdiction

The prior construction canon states that if “a statute uses words or phrases that have already received authoritative construction by the jurisdiction’s court of last resort . . . they are to be understood according to that construction.” ANTONIN SCALIA & BRYAN A. GARNER, *Reading Law: The Interpretation of Legal Texts* 247 (2012) [hereinafter, *Reading Law*]. Not only has this Court interpreted the word “case,” it has done so in the context of the UCMJ.

In 1803, this Court explained, “It is the essential criterion of appellate jurisdiction, that it revises and corrects *the proceedings in a cause already instituted*, and does not create that cause.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803) (emphasis added). Stated differently, “cause” means “case” and the *sine qua non* of a case—and appellate jurisdiction—is “some judicial determination, some judgment, decree, or order of an inferior tribunal, from which an appeal has been taken.” *Ortiz v. United States*, 138 S. Ct. 2165, 2173 (2018); *Alicia*, 74 U.S. (7 Wall.) 571, 573 (1869).

This Court expressly adopted this broad understanding of “case” and “appellate jurisdiction” in the context of the UCMJ. *Ortiz*, 138 S. Ct. at 2173-74. In addition to discussing the definition of “case” and “appellate jurisdiction” elucidated in *Marbury*, this

Court in *Ortiz* focused on the fact that a case is something that originated at a court-martial, went through a service court of criminal appeals, and then the CAAF before arriving at this Court. *Id.* at 2174. As such, “this Court would hardly be the first to render a decision in the case.” *Id.*

This Court has also defined the word “decision” in a broad manner. *Salinas v. United States RRB*, 141 S. Ct. 691, 697 (2021) (“The phrase ‘any final decision’ is broad”); *Smith v. Berryhill*, 139 S. Ct. 1765, 1774 (2019) (“[W]e note that the phrase ‘final decision’ clearly denotes some kind of terminal event, and Congress’ use of the word ‘any’ suggests an intent to use that term ‘expansive[ly].’”) (citations omitted); *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018) (requiring appellate courts to “look through” unexplained or merits “decisions” in federal habeas corpus cases); *Stack v. Boyle*, 342 U.S. 1, 6 (1951) (finding that an “order denying the motion to reduce bail is appealable as a ‘final decision’ of the District Court”), *superseded by statute on other grounds as stated in Galen v. County of Los Angeles*, 322 F. Supp. 2d 1045 (C. Dist. Cal Jan. 9, 2004) (unpublished); *United States v. Thompson*, 251 U.S. 407, 412 (1920) (finding that a “decision” includes a motion to quash).

This Court should grant review not only because it has defined the words “case” and “decision” expansively in the past, but also because the words’ plain meanings convey that this Court has jurisdiction over a servicemember’s entire case. “Case” is defined as:

A general term for an action, cause, suit, or controversy, at law or in equity; a question contested before a court of justice; an aggregate of facts which furnishes occasion for the exercise of the jurisdiction of a court of justice. A judicial proceeding for the determination of a controversy between parties wherein rights are enforced or protected, or wrongs are prevented or redressed; any proceeding judicial in its nature.

Black's Law Dictionary, 215 (6th ed. 1990). Likewise, “decision” is also defined capaciously:

A determination arrived at after consideration of facts, and in legal context, law. *A popular rather than technical or legal word; a comprehensive term having no fixed, legal meaning.* It may be employed as referring to ministerial acts as well as to those that are judicial or of a judicial character . . . the term is broad enough to cover both final judgments and interlocutory orders . . . the word may also include various rulings, as well as orders, including agency and commission orders.

Id. at 407 (citations omitted) (emphasis added).

This Court’s prior definitions and the inclusive, plain language of these words point to one conclusion: This Court should grant review because it does, in fact, have jurisdiction over “cases” from the CAAF, not just granted issues.

ii. The Legislative History Indicates that “Cases” did not Mean Granted Issues

Even Justice Scalia—who loathed legislative history—gave one exception to consulting it:

Using legislative history to establish what the legislature “intended” is quite different from using it for other purposes. For example, for the purpose of establishing linguistic usage—*showing that a particular word or phrase is capable of bearing a particular meaning*—it is no more forbidden (though no more persuasive) to quote a statement from the floor debate on the statute in question than it is to quote the Wall Street Journal or the Oxford English Dictionary.

Reading Law at 289 (emphasis added). Initially, the House drafted 28 U.S.C. § 1259 to use the word “issues” instead of “cases.” H.R. 6298, at 39 (1980). As such, this Court would have only been able to review “issues upon which the Court of Military Appeals [CAAF] granted review and other issues upon which the [CAAF] took action in cases in which a petition for review was granted.” *Id.*

However, the final version of the bill that Congress passed replaced “issues” with “cases.” The legislative history indicates that the Congress was concerned with this Court’s workload. Meaning, Congress intended only to limit the *number* of cases heard by this Court, not the scope of its review. S. Rep. No. 98-53, at 33 (1983) (“[T]he Committee has taken steps to ensure that the bill will not result in an undue increase in *the volume of cases* presented to the

Supreme Court.”) (emphasis added). Notably, this legislative history is pre-enactment; as such, this argument presents the “ordinary meaning at the time of enactment,” which should govern. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1750 (2020).

At least one scholar has recognized that the legislative history “makes it clear that the Supreme Court has jurisdiction over any case in which the lower court granted review, even if the grant did not include the particular issue on which the certiorari petition is predicated.” Eugene R. Fidell, *Review of Decisions of the United States Court of Appeals for the Armed Forces by the Supreme Court of the United States*, in *Evolving Military Justice* 150-51 (Eugene R. Fidell & Dwight H. Sullivan eds. 2002).

The fact that Congress selected “cases” vice “issues” confirms that this Court should read “cases” and “decisions” broadly—in accordance with past decisions. Congress’ selection of these words confirms that this Court’s jurisdiction is not limited to only issues reviewed by the CAAF.

iii. The Surplusage Canon and the Harmonious Reading Canon Weigh in Favor of Jurisdiction

The surplusage canon dictates that “every word and every provision is to be given effect.” *Reading Law* at 148. Specifically, every word “Congress used” in the statute. *Carcieri v. Salazar*, 555 U.S. 379, 391 (2009). This canon “prevents not [only] the total disregard of a provision, but instead an interpretation that renders it pointless.” *Reading Law* at 148. If this Court were to interpret “decisions” narrowly—like the Solicitor General has suggested in the past—it would render Congress’ specific word choice of “cases” a nullity. In

other words, the five times 28 U.S.C. § 1259 uses “cases,” would simply be a redundancy of “decisions.”

However, the use of “decisions” and then “cases” is not a redundancy. Rather, “decisions” means any “determination arrived at after consideration of the facts, and . . . law,” such as the CAAF’s decision not to grant review on one issue, but to grant the petition for review on a different issue. *Black’s Law Dictionary*, 407 (6th ed. 1990). Once the CAAF has made the decision to grant a petition on one issue, but not another, this Court then has jurisdiction over the entire case because it is a “[c]ase[] in which the Court of Appeals for the Armed Forces granted a petition for review.” 28 U.S.C. § 1259(3).

This Court should favor this reading because it aligns with the harmonious-reading canon. Meaning, “The provisions of a text should be interpreted in a way that renders them compatible, not contradictory.” *Reading Law* at 152. If this Court were to read 28 U.S.C. § 1259 as the Solicitor General has historically wished, it would mean “decisions” and “cases” would be “provisions in conflict.” *Id.* Notably, this canon of interpretation is “more categorical than most other canons of construction because it is invariably true that intelligent drafters do not contradict themselves.” *Id.* Here Congress specifically chose the word “cases” over “issues.” Thus, if “decisions” narrowly modified “cases,” Congress would have contradicted themselves.

C. This Court Should Grant Review to Answer Questions that *Jackson v. Virginia* did not Resolve

To convict 2d Lt Johnson, members had to find that the Government proved the following two

elements beyond a reasonable doubt: (1) that 2d Lt Johnson committed a sexual act upon M.P. by penetrating her vulva with his fingers; and (2) that he did so by causing bodily harm to M.P., to wit: penetrating her vulva with his fingers *without her consent*. Pet. App. at 014a (emphasis added).

2d Lt Johnson's conviction presents several questions about legal sufficiency with regard to consent that this Court has not clarified. First, although there was some evidence of consent, does 2d Lt Johnson's case fall within the narrow window of protection that *Jackson* outlined? Second, what is the quantum of evidence "necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense," specifically for the element of consent? *Jackson*, 443 U.S. at 316. *See also Tibbs v. Florida*, 457 U.S. 31, 45 (1982) ("We held in *Jackson* that the Due Process Clause forbids any conviction based on evidence insufficient to persuade a rational factfinder of guilt beyond a reasonable doubt."). Third, should any of this Court's legal sufficiency standards change given that 2d Lt Johnson's case went through Article I courts—not state or federal habeas proceedings?

i. 2d Lt Johnson's Conviction for Assaulting M.P. Falls Between "No Evidence" and the "Lower Limit" Floor of Legal Sufficiency, Entitling him to Relief

In *Jackson*, this Court held that "the [*Thompson v. Louisville*, 362 U.S. 199 (1960)] 'no evidence' rule is simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt." *Jackson*, 443 U.S. at 320. In rejecting *Thompson*, the Court embraced *In re*

Winship, 397 U.S. 358 (1970), noting that “the record in *Winship* was not totally devoid of evidence of guilt.” *Id.* at 315. Later, this Court explained that the Due Process Clause sets “a lower limit on an appellate court’s definition of evidentiary sufficiency.” *Tibbs*, 457 U.S. at 45. Thus, *Jackson* stands for the proposition that a conviction can be legally insufficient—even with some evidence presented—if it falls below the “lower limit” of evidentiary sufficiency.

To gauge the sufficiency of the evidence, this Court stated that the test 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.” *Jackson*, 443 U.S. at 319 (emphasis in original) (citation omitted).

Although this is a low standard, it is “not entirely toothless” and was designed to correct the “occasional abuse” that appellate review missed. *See United States v. Teffera*, 985 F.2d 1082, 1085 (D.C. Cir. 1993) (“We do not . . . fulfill our duty through rote incantation of the[] principles [outlined above] followed by summary affirmance.”) (quoting *United States v. Long*, F.2d 1572, 1576 (D.C. Cir. 1990); *see also Jackson*, 443 U.S. at 322 (“Although state appellate review undoubtedly will serve in the vast majority of cases to vindicate the due process protection that follows from *Winship*, the same could also be said of the vast majority of other federal constitutional rights that may be implicated in a state criminal trial.”)). This Court should grant review because 2d Lt Johnson’s case is one of the “occasional abuses” of evidentiary sufficiency where there was

some evidence of consent, but not enough to meet the “lower limit” that *Jackson* demands.

ii. Jackson v. Virginia Stated that a Factfinder must Apply the Beyond a Reasonable Doubt Standard Reasonably, Fairly, and Rationally

This Court in *Jackson* repeatedly emphasized that the legal sufficiency test is not “simply a trial ritual.” 443 U.S. at 316-17. For example:

- “A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will *rationaly* apply that standard to the facts in evidence.” *Id.* at 317 (emphasis added).
- “[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could *reasonably* support a finding of guilt beyond a reasonable doubt.” *Id.* at 318 (emphasis added).
- “This familiar standard gives full play to the responsibility of the trier of fact *fairly* to resolve conflicts in the testimony, to weigh the evidence, and to draw *reasonable* inferences from basic facts to ultimate facts.” *Id.* at 319 (emphases added).

In his concurrence, Justice Stevens was concerned that this new test could not only do constitutional harm, but that it could also just become a “meaningless shibboleth.” *Id.* at 328.

There are two reasons why the evidence presented on consent did not meet the quantum

necessary to have convinced “*any* rational trier of fact” of the element of consent. *Id.* at 319 (emphasis in original). First, the only evidence that 2d Lt Johnson touched M.P. without her consent was from M.P.—a witness whose blood alcohol level was estimated to be anywhere from .15 to .262 at the time of the touching. R. at 893. The only thing that M.P. remembered after going to the bar earlier in the evening was waking up to 2d Lt Johnson touching her. R. at 572. Without delving into any of M.P.’s credibility issues, it was not reasonable, fair, or rational for the members to find that lack of consent was met given M.P.’s intoxication level. This is in addition to her lack of memory throughout the entire night—except for the exact moment in question. By comparison, A.M.—who had a similar blood alcohol content as M.P.—had no memory of her assault to the point that she had to be told that 2d Lt Johnson assaulted her. R. at 553-54; 892.

Second, per M.P.’s own testimony, the *timing* of when 2d Lt Johnson touched her proves her interactions with him were consensual. That is, the touching occurred before 2d Lt Johnson assaulted A.M., when M.P. and he were “laugh[ing],” “making out,” and “very physically connected” on the couch. R. at 661-62, 682, 687, 1008. The Air Force Court explained that the “timing of Appellant’s actions towards both M.P. and A.M. are critical to determining legal and factual sufficiency.” *Id.* This is because if 2d Lt Johnson touched M.P. before he assaulted A.M. he would have a “viable argument” that the touching was consensual as there was “no indication of any mal-intent” prior to A.M.’s assault. Pet. App. at 015a - 016a.

M.P.'s testimony was that she remembered 2d Lt Johnson touching her while he was fully clothed. R. at 573. 2d Lt Johnson was only fully clothed *before* he assaulted A.M., while M.P. and he were consensually “touching each other” on the couch. R. at 674. Once M.P. saw 2d Lt Johnson naked in the hallway, he did not touch her again. R. at 574.

Based on M.P.'s own testimony, then, the Air Force Court's timeline was incorrect—2d Lt Johnson's interactions with M.P. while clothed occurred *prior to* the incident with A.M. Therefore, using the Air Force Court's own logic, 2d Lt Johnson had a “viable argument” that the touching was consensual. Pet. App. at 016a.

While it is true that a court must assume “that the trier of fact resolved” conflicting inferences in favor of the Government, this is not an issue of an inference. *Jackson*, 443 U.S. at 326. An “inference” is “[a] logical and reasonable conclusion of a fact *not presented by direct evidence* but which, by process of logic and reason, a trier of fact may conclude exists from the established facts.” *Black's Law Dictionary*, 778 (6th ed. 1990) (emphasis added). Here, there was “direct evidence” presented that while 2d Lt Johnson was clothed, *before* assaulting A.M., his interactions with M.P. were not only consensual, but enthusiastically consensual:

- M.P. asked for permission to have 2d Lt Johnson stay the night with her. R. at 1006.
- 2d Lt Johnson and M.P. were “on the couch, kissing and touching each other.” R. at 661.
- 2d Lt Johnson and M.P. were “very physically connected” on the couch. R. at 662.

- 2d Lt Johnson and M.P. were “making out.” R. at 1008.
- “Everything seemed mutual” between 2d Lt Johnson and M.P. R. at 674.
- M.P. said she was “fine.” R. at 1008.
- 2d Lt Johnson and M.P. were “actively kissing.” *Id.*
- M.P. was not resisting when 2d Lt Johnson kissed her. *Id.*
- M.P. was kissing 2d Lt Johnson back. *Id.*
- M.P. did not object. R. at 681.
- M.P. did not ask for help. *Id.*
- M.P. and 2d Lt Johnson were laughing when no one was in the room with them. R. at 688.
- M.P. did not try to stop any of “the activity” with 2d Lt Johnson while they were on the couch. R. at 682.
- Witnesses did not think M.P.’s actions with 2d Lt Johnson were wrong and they did not try to stop them. R. at 681-82; 1009.

Given the uncontroverted facts from multiple witnesses, the panel members’ finding of a lack of consent did not flow from the facts and circumstances that were proven in the record. *Cf. Leary v. United States*, 395 U.S. 6, 33 (1969) (“[A] statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.”). In the face of these facts and the questionable

evidence for lack of consent, the panel members' decision to convict was not rational, reasonable, or fair.

iii. This Case Presents Additional Matters that this Court can Clarify

The question that this Court decided in *Jackson* was “what standard is to be applied in a federal habeas corpus proceeding when the claim is made that a person has been convicted in a state court upon insufficient evidence.” 443 U.S. at 307. 2d Lt Johnson’s case does not share the same procedural posture since his case is still on direct appeal. Because of the distinction, the following questions are worth this Court’s attention.

First, is the standard articulated in *Jackson* applicable to a direct appeal in an Article I court?

Second, is the *Jackson* standard high enough since 2d Lt Johnson, and other appellants in courts-martial, are not entitled to unanimous verdicts? *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023).⁵

Third, the Air Force Court has statutory authority to “conduct a de novo review of both the legal and factual sufficiency of a conviction.” *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017). The CAAF does not have statutory authority to review questions of fact. *United States v. Piolunek*, 74 M.J. 107, 110 (C.A.A.F. 2015). Because CAAF did not

⁵ A Petition for a Writ of Certiorari has been filed with the question of “Whether military convictions for serious offenses must be unanimous.” Petition for a Writ of Certiorari, *Jonathan M. Martinez, Et Al. v. United States*, No. 22-0165/AF, 2023 CAAF LEXIS 494 (C.A.A.F. July 18, 2023) (23-242).

review this issue, and the Air Force Court combined its legal and factual sufficiency analysis, would this Court use its powers to review questions of fact to ensure the Air Force Court's decision was correct as to factual sufficiency? *See* SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings.").

If this Court were to use its power to review factual matters, lack of consent would become even weaker than it is now for two reasons. First, 2d Lt Johnson could argue mistake of fact as to consent. Given the numerous indicators of consent throughout the night—not just those listed above—any reasonable individual in 2d Lt Johnson's place would have believed that M.P. consented to the touch. Second, this Court could consider M.P.'s poor credibility and her motives to fabricate. Most notably, that M.P. was married at the time and she was going through a contentious divorce where her husband filed for custody of her daughter. R. at 613. The morning after the conduct, prior to M.P. reporting, her husband's friend came to the house. R. at 614.

iv. Conclusion: Why Panel Members Convicted

The reason is clear why panel members convicted 2d Lt Johnson even though they were given voluminous and qualitative indicators of consent and, in turn, a dearth of evidence on a must-prove element: Spillover. A junior ranking Airman caught 2d Lt Johnson *in flagrante delicto* penetrating A.M. from behind with his penis—while she was unconscious. Pet. App. at 007a. The Airman had to push 2d Lt Johnson off of A.M. *Id.* Even though the members were instructed not to consider one crime for

the other, the brazenness of A.M.'s assault created "just too great of a risk" of spillover. R. at 141, 238.

This Court should grant review to state what quantum of evidence is necessary to fulfill legal sufficiency for consent issues and to clarify the standards this Court laid down in *Jackson*.

CONCLUSION

This Court's jurisdiction is "an important question of federal law" that justifies granting this Petition. Moreover, the decisions of this Court, like the CAAF, "are of considerable importance to our nation because they impact directly on the rights of servicemembers, the prerogative of commanders, and the public perception of the fairness and effectiveness of the military justice system." S. Rep. No. 98-53, at 33 (1983). By granting this Petition, this Court will not only impact 2d Lt Johnson's rights, but future military members who petition this Court under 28 U.S.C. § 1259. A grant of the writ of certiorari, and an affirmation of the first question presented, will also positively impact "the public perception of the fairness and effectiveness of the military justice system" and this Court's role in it. *Id.*

Respectfully submitted,

MAJOR SPENCER R. NELSON

Counsel of Record

United States Air Force

Air Force Appellant Defense Division

1500 West Perimeter Road, Suite 1100

Joint Base Andrews, MD 20762

(240) 612-4770

spencer.nelson.1@us.af.mil

Counsel for Appellant

TABLE OF CONTENTS FOR PETITIONER’S APPENDIX

Air Force Court Opinion (October 16, 2020).....	001a
CAAF Decision without Published Opinion (August 10, 2021).....	049a
Air Force Court Opinion (July 19, 2022)	051a
CAAF Decision without Published Opinion (May 8, 2023).....	062a
Appellant’s Supplement to the Petition for Grant of Review (February 16, 2021)	064a

**UNITED STATES AIR FORCE COURT OF
CRIMINAL APPEALS**

No. ACM 39676

UNITED STATES
Appellee

v.

D'Andre M. JOHNSON
Second Lieutenant (O-1), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial
Judiciary

Decided 16 October 2020

Military Judge: W. Shane Cohen

Sentence: Dismissal, confinement for 10 years, and forfeiture of all pay and allowances. Sentence adjudged 1 December 2018 by GCM convened at Moody Air Force Base, Georgia.

For Appellant: Mark C. Bruegger, Esquire; Catherine M. Cherkasky, Esquire.

For Appellee: Lieutenant Colonel Brian C. Mason, USAF; Major Anne M. Delmare, USAF; Mary Ellen Payne, Esquire.

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

Judge MEGINLEY delivered the opinion of the court, in which Senior Judge POSCH and Judge RICHARDSON joined.

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

MEGINLEY, Judge:

Contrary to his pleas, a general court-martial composed of officer members convicted Appellant of one specification of sexual assault of AM, by penetrating AM's vulva with his penis, while AM was incapable of consenting to the sexual act due to impairment by alcohol, and one specification of sexual assault of MP, by penetrating her vulva with his finger by causing bodily harm, both in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920.¹ The panel sentenced Appellant to a dismissal, confinement for ten years, and forfeiture of all pay and allowances. The military judge credited Appellant with 138 days against his sentence for time Appellant spent in pretrial confinement. The convening authority approved the sentence as adjudged.

Appellant raises three assignments of error (AOE) on appeal: (1) whether the evidence is legally and factually sufficient to support the conviction of sexual

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

assault against MP; (2) whether trial defense counsel provided ineffective assistance of counsel; and (3) whether Appellant suffered cruel and unusual punishment in violation of the Eighth Amendment² and Article 55, UCMJ, 10 U.S.C. § 855, when he was not given proper medical treatment while in confinement. Alternatively, Appellant contends that the conditions of his posttrial confinement render his sentence inappropriately severe, warranting relief under Article 66(c), UCMJ, 10 U.S.C. § 866(c). In addition, as part of our consideration of Appellant's second AOE, we consider the issue of whether the military judge abused his discretion in allowing portions of MP's unsworn victim impact statement to be presented to the members at the sentencing hearing.

Finding no error materially prejudicial to a substantial right of Appellant, we affirm the findings and sentence.

I. BACKGROUND

Appellant graduated from the United States Air Force Academy in 2017. After graduation, Appellant was assigned to Moody Air Force Base, Georgia, as a Logistics Readiness Officer. After his arrival, Appellant subsequently joined a fitness center in neighboring Valdosta, Georgia, where he met MP, who was an assistant manager at the gym.

Until the night of the offense, MP had seen Appellant twice and talked to him once, and, although she knew him from the gym, AM had never talked to Appellant

² U.S. CONST. amend. VIII.

directly. Appellant started “following” MP on the social networking application Instagram, and on 14 September 2017, made a comment to one of MP’s posts at 2159 hours. Appellant and MP continued to chat via Instagram; on 15 September 2017, MP gave Appellant her phone number after Appellant requested her number and they texted back and forth. The Instagram and text messages consisted of messages of a flirtatious nature, discussions about football and families, and some sexual innuendos. On 16 September 2017, MP told Appellant of her plans for that evening, which included going to a local bar, known as the Bluewater Bar, with some friends, including her friend AM (also her co-worker). Appellant responded that maybe he would see her “out Saturday night.” In all, before MP and Appellant would meet up on the night of 16 September 2017, they had been messaging and texting each other for less than 48 hours.

On 16 September 2017, MP and AM went out to dinner with friends. MP had a mixed drink at dinner, while AM did not have any alcohol. Thereafter, the group went to the house of a friend, JP, where MP had another mixed drink. At around 2330 hours, the group left for Bluewater. The bar was approximately a five-minute walk from JP’s house. AM consumed shots and mixed drinks at JP’s house prior to going to Bluewater, and she had more shots and mixed drinks at Bluewater. AM consumed “a lot” of alcohol, but could not recall how much. She opined she had “never drank that much” alcohol in her life.

Appellant arrived at Bluewater around 2100 that evening. Prior to his arrival, Appellant consumed five or six shots, along with five or six beers, with friends at another bar. After MP arrived at Bluewater, she eventually met up with Appellant. At 0102 on 17 September 2017, Appellant and MP were texting with each other, with Appellant asking MP where she was in the bar. While at Bluewater, MP and Appellant spent time with each other at the bar, grinding³ on each other while dancing and kissing.

At approximately 0200 on 17 September 2017, Bluewater closed. A group of individuals, including MP, AM, Appellant, Senior Airman (SrA) CC, and others, decided to go to JP's house; JP and her male friend, SrA KC, were already at JP's house. According to SrA CC, the group left Bluewater between 0200 and 0215. AM was very intoxicated, slurring her words, unbalanced, and falling to the ground. Because of her condition, SrA CC gave her a "piggyback ride" to JP's house.

Once they arrived at JP's house, the group mingled outside for an undetermined amount of time before going inside. MP and Appellant continued kissing outside of JP's residence. MP asked JP if Appellant could "stay" the night at JP's house; JP agreed.

Some individuals eventually left JP's house. Those that remained were MP, AM, Appellant, and SrA CC, along with JP and SrA KC. Once the group entered the house, SrA CC "plopped [AM] down into the chair" near the front door. Although the group wanted to continue drinking and play cards, they were

³ When defense counsel asked the witness, "What is grinding?" the witness replied, "Female in front of the male, rubbing against each other."

concerned about AM because she was “way out of it and looked extremely intoxicated.” It was decided to put AM in JP’s son’s vacant room, which was next to the bathroom. As SrA CC was getting ready to pick up AM to move her, Appellant picked AM up “like a child” and carried her to JP’s son’s bedroom. The group followed Appellant into the bedroom as he laid AM on the bed. The group suggested SrA CC stay with AM and cuddle with her until she fell asleep, which he agreed to do. SrA CC lay down next to AM on his back, and AM cuddled against SrA CC, putting her left leg and arm across his body, and her head on SrA CC’s chest. Shortly after, AM fell asleep. AM still had her clothes on; she was wearing a “romper,” a one-piece outfit (MP was also wearing a romper during the evening). SrA CC testified the bedroom was not pitch black, as the door had been cracked open to allow some light from the hallway to come into the room.

SrA KC testified that after putting AM to bed and after shutting the door, Appellant and MP were on the couch kissing and touching each other. SrA KC and JP asked if MP and Appellant needed a blanket. When they did not get a response, SrA KC stated [he] “threw a blanket at them, turned the lights off, and . . . went back to [JP’s] room.” SrA KC stated he observed Appellant and MP from the time they entered the house until he went to bed, and although she was drunk by appearance, MP was coherent. SrA KC also stated he heard laughter from MP and Appellant and that they “were very physically connected.”

JP testified that when she woke up to go to the bathroom, she went into the living room to check on MP and Appellant and found them “making out” on the couch. One was on top of the other, although she did not recall who was on top. When asked by defense

counsel if JP had any concern about MP's well-being when she entered the living room, she stated:

No, if I thought something was of a harm, I would have done something about it. . . . [A]t that moment, I didn't see anything that was going wrong. Not saying that something couldn't have gone wrong afterwards.

SrA CC received a text at 0254 and responded to that text at 0302. Shortly after, he fell asleep. At approximately 0330, while still lying next to AM, SrA CC woke up feeling something was strange. When he opened his eyes, he saw Appellant behind AM. He could see Appellant was naked. SrA CC further stated AM was "positioned as her right knee was on the carpet and her left knee was on the bed. It was not on me anymore, and as in she was still on her stomach and her head was still on my chest." SrA CC stated Appellant was on both knees, "moving back and forth in a thrusting motion." At this point, as he was waking up, SrA CC realized that Appellant was penetrating AM's vagina with his penis. SrA CC "tried to shove" Appellant off AM, and was finally able to push him off AM within "about three pushes." SrA CC stated that AM's romper had been slid to the right to allow Appellant's penis to enter her vagina. SrA CC was "[o]ne hundred percent" confident he saw Appellant's penis inside AM's vagina, stating he could tell Appellant was not wearing a condom and that he "vividly remember[ed] the shape of [Appellant's] penis. Like that will not—never leave my head—ever."

While SrA CC was pushing Appellant off AM, Appellant said, "It's okay. It's [MP]." SrA CC said, "No man. It's not [AM]—I mean [MP]. It's [AM]."

Appellant then stated, “No. This is [MP].” SrA CC told Appellant, “You need to get off.” Appellant then stated, “Oh,” and after SrA CC pushed Appellant off AM, Appellant kept saying, “I’m sorry. I’m sorry.” SrA CC then escorted Appellant out of the room and locked the door. During this time, AM was still unconscious with her eyes shut, and she was still lying with half her body on the bed, even after SrA CC escorted Appellant out of the room.

SrA CC panicked. After about 10–15 minutes trying to decide what to do, at 0343, SrA CC texted his roommate, SrA DS, and his other roommate, JL. SrA DS called him back. SrA CC walked out of the bedroom and into the living room, where he saw MP and Appellant both on the couch. MP was on one side; Appellant was on the other. Both were sleeping. SrA CC tried to wake up MP, telling her, “Hey. This is an emergency. You need to go into the room with [AM].” MP would not wake up. According to SrA CC, MP was “unconscious however, she was moving. It looked like she was fighting to wake up however, she just couldn’t get there until I had to put my hands on her and shake her [on her shoulders] a little bit, be a little louder, and then finally she did . . . awake to understand what I was saying.” SrA CC escorted MP to the bedroom where AM was lying. AM was still “completely” unconscious. MP fell asleep on the floor; AM was on the bed.

SrA DS showed up at the house at approximately 0400. When he arrived, Appellant was on the couch. SrA DS did a sweep of the house to make sure there were no kids in the house. SrA DS and SrA CC had trouble waking Appellant, who was in his underwear (described by SrA DS as “gray with a black waistband, spandex type”) and was “passed out unconsciously on

the couch.” Appellant’s clothes were on the floor next to the couch. SrA DS tried to wake Appellant, telling him, “Hey. You’re not wanted here. You need to leave right now.” Using Appellant’s phone (which Appellant unlocked), SrA DS called Appellant an “Uber” ride to get him out of the house.

SrA DS woke JP and SrA KC up and told them what was going on. Then SrA CC and SrA DS helped Appellant off the sofa to get him dressed. Appellant’s clothes were on the floor next to the couch. Appellant dressed in the bathroom. SrA DS walked Appellant outside, sat him down, and waited for the Uber. The Uber arrived a short time later and took Appellant to his home. According to the Uber driver’s video, Appellant was picked up from JP’s residence at 0417 and dropped off at his own residence at 0430.

After Appellant left in the Uber, there was additional discussion on what to do about AM, who was still unconscious in the bedroom. SrA KC, who was a security forces member, called his supervisor to discuss who would have jurisdiction. His supervisor told him to call 911. JP went to the room where AM and MP were sleeping and at approximately 0534, SrA KC called 911 and reported that AM had been sexually assaulted.⁴ When SrA KC called 911, he was not aware MP believed Appellant had also sexually assaulted her.

Officer BT, a deputy sheriff, responded to the 911 call. Initially, he was told of only one victim. Officer BT talked to SrA CC about the situation and then went

⁴ SrA KC recalled calling 911 at approximately 0520; Officer BT testified the call came in at 0534. He then stated it only took him five minutes to get to JP’s residence.

into the bedroom where AM was still unconscious. Officer BT stated, “[AM] was not coherent at the time and she was still in the process of being woke up in the front bedroom.” At some point while Officer BT was there, AM woke up and was “hysterically crying” after being told what happened. After talking to a few people, Officer BT then spoke with MP, who made a comment that “she didn’t consent either.” Officer BT began to ask questions to MP, who told him that Appellant had digitally penetrated her, and that the entire time he was trying to do this, she was “trying to push him off, and was telling him to stop.” At this point, Officer BT believed he had two victims and arranged for both AM and MP to undergo a forensic evaluation for sexual assault.

DNA was later taken from Appellant, AM, and MP. Although no semen was found in MP’s underwear, AM’s cervical swabs, or AM’s rectal swaps, Appellant’s DNA was found in AM’s cervix and rectum. AM’s DNA was also found in Appellant’s underwear. The results also indicated that Appellant’s and AM’s DNA were found in MP’s underwear.

II. DISCUSSION

A. Legal and Factual Sufficiency of Sexual Assault of MP

1. Additional Background

At trial, MP testified that even though she was texting with Appellant, she tried to deflect some interest in Appellant through some of her responses. Nonetheless, MP told Appellant she would be at the Bluewater Bar the evening of 16 September 2017. MP stated she met up with Appellant at Bluewater and he

got her a drink. According to her testimony, MP remembered little after this event. After Appellant brought her a drink, MP stated she did not remember the following events: (1) dancing with Appellant; (2) leaving Bluewater that night with Appellant; (3) walking to JP's house; (4) taking pictures on her phone; (5) asking JP if Appellant could stay at her house; (6) JP asking MP if she was okay while she was kissing Appellant on the couch; and (7) JP asking if MP was okay or if she needed a blanket.

MP testified that her next memory after Appellant brought her a drink at Bluewater was "waking up on the couch with [Appellant] on top of [her]." She testified that:

[Appellant] was on top of me kissing me, and I, kind of like, realized, started to realize, kind of what was going on. I remember, kind of pushing him off, and then, kind of, I guess, went out again, I guess is a way to put it.

MP stated Appellant was wearing a pink shirt and was pretty sure he had his pants on.

The next memory MP had was waking up to Appellant having his hand in her romper outfit. MP stated she had to "push his hands out of me, basically," referring to Appellant having his fingers in her vagina. When she realized Appellant's hands were inside her, she "had to push them out." She stated, "I told him no, and I told him stop."

MP testified,

I remember pushing him off, and then I remember him finally getting off, and I

thought at that point he had left. So, I curled over into, like curled over into the couch, basically, I was trying to go—and trying to go to sleep, but that way he couldn't get to me, I thought. And then the next thing I remember, I guess I heard a sound or something. I am not sure what woke me up, but I remember seeing him. So, the bathroom light was on, and I remember seeing him, an outline, in the hallway, and he didn't have any clothes on, and then I remember him being on top of me and he was in my face, saying my name.

2. Law

A Court of Criminal Appeals may affirm only such findings of guilty “as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.” Article 66(c), UCMJ, 10 U.S.C. § 866(c). “Article 66(c) requires the Courts of Criminal Appeals to conduct a *de novo* review of legal and factual sufficiency of the case.” *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted).

“The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). “The term reasonable doubt, however, does not mean that the evidence must be free from conflict.” *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017)

(citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018). “[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution.” *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). As a result, “[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction.” *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (alteration in original) (citation omitted), *cert. denied*, 2019 U.S. LEXIS 3102, 139 S. Ct. 1641 (2019).

The test for factual sufficiency is “whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses,” this court is “convinced of the [appellant]’s guilt beyond a reasonable doubt.” *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). “In conducting this unique appellate role, we take ‘a fresh, impartial look at the evidence,’ applying ‘neither a presumption of innocence nor a presumption of guilt’ to ‘make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.’” *Wheeler*, 76 M.J. at 568 (alteration in original) (quoting *Washington*, 57 M.J. at 399). This court’s review of the factual sufficiency of evidence for findings is limited to the evidence admitted at trial. Article 66(c), UCMJ; *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007) (citations omitted).

Appellant was convicted of sexual assault by bodily harm against MP in violation of Article 120(b)(1)(B), UCMJ, 10 U.S.C. § 920(b)(1)(B), which required the Prosecution to prove two elements beyond a

reasonable doubt: (1) that Appellant committed a sexual act upon MP by penetrating her vulva with his fingers; and (2) that Appellant did so by causing bodily harm to MP, to wit: penetrating her vulva with his fingers without her consent. *See Manual for Courts-Martial, United States* (2016 ed.) (*MCM*), pt. IV, ¶ 45.b.(3)(b). “[B]odily harm’ means any offensive touching of another, however slight, including any nonconsensual sexual act.” *MCM*, pt. IV, ¶ 45.a.(g)(3).

With regard to consent, the statute explains,

[t]he term “consent” means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.

MCM, pt. IV, ¶ 45.a.(g)(8)(A). The statute further explains that “[a] sleeping, unconscious, or incompetent person cannot consent.” *MCM*, pt. IV, ¶ 45.a.(g)(8)(B). “Lack of consent may be inferred based on the circumstances of the offense. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person’s actions.” *MCM*, pt. IV, ¶ 45.a.(g)(8)(C).

The defense of mistake of fact as to consent requires that an appellant, because of ignorance or mistake, incorrectly believe that another consented to the sexual contact. *See* R.C.M. 916(j)(1). In order to rely on a mistake of fact as to a consent defense, Appellant's belief must be honest and reasonable. *See id.*; *United States v. Gans*, No. ACM 39321, 2019 CCA LEXIS 162, at *14 (A.F. Ct. Crim. App. 11 Apr. 2019) (unpub. op.); *United States v. Jones*, 49 M.J. 85, 91 (C.A.A.F. 1998) (quoting *United States v. Willis*, 41 M.J. 435, 438 (C.A.A.F. 1995)). Once raised, the Government bears the burden to prove beyond a reasonable doubt that the defense does not exist. R.C.M. 916(b)(1); *see United States v. McDonald*, 78 M.J. 376, 379 (C.A.A.F. 2019). Yet, the "burden is on the actor to obtain consent, rather than the victim to manifest a lack of consent." *McDonald*, 78 M.J. at 381. An "[a]ppellant's actions could only be considered innocent if he had formed a reasonable belief that he had obtained consent. The government only needed to prove that he had not done so to eliminate the mistake of fact defense." *Id.*

3. Analysis

The timing of Appellant's actions towards both MP and AM are critical to determining legal and factual sufficiency. At 0254 on 17 September 2017, SrA CC received a text and responded to that text at 0302. Shortly after, he fell asleep; the door to his room was cracked open. At approximately 0330, SrA CC awoke to Appellant penetrating AM with his penis while Appellant was on his knees.

Prior to 0302, there is no indication of any mal-intent on the part of Appellant towards either MP or AM. In fact, regarding MP the converse is true: the testimony shows that MP was somewhat, if not very, interested

in Appellant. The text messages leading up to Appellant and MP meeting at the Bluewater show a rapid escalation in MP and Appellant's relationship. MP was observed both dancing and "grinding" with Appellant at Bluewater, and kissing him outside JP's residence. No witness indicated MP was in distress at any point during the night. MP asked JP if Appellant could stay the night at the house. Both JP and SrA KC indicated MP was engaged in intimate behavior with Appellant while in JP's residence. SrA KC heard laughter coming from the living room. JP did not sense anything was wrong between MP and Appellant, and even went so far as to say that if she thought MP was in harm, she would have done something about the situation. Before 0302, when SrA CC received a text, there is nothing in the record to suggest that Appellant committed a sexual assault against MP.

Appellant argues that MP's claim of sexual assault is inconsistent with the balance of the evidence and demonstrates Appellant's reasonable mistake of fact as to consent. Had MP alleged a sexual assault occurring before SrA CC fell asleep at 0302, the facts above indicate a viable argument. However, the fact that AM's DNA was found in MP's underwear supports a conclusion that Appellant sexually assaulted MP *after* he penetrated AM and before SrA CC saw MP and Appellant on the couch around 0345. The following evidence supports this conclusion: (1) Appellant was clothed when MP said "no" and "stop" on the couch; (2) SrA CC testified he saw Appellant's clothes near the couch and Appellant was naked when he was in the bedroom, which supports an inference that Appellant took off his clothes in the living room before he sexually assaulted AM; (3) Appellant told SrA CC it was okay he was having sex with MP, when

he was actually having sex with AM, and that he was “sorry”; (4) MP remembered seeing Appellant naked in the hallway; (5) MP testified she was asleep when Appellant came back to the couch; (6) SrA CC saw MP and Appellant asleep on the couch when he came out to the living room; and (7) SrA CC’s observation of Appellant on the couch in his underwear indicated to him Appellant put his underwear back on after he left AM’s room and returned to the couch where MP slept. Appellant penetrated AM’s vagina with his penis, and after SrA CC pushed Appellant off AM, Appellant moved back to the couch, where he digitally penetrated MP’s vagina. The evidence does not support a finding that Appellant had a reasonable or honest belief that MP was consenting to Appellant’s digital penetration.

Appellant argues that MP had a personal motive to fabricate her allegations against Appellant due to an ongoing child custody battle with her soon to-be ex-husband. Appellant hinges this argument on the fact that SrA DS, who showed up at JP’s house right after the sexual assaults, was a friend of MP’s soon-to-be ex-husband, and had MP’s ex-husband learned MP had been engaged in sexual activities “with an accused sexual assaulter on the same night her friend, AM, was attacked,” it could cast her in an unfavorable light in those proceedings. Appellant notes the timing of when MP came forward, stating MP only decided to report her alleged assault after SrA DS showed up.

We find no evidence to support this attack on MP’s credibility. The Defense has essentially asked us to speculate why MP did not tell anyone what happened to her before her disclosure to Officer BT. There was no evidence, or comments, or any reaction to MP seeing SrA DS in a negative light when he showed up

to assist. In fact, SrA DS testified that MP told SrA DS that Appellant pressed on her, that he was aggressive, and that she told him no. MP's comments to SrA DS could be viewed as MP trying to prevent or preempt SrA DS from telling MP's husband that MP was possibly engaged in sexual activity, by fabricating a sexual assault when SrA DS suddenly showed up at the house. However, from this court's review of the testimony and evidence, the record suggests this is not the case. Most importantly, there was no evidence SrA DS called MP's husband to inform him of what happened to MP. MP did report an assault to Officer BT. Finally, MP subjected herself to a SANE examination.

In assessing legal sufficiency, we are limited to the evidence produced at trial and are required to consider it in the light most favorable to the Government. In doing so, we conclude a reasonable factfinder could have found beyond a reasonable doubt all the elements to support Appellant's conviction of sexual assault against MP. Furthermore, in assessing factual sufficiency, after weighing all the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt. Therefore, we find Appellant's conviction of sexual assault against MP both legally and factually sufficient.

B. Ineffective Assistance of Counsel Claim

1. Additional Background

Appellant asserts his trial defense counsel, Mr. JMB, Mr. LEC, Mr. JRH, and Captain (Capt) RM, were ineffective in that they (1) failed to submit a resignation-in-lieu of court-martial (RILO) request

within seven days of referral of Appellant's case; (2) engaged in harassing behavior against MP; and (3) offered a theory of the case that conceded Appellant's guilt. We examine each claim in turn.

Pursuant to Appellant's second assignment of error, on 7 May 2020 this court ordered Appellant's four trial defense counsel to provide affidavits or declarations that were responsive to Appellant's claims that he did not receive effective assistance of counsel.⁵ We have considered whether a post-trial evidentiary hearing is required to resolve any factual disputes. Reviewing trial defense counsel's declarations and the record as a whole, we are convinced such a hearing is unnecessary. *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997); *United States v. DuBay*, 37 C.M.R. 411, 413 (C.M.A. 1967) (per curiam).

Charges were preferred against Appellant on 18 April 2018, the preliminary hearing occurred on 1 June 2018, the case was referred on 21 June 2018, and Appellant was served with the referral on 29 June 2018. On 19 October 2018, three days before Appellant's initial trial date (22 October 2018), Appellant submitted a RILO. At trial, the military judge granted a defense request for a continuance until 26 November 2018 that was unrelated to the RILO submission.

The Government sought to proceed to trial while the decision of the Secretary of the Air Force on Appellant's RILO was pending. On 15 November 2018,

⁵ This court did not receive a declaration from trial defense counsel, Mr. JMB. However, Mr. JMB did concur with Mr. LEC's declaration. Mr. LEC is a member of Mr. JMB's law firm and one of Appellant's defense attorneys. Appellant did not raise opposition to the absence of Mr. JMB's affidavit or declaration.

the Chief of the Military Justice Division (JAJM) granted the Government permission to proceed to trial based on “the particular circumstances of [Appellant’s] request to resign, including his failure to submit his request within seven (7) days of referral.” Appellant’s court-martial concluded on 1 December 2018 with findings of guilty to the Charge and its two specifications. On 4 April 2019, Appellant’s request for a RILO was denied.

As part of his pretrial investigation, Appellant, through counsel, hired a private investigator to interview the witnesses who were identified as victims in the case. The investigator attempted to interview MP at her residence and place of employment. Upon receiving notice from trial counsel that MP requested a Special Victims’ Counsel, the defense team notified the investigator to cease attempts to contact MP, and the investigator complied. Capt RM also stated that he talked to Mr. LEC and Mr. JMB and they related there was no intent to harass the alleged victim, only to investigate the case.

At trial, it was revealed that one of Appellant’s civilian defense counsel, Mr. LEC, provided MP’s blood alcohol report from the Georgia Bureau of Investigation and MP’s written statement in Appellant’s case to MP’s husband’s divorce attorney. In exchange, Mr. LEC received a deposition from the divorce proceedings.

As lead counsel for the Defense, Mr. JMB gave the closing argument at the conclusion of findings. According to Capt RM, Mr. JMB’s strategy during closing argument was to raise reasonable doubt throughout the entirety of his argument. Mr. JMB talked about a “terrible mistake” by Appellant, stating that:

I think it's a plausible suggestion that [Appellant] got up, went to the bathroom just a short distance away, just the end of the hallway. [Appellant] went in the bathroom, instead of going straight and coming right back out to [MP], [Appellant] took a left turn in a house he'd never been in and went into the bedroom instead. Another girl in there, near darkness. It's night. The only light was coming from the hallway. Both [women] were wearing black rompers. It doesn't make sense that he would go in there unless [Appellant] was just making a huge mistake with another guy laying on the bed.

Capt RM stated in his declaration:

Based on my conversations with Mr. [JMB] about his closing argument prior to trial, the argument was not intended to be a misguided presentation of the case nor a concession of guilt, but a way to raise reasonable doubt as to the prosecution's presentation of the case.

Mr. LEC declared, "[a]ny defense theory tendered by the defense team during trial was a strategic decision made to obtain the best possible outcome for Appellant based on the facts known at the time."

2. Law

a. RILO

The Secretary of the Air Force clearly has authority to promulgate an administrative regulation providing for the tender of a RILO, if that officer has committed

acts rendering him subject to such trial. *United States v. Little*, No. ACM 34726, 2003 CCA LEXIS 224, at *7 (A.F. Ct. Crim. App. 26 Sep. 2003) (unpub. op.) (citation omitted). When an officer has submitted a RILO, Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 7.24.7.1 (8 Dec. 2017), dictates the process. Prior permission from the Air Force Legal Operations Agency, Military Justice Division (AFLOA/JAJM), is required before a case proceeds to trial if the officer accused has submitted a RILO on which action is pending. *Id.* at ¶ 7.24.7. JAJM will “normally approve [government] requests for permission to proceed while a [RILO] is pending if the officer submitted the request more than seven calendar days after service of” referred charges. *Id.* at ¶ 7.24.7.1. However, when officers submit resignation requests within seven days of receiving referred charges, JAJM “will normally disapprove [government] requests for permission to proceed.” *Id.* at ¶ 7.24.7.2.

b. Ineffective assistance of counsel

We review allegations of ineffective assistance de novo. *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009)). In order for Appellant to prevail on a claim of ineffective assistance of counsel, he must demonstrate that counsel’s performance was so deficient that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment, and that the deficiency resulted in prejudice “as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

We employ a presumption of competence, and apply a three-part test in assessing whether that presumption has been overcome: (1) “is there a reasonable explanation for counsel’s actions?;” (2) “did defense counsel’s level of advocacy ‘fall measurably below the performance . . . [ordinarily expected] of fallible lawyers?;” and (3) “[i]f defense counsel was ineffective, is there ‘a reasonable probability that, absent the errors,’ there would have been a different result?” *Gooch*, 69 M.J. at 362 (omission and alteration in original) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)).

“Defense counsel do not perform deficiently when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so.” *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (citing *Gooch*, 69 M.J. at 362–63) (additional citation omitted). In reviewing the decisions and actions of trial defense counsel, this court does not second guess strategic or tactical decisions. See *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993) (citations omitted). It is only in those limited circumstances where a purported “strategic” or “deliberate” decision is unreasonable or based on inadequate investigation that it can provide the foundation for a finding of ineffective assistance. See *United States v. Davis*, 60 M.J. 469, 474 (C.A.A.F. 2005).

“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation, and . . . shall consult with the client as to the means by which they are to be pursued.” AFI 51-110, *Professional Responsibility Program*, Attachment 2, Rule 1.2(a) (5

Aug. 2014)).⁶ “A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive trial by court members, the composition of the court, and whether the client will testify.” *Id.*

“Whenever the law, nature, and circumstances of the case permit, trial defense counsel should explore the possibility of an early diversion of the case from the criminal process.” AFI 51-110, Attachment 7, Standard 4-6.1(a). This includes requests for administrative discharge in lieu of court-martial. *Id.*, Discussion.

3. Analysis

a. Appellant’s RILO case

As stated, Appellant did not submit a RILO until 19 October 2018, nearly four months after he acknowledged receipt of the referred charges. We understand Appellant’s argument to be that by failing to submit the RILO immediately or soon after referral, his counsel’s justification that approval of the RILO would save Government time, expense, and manpower was lost. More important to Appellant, his counsel also lost the justification of “uncertainty,” which we understand to mean the uncertainty of whether the Government would continue to garner the victims’ cooperation and their desire to testify in the Government’s case at trial.⁷ Coupled with a viable

⁶ This AFI was updated on 11 Dec. 2018.

⁷ Appellant’s brief highlights challenges the Government needed to overcome, including that AM “considered not going through

mistake of fact defense, as well as issues regarding MP's credibility, Appellant believes these factors support the notion that a timely RILO request would not have been a "[H]ail [M]ary," but a "legitimate and reasonable offer that should have garnered serious consideration."

Trial defense counsel rebutted Appellant's claims about his desire to submit a RILO. In his declaration to this court, Mr. LEC explained:

The defense team regularly discussed the process for submitting a [RILO] request with Appellant, as well as the pros and cons associated [sic] submitting his request. Appellant was the ultimate decision maker as to whether to submit a request to resign in lieu of court-martial and as to the timing for its submission.

In his declaration to this court, Mr. JRH explained that he discussed the issue of the RILO multiple times with Appellant who was aware of his right to submit one. Mr. JRH stated, "Initially, [Appellant] stated that he did not want to submit a RILO, but then in October [Appellant] indicated that he would like to submit such a request—which was well after the date the charges were referred in June." Mr. JRH also stated,

[I]t should be noted that based upon various conversations with the Chief of Military Justice and other members of the legal office, it was clear that there would not be any support for a RILO

with this case because [she] just wanted to put it in the past and get on with [her] life."

from the legal office or from the command. In short, the chances of a RILO being approved for a sexual assault case that had two victims was virtually nonexistent. . . . it was well after the referral of charges and there was not any support for such a resolution.

Appellant did not provide any documentation to rebut these declarations.

“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation, and . . . shall consult with the client as to the means by which they are to be pursued. . . . A lawyer shall abide by a client’s decision whether to settle a matter.” AFI 51-110, Rule 1.2(a) (5 Aug. 2014). In their declarations, trial defense counsel stated they advised Appellant before referral, yet Appellant chose to not submit a RILO until shortly before trial. Trial defense counsel abided by Appellant’s decision on the matter, and therefore, we agree with Appellee that “trial defense counsel cannot be held ineffective for failing to submit a request to settle Appellant’s case when they lacked the authority to submit such a request.”

Further, Appellant notes there was no value in failing to request a delay in the trial pending the Secretary of the Air Force’s decision on this matter. Given that the Government had a strong case, the lack of support for Appellant’s request from the Government for the RILO, and timing of Appellant’s RILO submission, it is unlikely the military judge would have granted a continuance on this collateral matter pending the Secretary’s decision. We find that Appellant has failed to show any prejudice in the processing of a RILO, or

that his counsel were ineffective regarding the timing of his RILO request, nor were they ineffective in failing to request a continuance of his trial from the court pending the Secretary's decision.

b. Trial defense counsel's investigation of Appellant's case

We do not believe trial defense counsel engaged in harassing behavior against MP by hiring an investigator, as it is expected defense counsel would do their due diligence investigating facts. *See* AFI 51-110, Attachment 7, Standard 4-1.1. Specifically regarding MP, as soon as trial counsel notified trial defense counsel that MP requested a SVC, the investigator stood down.

However, we have given great consideration to Appellant's claim that release of MP's records to her estranged husband, by Appellant's defense attorneys, damaged the Defense's case. Specifically, at the time of her sexual assault, MP was in the process of getting a divorce from her husband and child custody was a significant issue. Trial defense counsel provided to MP's husband's divorce attorney MP's blood alcohol report from the Georgia Bureau of Investigation and MP's written statement to investigators, in exchange for a deposition from the divorce proceedings. Ultimately, during their cross-examination of MP, trial defense counsel sought to show MP had a motive to fabricate being a victim; that, by claiming to be a victim and not a voluntary actor, she would be put in a better light in her ongoing divorce and custody proceedings. Mr. LEC stated in his declaration that this type of exchange of evidence, "is not prohibited in Georgia" and "at all times [Appellant's trial defense

counsel] acted in conformance with the Georgia Rules of Professional Conduct.”

During cross-examination of MP, assistant trial counsel objected to the relevance of MP’s divorce proceedings. In the following Article 39(a), UCMJ, 10 U.S.C. § 839(a), session, when asked by the military judge about the relevance of the child custody issue, trial defense counsel stated:

Well, it certainly could have an impact, if someone is living a certain way and doing certain things that the court does not approve of. And I can certainly state my place, Judge. We are still in a very conservative venue here in South Georgia, and they expect mothers of children are not to go out and do certain things. And again, it is certainly better in a case arguably to be a victim, as opposed to being something else.

Ascertaining the situation, the military judge asked Mr. JMB, “why would you be releasing this discovery for this case to someone else, who had no interest?” Mr. JMB responded, “It was a quid pro quo for—he wanted something from us, for us, to give us the The deposition from the divorce.” Mr. JMB stated this type of “quid pro quo” frequently happened in civilian court. Mr. JMB denied releasing any medical records. Shortly thereafter, trial defense counsel clarified the relevance of the information, stating that MP’s level of intoxication that night “goes toward whether [MP] was out being promiscuous, or whether she was forcibly assaulted.”

After some debate on the relevance of the documents, MP’s possible motive, and the prejudice to the Defense

regarding the release of the records, the military judge stated:

[T]he real prejudice is not to you guys, because you are the ones, who released it. The real question is whether it is prejudicial to your client, and that's really my only concern here. Whether or not you guys did the right thing, that is something we are going to take up later, whether you released official government, you know, government documents that were part of a trial, and you released them as part of a quid pro quo agreement with another attorney, knowing that it would have a beneficial impact also to your particular case here, when those government documents were released under Rules for Courts-Martial, and under our guidelines, and under our ethical rules and those kinds of things, that is a separate issue, which we may take up after this trial is over. The real question is, why let your actions prejudice your client? That is my only concern right here.

. . .

I do have an issue with what you did. I don't care whether if it is the good old boys and girls network and that's how you work things. That is not the way it works in a court-martial. That is for official use only. That is how those documents are released.

Finding that there was grounds under Mil. R. Evid. 608(c), the military judge allowed minimal questioning of MP on the issue of her divorce and custody, as well as that SrA DS knew her husband, as proper bias, motive to misrepresent, and impeachment evidence of MP.

Yet, in her testimony at sentencing, MP noted that the documents trial defense counsel turned over to her husband's attorney resulted in the family court judge's "concerns about [her] character and alcohol. And so at that point, he did not decide it was okay to give custody to us. So he, in turn gave custody to our grandmothers. And, I attended alcohol counseling and counseling for that." Trial counsel then asked MP if it was her understanding that the family court judge's decision was a direct result of the documents turned over. MP responded, "That's my understanding; yes, sir." The military judge also allowed MP to provide information related to her divorce to be presented in an unsworn statement to the members.

After announcement of sentence, trial counsel reminded the military judge about the release of the documents. The military judge concluded that under Article 48, UCMJ, 10 U.S.C. § 848, his authority to punish for contempt was limited, and that Article 6(b), UCMJ, 10 U.S.C. § 806b, did not specifically indicate Article 48 was a remedy for an Article 6(b) violation. However, he left the door open in the event trial counsel chose to pursue contempt proceedings. They did not.

The Defense had no evidence that MP fabricated being a victim; it was a mere theory. The disclosure of documents in a "quid pro quo" transaction related to Appellant's case to MP's estranged husband's attorney

was done to gain an advantage in an attempt to attack MP's credibility. Standard 4-4.3(a) of Attachment 7, AFI 51-110, states that defense counsel "should not use means that have no substantial purpose other to embarrass, delay, or burden a third person" While the disclosure of this evidence did burden and affect MP's civil case with her husband, we do not believe trial defense counsel's substantial purpose in the "quid pro quo" was to embarrass or burden MP. Additionally, revisiting Appellant's assignment of error on factual sufficiency, trial defense counsel had little evidence to attack MP's credibility. As Appellee argued, the Government's case was strong, and because Appellant did not have a credible defense to counter the evidence, there was no reasonable probability "absent trial defense counsel's investigation there would have been a different result at trial." Appellee also notes that the members were never informed how MP's husband gained the knowledge of Appellant's case. From our view, while we do not subscribe with, or condone, trial defense counsel's interactions with MP's husband's attorneys, we do recognize that trial defense counsel had an obligation to conduct a prompt investigation of this case and explore all avenues leading to facts relevant to the merits of the case. *See* AFI 51-110, Attachment 7, Standard 4-1.1.

With this said, evaluating whether trial defense counsel was ineffective on this issue, we look at the three-part test in *Gooch*. First, was there a reasonable explanation for trial defense counsel's actions? *See Gooch*, 69 M.J. at 362. In this case, the Defense was trying to develop a theory that would attack MP's credibility. Second, did trial defense counsel's level of advocacy "fall measurably below the

performance . . . [ordinarily expected] of fallible lawyers?” *Id.* Pursuant to their obligations as Appellant’s counsel, we would expect trial defense counsel to do their due diligence in conducting an investigation to discover all facts relevant to the case. Trial defense counsel took a risk in this case, in that, had they been able to attack MP’s credibility with this information, Appellant could have been acquitted of the specification related to MP; conversely, if this information backfired, it could impact Appellant in sentencing. We find that there was no prejudice to Appellant, and that the level of advocacy provided by trial defense counsel did not fall below the performance expected of attorneys practicing in the military justice arena. Finding that trial defense counsel were not ineffective, we need not address the third prong of *Gooch* — “a reasonable probability that, absent the errors,’ there would have been a different result.” *Id.*

c. Trial defense counsel’s theory of the case

The facts of this case strongly favored the Government’s charging, particularly regarding AM. Trial defense counsel noted their strategy was to try to create as much reasonable doubt as possible. As Mr. JRH declared, the possible defenses were limited, given the eyewitness and scientific evidence against Appellant. Trial defense counsel did their best to attack the credibility and biases of witnesses, to provide explanations for Appellant’s behavior, and ultimately in our view, they did not concede guilt. One of those explanations was the “terrible mistake” Appellant made when he thought AM was MP.

We do not agree with Appellant that “but for counsel’s errors,” the result of the proceedings would have been

different. As Appellant stated, trial defense counsel could have offered a strategy of no defense or a limited defense; however, it is speculative how that might have helped Appellant in this case. Trial defense counsel could have chosen a different closing argument strategy. However, the record shows their trial strategy in this case was not unreasonable. That strategy brought relevant information to the attention of the members. We evaluate trial defense counsel's performance not by the success of their strategy, but whether counsel made reasonable choices from the alternatives available at trial. *See United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001) (quoting *United States v. Hughes*, 48 M.J. 700, 718 (A.F. Ct. Crim. App. 1998)). Under these circumstances, Appellant fails to overcome the strong presumption that counsel's performance was within the wide range of reasonable professional assistance.

C. Portions of MP's Unsworn Victim Impact Statement

1. Law

Although not raised by Appellant in his brief, in light of the information provided by MP in her unsworn victim impact statement, we address whether the military judge abused his discretion in allowing portions of that statement to be presented to the members at the sentencing hearing. In *United States v. Hamilton*, this court stated that "Article 6b, UCMJ, gives victims the right to be reasonably heard through an unsworn statement, which is tantamount to victim allocation at sentencing." 77 M.J. 579, 584 (A.F. Ct. Crim. App. 2017) (citing *Kenna v. United States Dist. Court*, 435 F.3d 1011, 1014–16 (9th Cir. 2006); *United States v. Degenhardt*, 405 F. Supp. 2d 1341, 1351 (D.

Utah 2005)). “R.C.M. 1001A broadly defines the scope of victim impact.” *Id.* The court went further in *Hamilton*, stating:

[U]nsworn victim impact statements offered pursuant to R.C.M. 1001A are not evidence, and therefore not aggravation evidence offered by the Prosecution.

. . . .

. . . The military judge has the obligation to ensure the content of a victim’s unsworn statement comports with the defined parameters of victim impact or mitigation as defined by the statute and R.C.M. 1001A. *See [MCM]*, pt. II, Discussion (“A victim’s unsworn statement should not exceed what is permitted under R.C.M. 1001A(c) Upon objection or *sua sponte*, a military judge may stop or interrupt a victim’s unsworn statement that includes matters outside the scope of R.C.M. 1001A”). A victim’s right to be heard at sentencing is the right to be “reasonably” heard. 10 U.S.C. § 806b(a)(4). What a military judge may find to be “reasonable” in a particular context may be informed to some extent by legal principles embodied in the Military Rules of Evidence. However, those rules do not apply to victim unsworn statements, which are not evidence.

Mil. R. Evid. 403 addresses “legal relevance” and provides that “evidence”

may be excluded notwithstanding its logical relevance. In the decision to allow a victim to exercise their right to be heard on sentencing, a military judge is neither making a relevance determination nor ruling on the admissibility of otherwise relevant evidence. Instead, the military judge assesses the content of a victim's unsworn statement not for relevance, but for scope as defined by R.C.M. 1001A.

Id. at 585–86 (Third omission in original).

Under R.C.M. 1001A(b)(2), “‘victim impact’ includes any financial, social, psychological, or medical impact on the victim directly relating to or arising from the offense of which the accused has been found guilty.”

When there is error regarding the presentation of victim statements under R.C.M. 1001A, the test for prejudice “is whether the error substantially influenced the adjudged sentence.” *United States v. Barker*, 77 M.J. 377, 384 (A.F. Ct. Crim. App. 2018) (citation omitted). When determining whether an error had a substantial influence on a sentence, this court considers the following four factors: “(1) the strength of the [g]overnment’s case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question.” *Id.* (citations omitted); *see also United States v. Machen*, No. ACM 39295, 2018 CCA LEXIS 419, at *12 (A.F. Ct. Crim. App. 29 Aug. 2018) (unpub. op.) (citing *United States v. Bowen*, 76 M.J. 83, 89 (C.A.A.F. 2017)). “An error is more likely to be prejudicial if the fact was not already obvious from the

other evidence presented at trial and would have provided new ammunition against an appellant.” *Barker*, 77 M.J. at 384 (citing *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007)).

2. Analysis

Trial defense counsel objected to portions of MP’s statement, specifically that MP “lost [her] employment in Valdosta because [she] had to move to Mississippi to be near [her] daughter,” that MP had been followed by investigators, and that MP felt Appellant “ha[d] [no] remorse for what he had done. He’s just upset he got caught.”

In an Article 39(a), UCMJ session, before she presented her statement to the members, MP provided clarification to the military judge about her victim impact. At the session and outside the presence of the members, MP described in greater detail the impact the case had on her, and her divorce and custody trial, testifying that the documents trial defense counsel turned over to her estranged husband resulted in her losing custody of her daughter to her own mother, and that MP had to attend alcohol counseling ordered by the court.

Initially, and although in error, the military judge did a Mil. R. Evid. 403 balancing test. In finding MP’s statement relevant under R.C.M. 1001A, the military judge found evidence of a social and psychological impact on MP, and found the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice to Appellant. The military judge later addressed that he was in error in doing a balancing test, and simply looked at the confines of R.C.M. 1001A to determine if the contents of MP’s

statement would be allowed. In doing so, he allowed MP's statement to go forward as drafted.

The question for this court is whether the military judge abused his discretion in allowing the court exhibit and MP's presentation. We find that he did. The military judge stated he had "no doubt that [trial defense] counsel's actions . . . have caused [MP] additional psychological impact," and we agree with this statement. However, allowing that information potentially resulted in Appellant being held accountable for the actions of his attorneys, who exacerbated MP's status as a victim, and made MP's situation worse by the disclosure of evidence to her soon-to-be ex-husband, who may have used her situation to his advantage in their divorce and custody proceedings. While MP suffered personal consequences that *arose* as part of Appellant's actions and his counsel's litigation strategy, the statements admitted as written allowed MP to pin the blame of her personal situation onto Appellant. We find these statements went outside the scope of victim impact allowed, as her divorce and custody issues did not directly arise from Appellant's offenses.

With that said, we apply the test from *Bowen* to determine whether the error regarding MP's statement had a substantial influence on the sentence.

The Government had a very strong case against Appellant involving two victims. The facts surrounding the sexual assault committed against AM were extremely egregious and disturbing, and then just minutes after penetrating AM's vagina with his penis, Appellant sexually assaulted MP. Conversely, Appellant had few facts in his favor. Regarding the

materiality and quality of MP's statement, we assess how much the erroneously admitted evidence may have affected the court-martial. *See United States v. Washington*, 80 M.J. 106, 111 (C.A.A.F. 2020). Here, trial defense counsel cross-examined MP on her divorce in findings, so this information was not a surprise to the panel at the sentencing hearing. Also, the information provided by MP was given through an unsworn statement, and the military judge appropriately provided guidance through an instruction to the panel on how to consider the information and that the weight and significance of that unsworn statement rests "within the sound discretion of each court member." Applying the *Bowen* test, we find the admission of MP's victim unsworn statement did not substantially influence Appellant's sentence, nor affect the court-martial, and we are confident the panel gave MP's statement the proper weight it deserved.

D. Conditions of Appellant's Post-Trial Confinement

1. Additional Background

Appellant spent 33 days in pretrial confinement at the Lowndes County, Georgia, Jail, before his release and restriction to base.⁸ After his conviction, Appellant was again confined in the Lowndes County Jail, where he remained for approximately two months before his transfer to a military confinement facility. On 29 March 2019, Appellant submitted a clemency letter to the convening authority, alleging that while confined in the civilian confinement facility, he was subjected

⁸ Appellant was released by civilian authorities conditioned upon being restricted to base.

to the following post-trial living conditions: (1) he had to share a single cell and toilet with 16 other prisoners, some of whom were gang members and suffering drug-withdrawal symptoms; (2) he suffered physical attacks and injuries from other prisoners; (3) the guards were not located close to his cell and neglected calls for help; (4) cleaning supplies were never made available to clean the toilet; (5) confinement officials withheld his mail; (6) he was not allowed any visitors until his transfer to military confinement; (7) confinement officials withheld food from him; (8) he was not permitted to go outside for the entirety of his two-month confinement; (9) he was not provided clean clothes; and (10) he had limited opportunities to bathe.

Appellant argues these post-trial conditions adversely affected him both physically and mentally. On 31 March 2019, the staff judge advocate wrote an addendum to her 18 March 2019 staff judge advocate recommendation (SJAR). In the SJAR Addendum, she stated she received Appellant's clemency matters. Her recommendation to the convening authority, which was to approve the sentence as adjudged, remained unchanged. Action was taken on 5 April 2019.

On 10 April 2020, as part of his appeal, Appellant and his mother provided affidavits attesting to his conditions while in the civilian confinement facility. Appellant stated he did not file a complaint under Article 138, UCMJ, 10 U.S.C. § 938, because he was afraid of being labeled a "snitch," he knew his complaint would fall on deaf ears with the facility, and because of lack of access to his unit. In her affidavit, Appellant's mother, Ms. VR, noted that her son was not allowed visits during his time in civilian confinement and he did not have access to his mail.

Ms. VR also declared that she noticed a decline in Appellant's mental state and that her son was refused medical care. Finally, she noticed a decline in Appellant's overall demeanor and appearance.

In response to Appellant's assignment of error regarding his post-trial confinement conditions, Appellee moved to attach two declarations: a declaration from Captain JC, the jail administrator at the Lowndes County Jail, and a declaration from MSgt GB, Appellant's first sergeant. That motion was granted by this court. The declarations were deemed relevant to rebut Appellant's allegation of his post-trial conditions.

In his declaration, Captain JC outlined basic rules, standards, and conditions for inmates. Captain JC noted Appellant did file six grievances with the facility; however, Appellant never submitted any complaints about the conditions of his cell, concerns about his safety, not receiving mail, or being denied visitors. Captain JC also stated there were no records indicating Appellant was ever assaulted while confined at the jail.

MSgt GB declared that Appellant did complain he did not receive mail, but that Appellant did not show up at the designated location to pick up mail. MSgt GB also refuted Appellant's claims that his unit did not visit him. MSgt GB stated he attempted to resolve any complaints Appellant raised to him about the conditions of his post-trial confinement.

Finally, on 7 July 2020, this court granted a request from Appellant to attach an affidavit from Appellant's wife regarding his post-trial confinement conditions. In this affidavit, Ms. VJ stated she saw injuries to her husband (through video chat), including a black eye

and swelling around his lip. Ms. VJ stated Appellant did not tell her what happened to him until he was transferred to the Naval Consolidated Brig in Miramar, California; the true nature of what happened to Appellant is unknown, but according to Ms. VJ, it appears to have been a violation of the “snitch code.”

2. Law

We review de novo whether an appellant has been subjected to impermissible post-trial confinement conditions in violation of the Eighth Amendment or Article 55, UCMJ, 10 U.S.C. § 855. *United States v. Wise*, 64 M.J. 468, 473 (C.A.A.F. 2007) (citing *United States v. White*, 54 M.J. 469, 471 (C.A.A.F. 2001)).

“[T]he Eighth Amendment prohibits two types of punishments: (1) those ‘incompatible with the evolving standards of decency that mark the progress of a maturing society’ or (2) those ‘which involve the unnecessary and wanton infliction of pain.’” *United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102–03 (1976)). As the United States Supreme Court has explained, “[t]he Constitution ‘does not mandate comfortable prisons,’ but neither does it permit inhumane ones.” *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981)). “[P]rison officials must ensure that inmates receive adequate food, clothing, shelter and medical care, and must ‘take reasonable measures to guarantee the safety of the inmates.’” *Id.* at 832 (quoting *Hudson v. Palmer*, 468 U.S. 517, 526–27 (1984)). This includes protecting prisoners from violence committed by other prisoners. *Id.* at 833.

A violation of the Eighth Amendment is shown by demonstrating:

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

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

Our superior court has emphasized that “[a] prisoner must seek administrative relief prior to invoking judicial intervention to redress concerns regarding post-trial confinement conditions.” *Wise*, 64 M.J. at 469 (citing *White*, 54 M.J. at 472). “This requirement ‘promot[es] resolution of grievances at the lowest possible level [and ensures] that an adequate record has been developed [to aid appellate review].” *Id.* at 471 (alterations in original) (quoting *Miller*, 46 M.J. at 250). Appellant must show that “absent some unusual or egregious circumstance . . . he has exhausted the prisoner-grievance system [in his detention facility] and that he has petitioned for relief under Article 138, UCMJ.” *White*, 54 M.J. at 472 (citation omitted).

Under Article 66(c), UCMJ, we have broad authority and the mandate to approve only so much of the sentence as we find “correct in law and fact and determine, on the basis of the entire record, should be approved.” The scope of our Article 66(c), UCMJ,

authority to consider claims of post-trial confinement conditions “is limited to consideration of these claims as part of our determination of sentence appropriateness.” *United States v. Willman*, No. ACM 39642, 2020 CCA LEXIS 300, at *17 (A.F. Ct. Crim. App. 2 Sep. 2020) (unpub. op.) (quoting *United States v. Towns*, 52 M.J. 830, 833 (A.F. Ct. Crim. App. 2000), *aff’d*, 55 M.J. 361 (C.A.A.F. 2001)). “It is also limited to claims based on post-trial treatment that occurs prior to the action of the convening authority and which is documented in the record of trial.” *Id.* (quoting *Towns*, 52 M.J. at 833).

3. Analysis

This is not the first time this court has seen an appellant bring forth a posttrial confinement claim from Lowndes County Jail. Earlier this year, we considered in *United States v. O’Bryan*, No. ACM 39602, 2020 CCA LEXIS 211 (A.F. Ct. Crim. App. 24 Jun. 2020) (unpub. op.), a case where the appellant made similar claims against the facility. Interestingly, the appellant in *O’Bryan* was incarcerated at the Lowndes County Jail just months before Appellant in the present case was transferred there. *See id.* Our court also reviewed an affidavit from Captain JC in *O’Bryan*. *See id.* at *8. Ultimately, no relief was granted in that case.^{9,10}

⁹ As in *O’Bryan*, Appellant’s claims of maltreatment at Lowndes County Jail were documented in the record in his clemency response. In *O’Bryan*, the appellant’s defense counsel submitted a statement outlining the conditions; in the present case, Appellant did not. *See O’Bryan*, unpub. op. at *5.

¹⁰ We also note *United States v. Melson*, No. ACM 36523, 2007 CCA LEXIS 372 (A.F. Ct. Crim. App. 14 Sep. 2007) (unpub. op.), where the appellant in that case alleged pretrial confinement

In this case, by the time Appellant submitted his clemency response to the convening authority, Appellant had been moved to a military confinement facility. Although Appellant made reference to his confinement conditions in his clemency submission to the convening authority, Appellant acknowledged that he did not file a complaint under Article 138, UCMJ, because he was afraid of being labeled a “snitch,” he knew his complaint would fall on “deaf ears” with the facility, and because of lack of access to his unit. Appellant relies on the “snitch code” for his justification for not addressing his issues with command.

Captain JC acknowledged in his affidavit a “snitch code,” where inmates give information to officers, but stated the jail “protect[s] the information and identity of inmates that give us information.” Captain JC’s affidavit also noted Appellant filed six grievances with the facility; however, five of those grievances were filed when Appellant was in pretrial confinement.

Despite having command visits while at the civilian confinement facility, the first time Appellant complained to his command about his post-trial confinement conditions was in his clemency submission after he had already been transferred to a military confinement facility. The requirement that a confinee must seek administrative relief, including under Article 138, UCMJ, “promot[es] resolution of grievances at the lowest possible level [and ensures]

conditions at Lowndes County Jail. In *Melson*, trial defense counsel failed to raise illegal pretrial punishment at trial. *Id.* at *2. This court granted the appellant relief pursuant to *United States v. Suzuki*, 20 M.J. 248 (C.M.A. 1985). *Melson*, unpub. op. at *19.

that an adequate record has been developed [to aid appellate review].” *Wise*, 64 M.J. at 471 (alterations in original) (quoting *Miller*, 46 M.J. at 250). As in *O’Bryan*, had Appellant filed an Article 138, UCMJ, complaint and a prisoner grievance while in the civilian confinement facility, the record would reflect what action, if any, his command and prison officials took in response. Also, Appellant does not convincingly explain how raising issues of hygiene, visitation rights, and the receipt of mail would result in adverse consequences to him from confinement officials or inmates. Yet, although he was aware of the grievance procedures, as attested to by Captain JC, Appellant failed to make his grievances known to his command and prison officials and thus made it impossible for them to ameliorate, let alone record, all of his grievances.¹¹

By failing to raise his issues to prison officials or his command, Appellant has not shown deliberate indifference by the Lowndes County Jail. “[A] military prisoner’s burden to show deliberate indifference [by prison officials with respect to his health or safety] requires him to show that ‘official[s] [knew] of and disregard[ed] an excessive risk to inmate health or safety; the official[s] must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [they] must also draw the inference.’” *Lovett*, 63 M.J. at 216 (alterations in

¹¹ We note the affidavits from Captain JC and MSgt GB were written over a year after clemency was submitted. MSgt GB’s affidavit would have been much more powerful had he been given an opportunity to rebut Appellant’s claims in March 2019, instead of April 2020; yet, there is no evidence the convening authority or the staff judge advocate addressed Appellant’s allegations with Lowndes County Jail.

original) (quoting *Farmer*, 511 U.S. at 837). The record shows Appellant has failed to meet his burden that he was subjected to any forms of cruel or unusual punishment. As a result, Appellant is not entitled to any relief for his alleged Eighth Amendment or Article 55, UCMJ, violations. Further, for the reasons already articulated, we also do not grant relief under Article 66, UCMJ, for his alleged post-trial confinement conditions.

We have also considered whether Appellant's assertions warrant sentence relief under our Article 66(c), UCMJ, authority. We review issues of sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006) (footnote omitted). We may affirm only as much of the sentence as we find correct in law and fact and determine should be approved on the basis of the entire record. Article 66(c), UCMJ. In determining whether a sentence should be approved, our authority is "not legality alone, but legality limited by appropriateness." *United States v. Nerad*, 69 M.J. 138, 141 (C.A.A.F. 2010) (citing *United States v. Atkins*, 23 C.M.R. 301, 303 (C.M.A. 1957)). This authority is "a sweeping congressional mandate to the Courts of Criminal Appeal to ensure a fair and just punishment for every accused." *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (internal quotation marks and footnote omitted). This task requires "individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (internal quotation marks and citation omitted). In conducting this review, we must also be sensitive to considerations of uniformity and even-handedness. *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F.

2001) (citing *United States v. Lacy*, 50 M.J. 286, 287–88 (C.A.A.F. 1999)). Although we have great discretion to determine whether a sentence is appropriate, we have no authority to grant mercy. *Nerad*, 69 M.J. at 146.¹²

There is no question Appellant’s crimes are serious. Appellant sexually assaulted two women—one victim who was incapable of consenting, the other a victim of bodily harm—both in a matter of mere minutes. Based on our review of the entire record, we find that Appellant’s sentence is appropriate for the offenses he committed.

III. CONCLUSION

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

¹² Although we exercise our authority to consider outside-the-record matters to determine if Appellant’s sentence is correct in law under Article 55, UCMJ, and the Eighth Amendment, *see United States v. Erby*, 54 M.J. 476, 478 (C.A.A.F. 2001), we are precluded from considering additional information about those conditions that Appellant presents in his post-trial statement of facts to determine if his sentence is appropriate and “should be approved” as part of our Article 66(c), UCMJ, review. *See United States v. Jessie*, 79 M.J. 437, 441 (C.A.A.F. 2020).



FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

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

United States,	USCA Dkt. No.	21-
Appellee	0135/AF	
v.	Crim.App. No.	39676

D'Andre M. Johnson,	<u>ORDER</u>
Appellant	

On further consideration of the granted issues (81 M.J. __ (C.A.A.F. April 14, 2021)), and in view of *United States v. Willman*, 81 M.J. __ (C.A.A.F. July 21, 2021), we note that in its sentence appropriateness review, the United States Air Force Court of Criminal Appeals erred in failing to consider additional information about Appellant's post-trial confinement conditions even though Appellant had raised the matter in his clemency response to the convening authority. Appellate courts may "consider affidavits and gather additional facts through a *DuBay* hearing when doing so is necessary for resolving issues raised by materials in the record." *United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020). In *United States v. Tyler*, 81 M.J. 108 (C.A.A.F. 2021), we held that either party may comment on properly admitted unsworn victim statements. Therefore, the military judge did not plainly err in permitting trial counsel to present argument based on the victim's unsworn statement. Accordingly, it is, by the Court, this 10th day of August, 2021,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is affirmed as to findings but reversed as to sentence; and,

The record of trial is returned to the Judge Advocate General of the Air Force for further review under Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866. Thereafter, Article 67, UCMJ, 10 U.S.C. § 867, shall apply.

For the Court,

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

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

**UNITED STATES AIR FORCE COURT OF
CRIMINAL APPEALS**

No. ACM 39676 (rem)

UNITED STATES
Appellee

v.

D'Andre M. JOHNSON
Second Lieutenant (O-1), U.S. Air Force, *Appellant*

On Remand from
the United States Court of Appeals for the Armed
Forces

Decided 19 July 2022

Military Judge: W. Shane Cohen.

Approved Sentence: Dismissal, confinement for 10 years, and forfeiture of all pay and allowances. Sentence adjudged 1 December 2018 by GCM convened at Moody Air Force Base, Georgia.

For Appellant: Major Sara J. Hickmon, USAF; Mark C. Bruegger, Esquire; Catherine M. Cherkasky, Esquire.

For Appellee: Lieutenant Colonel Brian C. Mason, USAF; Lieutenant Colonel Matthew J. Neil, USAF;

Major Anne M. Delmare, USAF; Major John P. Patera, USAF; Mary Ellen Payne, Esquire.

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

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

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

RICHARDSON, Judge:

Contrary to his pleas, a general court-martial composed of officer members convicted Appellant of one specification of sexual assault of AM, by penetrating AM's vulva with his penis while AM was incapable of consenting to the sexual act due to impairment by alcohol, and one specification of sexual assault of MP, by penetrating her vulva with his finger by causing MP bodily harm, both in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920.¹ The panel sentenced Appellant to a dismissal, confinement for ten years, and forfeiture of all pay and allowances. The military judge credited Appellant with 138 days against his sentence for time Appellant spent in pretrial confinement. The

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

convening authority approved the sentence as adjudged.

I. BACKGROUND

On initial appeal, Appellant contended, *inter alia*, that he suffered cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution² and Article 55, UCMJ, 10 U.S.C. § 855, due to inhumane and dangerous conditions and mistreatment while in post-trial confinement. In a related claim, Appellant contended that the conditions of his post-trial confinement render his sentence inappropriately severe. Considered together, the claims sought relief under this court's authority to affirm "the sentence or such part or amount of the sentence" as we "find[] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c).

In *United States v. Johnson*, No. ACM 39676, 2020 CCA LEXIS 364 (A.F. Ct. Crim. App. 16 Oct. 2020) (unpub. op.), *rev'd and remanded in part*, 81 M.J. 451 (C.A.A.F. 2021) (mem.), we found Appellant failed to meet his burden that he was subjected to cruel or unusual punishment, and we concluded that he was not entitled to relief under the Eighth Amendment or Article 55, UCMJ. In particular, we found Appellant did not demonstrate deliberate indifference of prison officials, exhaustion of the prisoner-grievance system, or that he petitioned for relief under Article 138, UCMJ, 10 U.S.C. § 938. *Johnson*, unpub. op. at *54; *see also United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006). We "also considered whether

² U.S. CONST. amend. VIII.

Appellant’s assertions [regarding his post-trial confinement conditions] warrant sentence relief under our Article 66(c), UCMJ, authority,” without considering Appellant’s extra-record matters, and found Appellant’s sentence was appropriate. *Id.*, unpub. op. at *55, *56 n.12.

Finding no errors that materially prejudiced Appellant, we affirmed the findings and sentence.

Appellant petitioned the United States Court of Appeals for the Armed Forces (CAAF) to review his case, and the CAAF granted that petition on the following issue:

During clemency, Appellant detailed the deplorable conditions of his post-trial confinement. On appeal, he provided supplementary information on these conditions to support his claims of cruel and unusual punishment and to seek sentence relief. Did the lower court err when it decided it could not consider this supplementary evidence for its sentence appropriateness review?[³]

United States v. Johnson, 81 M.J. 229, 229–30 (C.A.A.F. 2021).

The CAAF summarily disposed of the issue, affirming our decision as to findings but reversing it as to sentence. *Johnson*, 81 M.J. at 452. The CAAF “note[d] that in its sentence appropriateness review, the United States Air Force Court of Criminal Appeals erred in failing to consider additional information

³ The CAAF granted an additional issue unrelated to this remand.

about Appellant's post-trial confinement conditions even though Appellant had raised the matter in his clemency response to the convening authority." *Id.* The CAAF returned Appellant's record of trial "to the Judge Advocate General of the Air Force for further review under Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866." *Id.* This is that review.

After his case was again docketed with this court, Appellant identified three assignments of error: (1) the conditions of his post-trial confinement render his sentence inappropriately severe, warranting sentence appropriateness relief; (2) he was entitled to a unanimous verdict at trial; and (3) the conditions of his post-trial confinement represented cruel and unusual punishment, warranting sentence relief.⁴ Having considered the additional information about Appellant's post-trial confinement conditions, we conclude that relief is not warranted under the first assignment of error.

I. DISCUSSION

In *Johnson*, this court noted that "[a]lthough we have great discretion to determine whether a sentence is appropriate, we have no authority to grant mercy." Unpub. op. at *56 (citing *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010)). We added the following footnote:

⁴ Appellant personally raised issues (2) and (3) pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Appellant raised issue (2) for the first time after his case was remanded for further review; he did not raise it at trial or earlier on appeal to this court. We addressed issue (3) in our previous opinion, and find no cause to alter our conclusions. We find issues (2) and (3) do not warrant further discussion or relief. See *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

Although we exercise our authority to consider outside-the-record matters to determine if Appellant's sentence is correct in law under Article 55, UCMJ, and the Eighth Amendment, *see United States v. Erby*, 54 M.J. 476, 478 (C.A.A.F. 2001), we are precluded from considering additional information about those conditions that Appellant presents in his post-trial statement of facts to determine if his sentence is appropriate and "should be approved" as part of our Article 66(c), UCMJ, review. *See United States v. Jessie*, 79 M.J. 437, 441 (C.A.A.F. 2020).

Johnson, unpub. op. at *56 n.12. The CAAF found we erred by not considering this additional information in our sentence-appropriateness review because "Appellant had raised the matter in his clemency response to the convening authority." *Johnson*, 81 M.J. at 452; *see also United States v. Willman*, 81 M.J. 355, 359–60 (C.A.A.F. 2021) (finding that outside-the-record declarations about post-trial confinement conditions may be considered in an Article 66(c), UCMJ, sentence appropriateness review when an appellant raised the issue to the convening authority during clemency).

We consider all of Appellant's assertions regarding post-trial confinement conditions and whether relief is warranted under Article 66(c), UCMJ, for sentence appropriateness. Having reviewed all matters presented on this issue, including all post-trial declarations submitted to this court, we find Appellant's sentence was not rendered inappropriately severe by the conditions of his

posttrial confinement. Relief is not warranted; the sentence is appropriate and should be approved.

I. CONCLUSION

In our previous decision, we affirmed the findings of guilty; the CAAF affirmed our decision as to findings. On remand, the sentence is correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the sentence is **AFFIRMED**.

MEGINLEY, Judge (dissenting in part and in the result):

I concur with the majority's opinion in footnote four, *supra*, with respect to Appellant's second assignment of error.

As this opinion notes, the Court of Appeals for the Armed Forces (CAAF) opined that in our sentence appropriateness review, this court erred in "failing to consider additional information about Appellant's post-trial confinement conditions even though Appellant had raised the matter in his clemency response to the convening authority." *United States v. Johnson*, 81 M.J. 451, 452 (C.A.A.F. 2021) (mem.). The CAAF returned this case to our court to consider whether Appellant's assertions regarding post-trial confinement conditions warrant relief under our Article 66(c), UCMJ, 10 U.S.C. § 866(c), review for sentence appropriateness. *Id.* In light of this directive, and now taking into consideration the additional information Appellant provided about his posttrial confinement conditions after he submitted clemency,

along with recent developments discussed in more detail below, I find it is worth reevaluating Appellant's third assignment of error: that the conditions of his post-trial confinement represented cruel and unusual punishment.

Since my delivering the opinion of the court in *United States v. Johnson*, No. ACM 39676, 2020 CCA LEXIS 364 (A.F. Ct. Crim. App. 16 Oct. 2020) (unpub. op.), *rev'd and remanded in part*, 81 M.J. 451 (C.A.A.F. 2021) (mem.), three opinions have been released by this court that have led to me to question whether Appellant suffered cruel and unusual punishment, and subsequently, whether he is entitled to any sentence relief. *See United States v. Pullings*, No. ACM 39948, 2021 CCA LEXIS 648 (A.F. Ct. Crim. App. 30 Nov. 2021) (unpub. op.), *rev. denied*, No. 22-0123, 2022 CAAF LEXIS 165 (C.A.A.F. 2 Mar. 2022), then *rev. granted*, No. 22-0123, 2022 CAAF LEXIS 395 (C.A.A.F. 26 May 2022); *United States v. Merritt*, No. ACM 39754, 2021 CCA LEXIS 61 (A.F. Ct. Crim. App. 11 Feb. 2021) (unpub. op.), *rev. denied*, 2021 CAAF LEXIS 731 (C.A.A.F. 9 Aug. 2021); *United States v. Citsay*, No. ACM 39712, 2020 CCA LEXIS 453 (A.F. Ct. Crim. App. 18 Dec. 2020) (unpub. op.), *rev. denied*, 2021 CAAF LEXIS 331 (C.A.A.F. 13 Apr. 2021).

In *Johnson*, we addressed the various issues Appellant raised regarding the conditions he faced at Lowndes County Jail (LCJ); along with the response provided by Captain JC, the jail administrator at the LCJ; and Master Sergeant GB, Appellant's first sergeant. Unpub. op. at *54–55. In that same opinion, this court also noted a then-recent case involving LCJ, *United States v. O'Bryan*, No. ACM 39602, 2020 CCA LEXIS 211 (A.F. Ct. Crim. App. 24 Jun. 2020) (unpub. op.), *rev. denied*, No. 20-0296, 2020 CAAF LEXIS 438

(C.A.A.F. 11 Aug. 2020), a case where that appellant made similar claims against the facility. Nonetheless, because Appellant failed “to raise his issues to prison officials or his command” under Article 138, UCMJ, 10 U.S.C. § 938, we found he had failed to show “deliberate indifference by the [LCJ].” *Johnson*, unpub. op. at *54–55.

A few months after *Johnson*, I penned a dissent in *Merritt* that questioned the reasonableness of dismissing allegations of cruel or unusual conditions of post-trial confinement simply because an appellant failed to file an Article 138, UCMJ, complaint with his or her leadership, a factor to be considered under *United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006). *See Merritt*, unpub. op. at *26–43 (Meginley, J., dissenting in part and in the result). Specifically, I wrote that

[u]nder the current state of the law, even if a confinee is able to prove the first factor under *Lovett* [that an appellant must show an objectively, sufficiently serious act or omission resulting in the denial of necessities], it is a rare case where a confinee will be able to prove the state of mind of prisons officials and deliberate indifference.

Id. at *31.

Following *Johnson*, this court has written on two additional cases involving LCJ: *Pullings* and *Citsay*. In both cases, this court chose not to grant relief to those appellants. Yet, earlier this year, our superior court granted review of our decision in *Pullings* on the following issues:

I. In addition to prison officials, can the decisions of military personnel satisfy the “Deliberate Indifference” aspect of cruel and unusual punishment test when they repeatedly send military inmates to a local civilian confinement center with a history of inhumane living conditions for inmates?

II. Additionally or alternatively, did Appellant suffer cruel and unusual punishment for 247 days and nights at Lowndes County Jail?

Pullings, 2022 CAAF LEXIS at 395.

I now raise the same questions in Appellant’s case as posed by the CAAF above. I cannot determine whether Appellant is entitled to relief under the Eighth Amendment to the United States Constitution¹ or Article 55, UCMJ, 10 U.S.C. § 855, or if his sentence is appropriate under Article 66(c), UCMJ, without knowing the answer to these questions. I now believe a post-trial evidentiary hearing is required to resolve any factual disputes between Appellant’s clemency and post-clemency matters and the declarations submitted by the Government, particularly Captain JC’s affidavit. *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997); *United States v. DuBay*, 37 C.M.R. 411, 413 (C.M.A. 1967). To the degree that such a hearing is found to be impractical, as it has been three and half

¹ U.S. CONST. amend. VIII.

years since Appellant's trial, I would grant Appellant relief under Article 66(c), UCMJ.²



FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

² As for whether Air Force officials have exhibited “deliberate indifference” on civilian confinement matters arising from Moody Air Force Base (AFB) cases, it is worth noting that this court has previously addressed other cases of confinement conditions of Airmen from Moody AFB at local confinement facilities and/or claims of cruel and unusual punishment. *See, e.g., United States v. Burke*, No. ACM S32137, 2014 CCA LEXIS 834 (A.F. Ct. Crim. App. 3 Nov. 2014) (unpub. op.); *United States v. Luckado*, No. ACM 37962, 2013 CCA LEXIS 741 (A.F. Ct. Crim. App. 1 Aug. 2013) (unpub. op.); *United States v. Wilson*, No. ACM 37897, 2012 CCA LEXIS 385 (A.F. Ct. Crim. App. 12 Oct. 2012) (per curiam) (unpub. op.); *United States v. Simmons*, No. ACM 37967, 2012 CCA LEXIS 230 (A.F. Ct. Crim. App. 27 Jun. 2012) (unpub. op.); *United States v. Branch*, No. ACM S31691, 2010 CCA LEXIS 403 (A.F. Ct. Crim. App. 13 Dec. 2010) (per curiam) (unpub. op.); *United States v. Lucas*, No. ACM 37363, 2009 CCA LEXIS 479 (A.F. Ct. Crim. App. 28 Dec. 2009) (unpub. op.); *United States v. Melson*, No. ACM 36523, 2007 CCA LEXIS 372 (A.F. Ct. Crim. App. 14 Sep. 2007) (per curiam) (unpub. op.). Most of these cases also involve the nearby Cook County Jail, Cook County, Georgia. No relief was granted to any of these appellants for cruel and unusual punishment, although the appellant in *Melson* was granted relief for his illegal pretrial punishment.

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

United States,
Appellee

USCA Dkt. No. 22-
0280/AF Crim. App. No.
39676

v.

ORDER

D'Andre M.
JOHNSON

Appellant

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, and in the light of *United States v. Pullings*, __ M.J. __ (C.A.A.F. 2023), it is, by the Court, this 8th day of May 2023,

ORDERED:

That the granted issue is answered in the negative, and the decision of the United States Air Force Court of Criminal Appeals is therefore affirmed.

For the Court,*

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

* HARDY, Judge (concurring in the judgment): For the reasons set forth in my separate opinion in *United States v. Pulling*, __ M.J. __ (C.A.A.F. 2023) (Hardy, J., concurring in the judgment), I concur in the judgment.

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

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,
Appellee,

v.

D'ANDRE M. JOHNSON,
Second Lieutenant (O-1), USAF
Appellant.

Crim. App. No. 39676

USCA Dkt. No. 21-0135AF

**SUPPLEMENT TO PETITION FOR GRANT OF
REVIEW**

MARK C. BRUEGGER
Senior Counsel
U.S.C.A.A.F. Bar No. 34247
Air Force Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
mark.bruegger.1@us.af.mil

SARA J. HICKMON, Capt, USAF
U.S.C.A.A.F. Bar No. 37207

Air Force Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
sara.hickmon@us.af.mil

Counsel for Appellant

Index

Issues Presented	1
Statement of Statutory Jurisdiction.....	2
Statement of the Case	2
Statement of Facts.....	3
Background.	3
The Air Force Court’s Decision	7
1. Legal and Factual Sufficiency.....	7
2. M.P.’s Unsworn Statement	10
3. Conditions of 2d Lt Johnson’s Post-Trial Confinement	12
Reasons to Grant Review	16
Argument	19
I. SECOND LIEUTENANT JOHNSON’S CONVICTION FOR SEXUALLY ASSAULTING M.P. IS LEGALLY INSUFFICIENT.....	19
Standard of Review.....	19
Law & Analysis.....	19
II. PORTIONS OF THE VICTIM’S UNSWORN STATEMENT FELL OUTSIDE THE SCOPE OF R.C.M. 1001A. THE LOWER COURT ERRED WHEN IT FOUND THESE STATEMENTS DID NOT SUBSTANTIALLY INFLUENCE THE SENTENCE.	22
Standard of Review.....	22
Law	23
Analysis.....	24

III. THE MILITARY JUDGE PLAINLY ERRED BY PERMITTING TRIAL COUNSEL TO ARGUE FACTS NOT IN EVIDENCE.	26
Additional Facts.....	26
Standard of Review.....	29
Law & Analysis.....	29

IV. DURING CLEMENCY, SECOND LIEUTENANT JOHNSON DETAILED THE DEPLORABLE CONDITIONS OF HIS POST- TRIAL CONFINEMENT. ON APPEAL, HE PROVIDED SUPPLEMENTARY INFORMATION ON THESE CONDITIONS TO SUPPORT HIS ALLEGATIONS OF CRUEL AND UNUSUAL PUNISHMENT, AND TO SEEK SENTENCE APPROPRIATENESS RELIEF. THE LOWER COURT ERRED WHEN IT DECIDED IT COULD NOT CONSIDER THIS SUPPLEMENTARY EVIDENCE FOR ITS SENTENCE APPROPRIATENESS REVIEW.	31
Standard of Review.....	32
Law & Analysis.....	32
Certificate of Filing and Service	37

Table of Authorities

Court of Appeals for the Armed Forces

<i>United States v. Andrews</i> , 77 M.J. 393 (C.A.A.F. 2018)	29
<i>United States v. Atchak</i> , 75 M.J. 193 (C.A.A.F. 2016)	32
<i>United States v. Barker</i> , 77 M.J. 377 (C.A.A.F. 2018)	30
<i>United States v. Bowen</i> , 76 M.J. 83 (C.A.A.F. 2017)	23
<i>United States v. Cole</i> , 31 M.J. 270 (C.M.A. 1990)....	32
<i>United States v. Fletcher</i> , 62 M.J. 175 (C.A.A.F. 2005)	29
<i>United States v. Grostefon</i> , 12 M.J. 431 (C.M.A. 1982)	1
<i>United States v. Harcrow</i> , 66 M.J. 154 (C.A.A.F. 2008)	29
<i>United States v. Harrow</i> , 65 M.J. 190 (C.A.A.F. 2007)	18, 23, 25
<i>United States v. Jessie</i> , 79 M.J. 437 (C.A.A.F. 2020)	16, 17, 32, 33
<i>United States v. Kearns</i> , 73 M.J. 177 (C.A.A.F. 2014)	19
<i>United States v. King</i> , 78 M.J. 218 (C.A.A.F. 2019)	19
<i>United States v. Hamilton</i> , 78 M.J. 335 (C.A.A.F. 2019).....	22, 23
<i>United States v. Marsh</i> , 70 M.J. 101 (C.A.A.F. 2011)	31
<i>United States v. McGriff</i> , 78 M.J. 487 (C.A.A.F. 2019)	34

<i>United States v. Paxton</i> , 64 M.J. 484 (C.A.A.F. 2007)	31
<i>United States v. Provost</i> , 32 M.J. 98 (C.A.A.F. 1991)	30
<i>United States v. Roach</i> , 66 M.J. 410 (C.A.A.F. 2008)	32
<i>United States v. Tyler</i> , USCA Dkt. No. 20-0252/AF	17, 29
<i>United States v. Willman</i> , USCA Dkt. No. 21-0030/AF	16, 35

Service Courts of Criminal Appeals

<i>United States v. DeFalco</i> , No. ACM 39607, 2020 CCA LEXIS 164, (A.F. Ct. Crim. App. 21 May 2020)	34
<i>United States v. Frantz</i> , No. ACM 39657, 2020 CCA LEXIS 404, (A.F. Ct. Crim. App. Nov. 10, 2020)	33
<i>United States v. Jacinto</i> , 79 M.J. 870 (N-M Ct. Crim. App. 2020)	33
<i>United States v. Lawler</i> , No. ACM 39699, 2020 CCA LEXIS 186, (A.F. Ct. Crim. App. May 28, 2020)	34
<i>United States v. Matthews</i> , No. ACM 39593, 2020 CCA LEXIS 193 (A.F. Ct. Crim. App. June 2, 2020)	34-35
<i>United States v. McGriff</i> , No. ACM 39306, 2018 CCA LEXIS 567, at *24-25 (A.F. Ct. Crim. App. 11 Dec. 2018)	34

Constitutional Provisions, Statutes, and Regulations

Eighth Amendment	7, 14-16, 34
10 U.S.C. § 866(c)	2

10 U.S.C. § 867(a)(3).....	2
Article 55, UCMJ	7, 14-16, 34
Article 66, UCMJ	32, 35
Article 120, UCMJ	2
R.C.M. 1001(c)(2)(C)	30
R.C.M. 1001A	<i>passim</i>
R.C.M. 1001A(a).....	30
R.C.M. 1001A(b)(1)	23
R.C.M. 1001A(b)(2)	11, 23
R.C.M. 1001A(c)	24
R.C.M. 1001A(e).....	30
R.C.M. 1001A(e)(2)	2

Issues Presented¹

I.

WHETHER SECOND LIEUTENANT JOHNSON'S CONVICTION FOR SEXUALLY ASSAULTING M.P. IS LEGALLY SUFFICIENT?

II.

PORTIONS OF M.P.'S UNSWORN STATEMENT FELL OUTSIDE THE SCOPE OF R.C.M. 1001A. DID THE LOWER COURT ERR WHEN IT FOUND THESE STATEMENTS DID NOT SUBSTANTIALLY INFLUENCE THE SENTENCE?

III.

WHETHER THE MILITARY JUDGE PLAINLY ERRED BY PERMITTING TRIAL COUNSEL TO ARGUE FACTS NOT IN EVIDENCE?

IV.

DURING CLEMENCY, SECOND LIEUTENANT JOHNSON DETAILED THE DEPLORABLE CONDITIONS OF HIS POST-TRIAL

¹ 2d Lt Johnson raises one additional issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). See Appendix A.

CONFINEMENT. ON APPEAL, HE PROVIDED SUPPLEMENTARY INFORMATION ON THESE CONDITIONS TO SUPPORT HIS CLAIMS OF CRUEL AND UNUSUAL PUNISHMENT, AND TO SEEK SENTENCE RELIEF. DID THE LOWER COURT ERR WHEN IT DECIDED IT COULD NOT CONSIDER THIS SUPPLEMENTARY EVIDENCE FOR ITS SENTENCE APPROPRIATENESS REVIEW?

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (hereinafter Air Force Court) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c) (2012). This Honorable Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

Second Lieutenant (2d Lt) D'Andre M. Johnson was tried by general court-martial before a panel of officer members at Moody Air Force Base (AFB), Georgia, on October 22-23, 2018, and November 26 - December 1, 2018. Contrary to 2d Lt Johnson's pleas, the panel found him guilty of one charge and two specifications in violation of Article 120, UCMJ. (Record (R.) at 1106-07.) The panel sentenced 2d Lt Johnson to a dismissal, ten-years confinement, and total forfeitures. (R. at 1192.) The convening authority approved the adjudged sentence. (R. at Vol. 1, General Court-Martial Order, dtd 5 April 2019.)

On October 16, 2020, the Air Force Court affirmed the findings and sentence. Appendix B. On November 14, 2020, the Air Force Court denied 2d Lt Johnson's Motion for Reconsideration. Appendix C.

Statement of Facts

Background

2d Lt Johnson graduated from the Air Force Academy in 2017 and was assigned to Moody AFB. (R. at Vol. 1, 2d Lt D'Andre Johnson Clemency Package (hereinafter Clemency) at 13, 33.) He subsequently joined a fitness center in neighboring Valdosta, Georgia, where he met M.P., who managed the gym. (R. at 564-65.)

On September 14, 2017, 2d Lt Johnson and M.P. began conversing over Instagram. (Prosecution Exhibit (PE) 4.) Over the next several days, their discussions ranged from information about their respective families to flirtatious comments and promises to meet up. (PE 4; R. at 577-83.) M.P. gave 2d Lt Johnson her phone number and later told him of her plans to go to the Bluewater Bar in Remerton, Georgia, on September 17, 2017. (PE 4 at 14, 37; *see also* R. at 442.)

Prior to arriving at Bluewater that night, M.P. went to dinner with several friends, including her co-worker, A.M. (R. at 548, 551, 570.) M.P. had a mixed drink at dinner, while A.M. did not have any alcohol. (R. at 551, 593.) Thereafter, the group went to a friend's house, where M.P. had another mixed drink. (R. at 594.) A.M. consumed "a lot" of alcohol, but could not recall how much. (R. at 552.) At around 2330

hours, the group left for Bluewater. (R. at 594.)

2d Lt Johnson also drank prior to going out. Starting around 1700 hours, he consumed five or six shots along with five or six beers at another bar. (R. at 987.) He and his friends eventually made their way to Bluewater, where he had several more shots and beers. (R. at 988.) 2d Lt Johnson consumed enough alcohol that his friends believed him to be intoxicated. (R. at 989, 994.)

At some point, 2d Lt Johnson met up with M.P. The pair spent the majority of their remaining time at the bar together, following each other around, “grinding” while dancing, and kissing.² (R. at 727-29, 995.) Shortly before Bluewater closed, several individuals—including 2d Lt Johnson, M.P., and A.M.—decided to walk to the house of J.P., a friend who lived nearby. (R. at 738.) The group mingled outside for a few minutes after arriving at the house, during which 2d Lt Johnson and M.P. continued kissing. (R. at 434, 731.) M.P. later asked J.P. if 2d Lt Johnson could stay the night. (R. at 1006.) From J.P.’s perspective, M.P. appeared to be in control of her faculties and understood what she was doing. (R. at 1006-07.)

Ultimately, only four people from the group stayed at J.P.’s house: 2d Lt Johnson, M.P., A.M., and SrA C.C.—a friend of M.P.’s who A.M. apparently had a romantic interest in. (R. at 420, 435, 439.) J.P. was also in the house, along with her friend, SrA K.C. (R. at 435, 660-61.)

By this time, A.M. appeared extremely

² “Grinding” involves a woman dancing in front of a male while “rubbing against each other.” (R. at 728-29.)

intoxicated. (R. at 438.) Following the group's request, 2d Lt Johnson carried A.M. to a bedroom, put her in bed, and left her there with SrA C.C. (R. at 438-39.) 2d Lt Johnson and M.P. then went to the couch in the living room, where they began kissing and touching each other. (R. at 661, 1008.) J.P. asked M.P. if she was okay or needed a blanket, and M.P. responded that she was fine. (R. at 1008.) Observing nothing wrong and having no concern for her close friend, J.P. then retreated to her bedroom with SrA K.C. (R. at 1008.)

According to SrA C.C., he awoke later that morning to find 2d Lt Johnson having sex with A.M. (R. at 487.) SrA C.C. told 2d Lt Johnson "this is wrong" and tried to get him off her, to which 2d Lt Johnson replied: "It's okay. It's [M.P.]." (R. at 488-90.) SrA C.C. responded that he needed to get off and pushed him. (R. at 490.) 2d Lt Johnson—who played fullback for the Air Force Academy's football team³—did not fight back against SrA C.C.; rather, he said "Oh" and "I'm sorry, I'm sorry" while SrA C.C. escorted him out of the room. (R. at 490.) SrA C.C. later called a friend for assistance, and then retrieved M.P. from the couch, where she was sleeping opposite from 2d Lt Johnson. (R. at 493-94.) Eventually, SrA C.C. and others called an Uber to pick up 2d Lt Johnson, and escorted him from the premises. (R. at 498-500.) Although these events occurred a few hours after 2d Lt Johnson left Bluewater, he still appeared to be very intoxicated. (R. at 689-90.)

When the police arrived to investigate the alleged sexual assault against A.M., M.P. also claimed to have been assaulted by 2d Lt Johnson. (R. at 744.)

³ See Clemency at 44-46.

At no point during the evening or early morning hours did any individual staying at J.P.'s hear any screams, struggling, or calls for help from M.P., or harbor any concerns regarding her well-being with 2d Lt Johnson. (R. at 524, 681, 1008-09.)

The Air Force Court's Decision

On appeal to the Air Force Court, 2d Lt Johnson raised three assignments of error: (1) whether his conviction for sexually assaulting M.P. was factually and legally sufficient; (2) whether his defense counsel were ineffective; and (3) whether the conditions of his confinement were cruel and unusual in violation of the Eighth Amendment and Article 55, UCMJ. Appendix B at 2. The Air Force Court specified an additional issue: whether the military judge abused his discretion in allowing the members to consider portions of M.P.'s unsworn statement. *Id.* Additional facts pertaining to these assignments of error, along with the Air Force Court's analyses and conclusions, follows:⁴

1. Legal and Factual Sufficiency

M.P. testified that she did not remember many of the events following her arrival at Bluewater. (R. at 571.) However, she claimed that she remembered "[w]aking up on the couch with [2d Lt Johnson] on top of [her]." (R. at 572.) He was wearing a pink shirt and still had his pants on. (*Id.*) M.P. said he was kissing her, she "kind of" pushed him off, and then she "went

⁴ Facts pertaining to the ineffective assistance of counsel allegations are included in Appendix A. Facts pertaining to Issue III are included in the Argument section below.

out again.” (R. at 573.) When she next awoke, M.P. attested that 2d Lt Johnson was digitally penetrating her. (R. at 573-74.) She claimed she pushed him off, curled up, and went back to sleep, and believed he had left at that point. (R. at 574.) She later awoke “to a sound or something,” saw 2d Lt Johnson’s outline in the hallway, and realized he was not wearing any clothes. (*Id.*) She claimed 2d Lt Johnson was then “on top of [her] and he was in [her] face, saying [her] name,” but she did not indicate that he thereafter touched her inappropriately. (*Id.*)

Analyzing M.P.’s testimony alongside 2d Lt Johnson’s mistake of fact as to consent defense and other evidence adduced at trial, the Air Force Court deemed the timing of the incidents involving A.M. and M.P. as “critical to determining factual and legal sufficiency.” Appendix B at 10. Noting that SrA C.C. testified he last sent a text message at 0302 hours, only to later be awoken by 2d Lt Johnson’s assault on A.M., the lower court determined that there was no indication of any mal-intent by 2d Lt Johnson prior to this time. *Id.* Instead, it opined that M.P. had been “somewhat, if not very, interested” in 2d Lt Johnson. *Id.* The Air Force Court added that, based on the evidence, “[h]ad M.P. alleged a sexual assault occurring before SrA [C.C.] fell asleep at 0302,” 2d Lt Johnson would have a “viable argument” regarding mistake of fact. *Id.* But the Court then highlighted how A.M.’s DNA was found inside M.P.’s underwear, SrA C.C. saw 2d Lt Johnson naked during A.M.’s assault, M.P. saw 2d Lt Johnson naked in the hallway, and SrA C.C. found 2d Lt Johnson in his underwear on the couch with M.P. around 0345 hours. *Id.* Based on these facts, the Air Force Court held that the evidence “supports a conclusion that [2d Lt Johnson]

sexually assaulted [M.P.] *after* he penetrated [A.M.] and before SrA [C.C] saw [M.P.] and [2d Lt Johnson] on the couch around 0345.” *Id.* (emphasis in original).

The Air Force Court’s analysis did not address the nature of the DNA evidence, in that the Government recovered only non-semen, epithelial DNA; a form relating to skin, saliva, touch, etc. (R. at 868-69.) Likewise, the lower court did not factor in how 2d Lt Johnson had earlier come into contact with A.M., when he carried her to one of the house’s bedrooms. (R. at 438-39.) The lack of any damage to M.P.’s clothes and the lack of any significantly corroborating injuries was also missing from the Air Force Court’s holding.

2. M.P.’s Unsworn Statement

During findings, M.P. conceded that she was married on the night she met up with 2d Lt Johnson. (R. at 613.) However, she claimed she separated from her husband and filed for divorce several months earlier. (R. at 613.) She further testified that her estranged husband was seeking custody of the daughter she shared with him (R. at 613), and that her allegations against 2d Lt Johnson had negatively affected her divorce proceedings. (R. at 615.) Later, in response to a member’s question, M.P. stated that she moved to Mississippi “to be with [her] daughter.” (R. at 619.) According to M.P., the move was separate and apart from her allegations. (R. at 619.)

Following 2d Lt Johnson’s conviction, M.P. sought to provide an unsworn statement. (R. at 1126 (referencing Court Exhibit (CE) II)). The Defense objected, as outside the scope of victim impact, to her

referencing losing her job and moving, being followed by investigators, and 2d Lt Johnson's purported lack of remorse. (R. at 1126-27.) In a subsequent Article 39(a) session, M.P. explained that her estranged husband's divorce lawyer had utilized her allegations against 2d Lt Johnson against her, resulting in the divorce judge questioning her character and alcohol use. (R. at 1131.) In turn, the judge ordered M.P. to undergo counseling and gave custody of her daughter to relatives. (R. at 1131.)

Having heard this additional information from M.P., the military judge allowed her to present her unsworn statement in its entirety. (R. at 1156.) The military judge concluded that her loss of employment, her move, and her harassment by investigators impacted her psychologically, socially, and financially, and thus fell within the confines of R.C.M. 1001A(b)(2). (R. at 1157.) M.P. then read her unsworn statement to the members, claiming her allegations prolonged her divorce, adversely affected her past and current employment, and ultimately resulted in losing custody of her child. (R. at 1163.) The members later received a written copy of M.P.'s statement (R. at 1163; *see also* Court Exhibit (CE) II), and trial counsel subsequently referenced M.P.'s purported repercussions in argument "as the price she wrongfully paid for a night of fun with friends." (R. at 1173.)

In its review of the military judge's ruling, the Air Force Court concurred that the actions of 2d Lt Johnson's defense attorneys had indeed impacted M.P. Appendix B at 22. However, it determined that the military judge abused his discretion in permitting M.P. to discuss her divorce and custody issues, as those matters "did not directly arise from [2d Lt Johnson's]

offenses.” *Id.* The Air Force Court nevertheless concluded the military judge’s error did not substantially affect the sentence, characterizing the Government’s case as strong compared to the “few facts in [2d Lt Johnson’s] favor.” *Id.* at 23. The lower court further opined that because the Defense cross-examined M.P. on her divorce in findings, “this information was not a surprise to the panel at the sentence hearing.” *Id.* Adding that the military judge properly instructed the members on how to consider M.P.’s unsworn statement, the Air Force Court held that the admission of her statement did not substantially affect 2d Lt Johnson’s sentence. *Id.*

3. Conditions of 2d Lt Johnson’s Post-Trial Confinement

Following his conviction, 2d Lt Johnson was confined at an off-base facility in Lowndes County, Georgia. (Clemency at 6.) He remained there for approximately two months while the Government purportedly awaited an opening at a military confinement facility. (*Id.*; see also R. at Vol. 1, Inmate Transfer Request (identifying 22 or 23 January 2019 as requested transfer date).) During those two months, 2d Lt Johnson was subjected to the following living conditions:

- He shared a single cell and toilet with 16 other prisoners;
- Some of his cellmates suffered from drug withdrawal symptoms, experiencing psychotic breaks, screaming during the night, and vomiting throughout the cell;
- Some of his cellmates were gang members and prisoners with life sentences, many of whom

engaged in violent, threatening, and extortive behavior;

- He suffered physical attacks and injuries from other prisoners;
- The guards were not located close to his cell and neglected calls for help;
- Cleaning supplies were never made available, the cell's single toilet was covered with feces and urine, and when someone vomited during the night, it would not be cleaned until the next morning's headcount;
- Confinement officials withheld his mail;
- He was not allowed any visitors until almost the end of his two-month confinement;
- Confinement officials withheld food from him;
- He was not permitted to go outside for the entirety of his two-month confinement;
- He was not provided clean clothes; and
- He had limited opportunities to bathe.

(Clemency Request at 6-7.)

2d Lt Johnson did not lodge any formal complaints through the confinement facility or his command pursuant to Article 138, UCMJ. However, he discussed these matters in the record of trial through his clemency request. (Clemency Request at 6-8.)

2d Lt Johnson re-raised his confinement conditions on appeal, alleging that they constituted cruel and unusual punishment in violation of the Eighth Amendment and Article 55, UCMJ. Appendix B at 2. He further argued that the conditions rendered his sentence inappropriately severe and sought sentence relief. *Id.*

To supplement his clemency matters, 2d Lt Johnson moved to attach an affidavit from himself and his mother. Appendix B at 24. In his affidavit, 2d Lt Johnson explained that he never filed a complaint under Article 138, UCMJ, because: (1) he feared retaliation from his fellow prisoners for being a “snitch”; (2) based on how he and the other prisoners were mistreated, he did not believe confinement officials would adequately address his complaints or, in the alternative, they would inform his fellow prisoners that he was a “snitch”; and (3) based on the failure of his command to reach out to him, he believed that they would not address his complaints. *Id.* Through her affidavit, 2d Lt Johnson’s mother attested that he was not allowed visits, he did not have access to mail, his mental state deteriorated, and he was refused medical treatment. *Id.* The lower court attached these affidavits to the record, along with rebuttal affidavits provided by the Government and a subsequent affidavit from 2d Lt Johnson’s wife describing how she observed injuries on her husband that she believed were a result of his violating the “snitch” code. *Id.*

Ultimately, the Air Force Court determined that 2d Lt Johnson failed to demonstrate he was subjected to cruel and unusual punishment, and found his sentence correct in law. Appendix B at 27-28. The lower court also declined to provide sentence appropriateness relief. *Id.* at 28. In doing so, it noted that while it had the authority “to consider outside-the-record matters to determine if Appellant’s sentence is correct in law under Article 55, UCMJ, and the Eighth Amendment,” it was “precluded from considering additional information about those conditions that Appellant presents in his post-trial

statement of facts to determine if his sentence is appropriate and ‘should be approved’ as part of [its] Article 66(c), UCMJ, review.” *Id.* at 28 n.12 (citing *United States v. Jessie*, 79 M.J 437, 441 (C.A.A.F. 2020)).

Reasons to Grant Review

Two of the presented issues are currently pending review before this Court in other cases. In *United States v. Willman*, USCA Dkt. No. 21-0030/AF, this Court is poised to address whether a Court of Criminal Appeals (CCA) can consider, for its sentence appropriateness review, matters it attached to the record to analyze alleged Eighth Amendment and Article 55, UCMJ, violations. This case involves the same question of law, as the Air Force Court similarly attached post-trial affidavits from 2d Lt Johnson and his family, considered those affidavits in assessing his cruel and unusual punishment claims, but then declined to consider them in its sentence appropriateness review. However, unlike the appellant in *Willman*, 2d Lt Johnson detailed the deplorable conditions of his confinement in clemency. Accordingly, this case presents an additional question of law that has not been, but should be, decided by this Court: the extent to which a CCA may supplement the record when deciding an issue raised by materials in the record. *See Jessie*, 79 M.J. at 442.

This Court is also set to determine, in *United States v. Tyler*, USCA Dkt. No. 20-0252/AF, the contours of a trial counsel’s argument with respect to R.C.M. 1001A matters. More specifically, whether a military judge errs by allowing trial counsel to argue facts not in evidence through reference to a victim’s unsworn statements. In the present case, trial

counsel similarly argued facts not in evidence when he emphasized information that originated solely from the unsworn statements of A.M. and M.P.

The Air Force Court further misjudged how 2d Lt Johnson's sentence was impacted by the military judge's erroneous admission of M.P.'s unsworn statement—namely, how her allegations against 2d Lt Johnson adversely affected her divorce proceedings. In concluding this error did not substantially influence the sentence, the lower court opined that no information in M.P.'s statement came as a surprise to the panel, as she previously discussed her divorce proceeding during findings. This is inaccurate, however, as M.P. discussed “new ammunition” in her unsworn statement: losing custody over her child. In accordance with this Court's binding precedent, this “new ammunition” made it more likely that the military judge's error was prejudicial, and the lower court's failure to consider this fact warrants correction. *See United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007).

Finally, this Court should review the Air Force Court's flawed legal sufficiency analysis, wherein it dismissed key inconsistencies that do not corroborate M.P.'s allegations. In particular, the Air Force Court's reliance on the timing of certain events contrasts with M.P.'s direct testimony, thereby making the lower court's timeline implausible and its conclusions erroneous. Considering these inconsistencies, M.P.'s actions leading up to and following the alleged sexual assault, the dearth of evidence to corroborate her claims, and 2d Lt Johnson's viable defense of mistake of fact as to consent, a rational fact finder would have acquitted him of sexually assaulting M.P.

Argument

I.

SECOND LIEUTENANT JOHNSON’S CONVICTION FOR SEXUALLY ASSAULTING M.P. IS LEGALLY INSUFFICIENT.

Standard of Review

This Court reviews questions of legal sufficiency *de novo*. *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (citing *United States v. Kearns*, 73 M.J. 177, 180 (C.A.A.F. 2014)). As articulated by this Court:

The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This legal sufficiency assessment draw[s] every reasonable inference from the evidence of record in favor of the prosecution. As such, [t]he standard for legal sufficiency involves a very low threshold to sustain a conviction. The criterion thus impinges upon “jury” discretion only to the extent necessary to guarantee the fundamental protection of due process of law.

Id. (internal citations, quotations, and quotation marks omitted).

Law & Analysis

As the Air Force Court acknowledged, M.P.'s prior interactions with 2d Lt Johnson indicated that she was "somewhat, if not very, interested" in him. Appendix B at 10. Based on its review of the evidence, the lower court concluded that "[h]ad M.P. alleged a sexual assault occurring before SrA [C.C.] fell asleep at 0302," 2d Lt Johnson would have a "viable argument" regarding his mistake of fact as to consent defense. *Id.* Ultimately, however, the Air Force Court concluded that 2d Lt Johnson assaulted M.P. after he left A.M. (and thus after 0302 hours), relying on the recovery of A.M.'s DNA from M.P.'s underwear and the timeline of events as recounted by M.P. and SrA C.C. *Id.* But the Air Force Court's reliance on these facts was misplaced.

First, the Government only recovered epithelial DNA. (R. at 868.) This form of DNA can be transferred by skin or touch, including by rubbing up against someone. (R. at 869.) Notably, 2d Lt Johnson came into physical contact with A.M. when he carried her to one of the house's bedrooms. (R. at 438-39.) This event immediately preceded his cuddling on the couch with M.P., wherein they kissed and touched each other. (R. at 661.) Accordingly, had 2d Lt Johnson touched M.P.'s underwear during this period—even without actually penetrating her vagina—he could have transferred A.M.'s DNA.

Even assuming, *arguendo*, that 2d Lt Johnson did in fact transfer the DNA when he digitally penetrated M.P., the timing cited by the Air Force Court does not align with M.P.'s testimony. Specifically, M.P. testified that 2d Lt Johnson was wearing his shirt and pants while they were kissing

on the couch. (R. at 572.) M.P. then recalled waking up to him fingering her vagina, pushing him off her, and curling up. (R. at 574.) It was only afterwards that she observed 2d Lt Johnson naked in the hallway. (*Id.*) And thereafter, M.P. never alleged he touched her inappropriately; rather, she merely claimed he was on top of her and in her face saying her name. (*Id.*) Based on M.P.'s own testimony, then, the Air Force Court's timeline is incorrect—2d Lt Johnson's interactions with M.P. while clothed occurred *prior to* the incident with A.M., when he was seen naked.

Considering M.P.'s flirtatious interactions on the night in question and beforehand, 2d Lt Johnson had more than a “viable argument” regarding his mistake of fact as to consent defense. This is especially true when viewed in connection with the Government's failure to offer any witness who observed or overheard M.P.'s purported distress, any damage to M.P.'s clothing indicative of non-consensual activities, and any physical injuries to M.P. that significantly corroborated her allegations. And given M.P.'s own contradictory testimony—which ranged from denying she was interested in 2d Lt Johnson to choosing to *remain* on the couch after 2d Lt Johnson purportedly forced himself on her—no rational factfinder would have found 2d Lt Johnson guilty of sexually assaulting M.P.

WHEREFORE, 2d Lt Johnson respectfully requests that this Honorable Court grant review of this issue.

II.

PORTIONS OF M.P.'S UNSWORN STATEMENT FELL OUTSIDE THE SCOPE OF R.C.M. 1001A. THE LOWER COURT ERRED WHEN IT FOUND THESE STATEMENTS DID NOT SUBSTANTIALLY INFLUENCE THE SENTENCE.

Standard of Review

When there is error regarding the presentation of victim statements under R.C.M. 1001A, the test for prejudice “is whether the error substantially influenced the adjudged sentence.” *United States v. Hamilton*, 78 M.J. 335, 343 (C.A.A.F. 2019) (citation omitted). When determining whether an error had a substantial influence on a sentence, this Court considers the four factors: “(1) the strength of the Government’s case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question.” *Id.* (quoting *United States v. Bowen*, 76 M.J. 83, 89 (C.A.A.F. 2017)). An error is more likely to be prejudicial if the fact was not already obvious from other evidence presented at trial and would have provided “new ammunition” against an appellant. *Harrow*, 65 M.J. at 200.

Law

Article 6b, UCMJ, affords a victim the right to be “reasonably heard” at a sentencing hearing. R.C.M. 1001A implements this right for “crime victims,” which includes individuals who have suffered “direct physical, emotional, or pecuniary harm as a result of

the commission of an offense of which the accused was found guilty.” R.C.M. 1001A(b)(1). Victim impact under R.C.M. 1001A includes “any financial, social, psychological, or medical impact on the victim directly relating to or arising from the offense of which the accused has been found guilty.” R.C.M. 1001A(b)(2). The military judge has an obligation to ensure the content of a victim’s unsworn statement comports with the defined parameters of victim impact or mitigation as defined by the statute and R.C.M. 1001A. *See* R.C.M. 1001A(e)(2), Discussion (“A victim’s unsworn statement should not exceed what is permitted under R.C.M. 1001A(c) Upon objection or *sua sponte*, a military judge may stop or interrupt a victim’s unsworn statement that includes matters outside the scope of R.C.M. 1001A(c).”) (emphasis in original).

Analysis

The Air Force Court correctly concluded that the military judge abused his discretion when he allowed, over defense objection, M.P. to present improper information to the panel through her unsworn statement. Appendix B at 22. However, it incorrectly found that this error did not have a substantial impact on the sentence.

To begin with, the lower court erroneously determined that the improper information M.P. provided would not surprise the panel, since she previously discussed her divorce during findings. *Id.* at 23. M.P. did, in fact, testify that her allegations against 2d Lt Johnson adversely impacted her divorce. (R. at 615.) She further testified that her husband was seeking custody of their daughter (R. at 613), whom she moved to Mississippi “to be with.” (R. at 619.)

However, she never testified that she had lost custody of her daughter. And in response to a member's question, M.P. clarified that her move was *separate and apart* from her allegations. (R. at 619.) She later provided contrary and additional information in her unsworn statement, laying the blame for nearly everything—her loss of employment, her move, her problems with her new job, and her lost custody of her child—at 2d Lt Johnson's feet. (R. at 1162; *see also* CE II.) All of this was new and significant ammunition that made it more likely the military judge's error influenced the panel. *Harrow*, 65 M.J. at 200. In particular, M.P.'s loss of her child was bound to impact the panel; a fact the Air Force Court underemphasized in its decision.⁵

Conversely, the lower court overemphasized how the panel would have viewed 2d Lt Johnson's offenses. Appendix B at 23. 2d Lt Johnson's actions were not premeditated, he did not stalk or insinuate himself among the victims against their wishes, and he did not use his considerable size and strength to continue to force himself on others after realizing what he was doing. Instead, his extreme intoxication was the root of his conduct. Given his youth, lack of prior criminal history, and the circumstances of his upbringing—which included earning a scholarship to the Air Force Academy after being raised by a single mother without many resources (R. at 1143-45)—a panel would have viewed 2d Lt Johnson as considerably more sympathetic than the stereotypical sexual offender.

In sum, this Court should not be confident that

⁵ Notably, at least two members of the panel had children themselves. (*See* R. at 287, 314.)

M.P.'s improper information did not substantially influence the panel, particularly since M.P. told the panel that she had lost her child due to the actions of 2d Lt Johnson and his attorneys.

WHEREFORE, 2d Lt Johnson respectfully requests this Honorable Court grant review of this issue.

III.

THE MILITARY JUDGE PLAINLY ERRED BY PERMITTING TRIAL COUNSEL TO ARGUE FACTS NOT IN EVIDENCE.

Additional Facts

A.M. testified during sentencing that she had not yet told her family what happened to her, and that she was unable to obtain counseling services because she was still on her parent's insurance. (R. at 1140-41.) She then provided an unsworn statement pursuant to R.C.M. 1001A, wherein she detailed how she felt violated during the sexual assault forensic examination, how she understood she had been sexually assaulted when the examiner concluded there had been "extensive penetration," and how she now suffered from depression. (CE I.) M.P. also provided an unsworn statement, attesting that her allegations against 2d Lt Johnson resulted in her loss of employment, a move, problems in her divorce, and the loss of custody over her daughter. (R. at 1163; CE II; *see also* Issue II, *supra*.)

During argument, trial counsel repeatedly referenced the unsworn statements:

Just read [A.M.'s] victim impact statement. She was so confused about what was going on and still in disbelief when she arrived at the Haven. She had barely processed what had just occurred to her when she arrived at the Haven. "They had to examine me from the waist down, which I thought at the time was one of the most uncomfortable moments of my life." And as she's laying down with her legs in the stirrups, with a stranger examining her, [A.M.] hears the words "extensive penetration," and she loses it. Members, surrounded by no one but a nurse that she met that night, [A.M.] learned that she was sexually assaulted.

(R. at 1171.)

Again, just read through [A.M.'s] victim impact statement. "That rapist took away what bit of self-worth I have. For the next months, I was severely depressed, but I chose to hide it." And a few lines down, "They offered me therapy, but I turned that down, too. This is because they needed my social for my insurance, and I didn't want my parents finding out. I am their baby girl. I didn't want them to know that someone raped me. I didn't want them to know that I was so intoxicated that I don't even remember it, so I chose to keep it to myself."

(R. at 1171-72.)

And [M.P.]? Members, Lieutenant Johnson has affected [M.P.'s] life in ways she could have never even imagined. [M.P.] could not have imagined that by her decision to come forward and report what Lieutenant Johnson did to her that she would subject herself to humiliation and the pain that would come the following year and four months. Before [M.P.] ever even made it into this courtroom, reports from this investigation were used against her in a divorce proceeding. Those reports led to her losing custody of her child, having to leave her job in Valdosta, and move back to Mississippi. That's the price she wrongfully paid for a night of fun with friends.

(R. at 1172-73.)

But for [A.M.] and [M.P.], the future as they planned it is also over because for the rest of their lives, they will carry with them the impact that Lieutenant Johnson's criminal behavior had on them. And they have not moved forward from this. It is still impacting their lives, and it likely will forever.

(R. at 1174.)

Although the Defense earlier objected to portions of M.P.’s unsworn statement (R. at 1126-27), it did not object during trial counsel’s argument.

Standard of Review

Whether argument is improper is a question of law, reviewed *de novo*. *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018). If no objection is made, this Court reviews for plain error. *Id.* “Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused.” *Id.* at 401 (quoting *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005)). In reviewing for plain error, this Court considers whether the error is obvious at the time of appeal, not whether it is obvious at the time of trial. *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008).

Law & Analysis

This Court has yet to determine the permissible contours of argument with respect to victim impact statements.⁶ It has nevertheless opined that victim testimony under R.C.M. 1001A “does not constitute witness testimony.” *United States v. Barker*, 77 M.J. 377, 382 (C.A.A.F. 2018) (citing R.C.M. 1001A(a)). Moreover, the language implementing a victim’s right to be heard is nearly identical to the language establishing the right for an accused to make an unsworn statement. *Compare* R.C.M. 1001A(e) *with* R.C.M. 1001(c)(2)(C). And this Court has determined

⁶ On February 9, 2021, this Court heard argument on this issue in *Tyler*, USCA Dkt. No. 20-0252/AF.

that an accused's unsworn statement is *not* evidence. See *United States v. Provost*, 32 M.J. 98, 99 (C.A.A.F. 1991). Consequently, akin to an accused's unsworn statement, unsworn victim impact statements should generally not be the subject of argument.

In this case, trial counsel utilized the unsworn statements of A.M. and M.P. to great effect, referencing how Lt Johnson's actions were "still impacting their lives." (R. at 1174.) Trial counsel also provided examples, such as how M.P. lost custody of her child (R. at 1173) and how A.M. felt 2d Lt Johnson "took away what bit of self-worth" she had. (R. at 1171.) This information was provided solely through unsworn statements, yet trial counsel argued it as if it were actual evidence. Although this Court has recognized some exceptions to counsel arguing matters from unsworn statements,⁷ trial counsel's comments here exceeded what was properly permissible under the rules, and the military judge plainly erred by failing to interject. The military judge's failure in turn allowed trial counsel to appropriate the unsworn statements as aggravating evidence, emphasizing to the members the necessity of a severe sentence based on matters that were not in evidence. 2d Lt Johnson was substantially prejudiced by trial counsel's argument, warranting correction by this Court.

WHEREFORE, 2d Lt Johnson respectfully requests this Honorable Court grant review of this

⁷ See, e.g., *United States v. Marsh*, 70 M.J. 101, 105 (C.A.A.F. 2011) (permitting trial counsel to highlight how an accused's statement is unsworn); *United States v. Paxton*, 64 M.J. 484, 487 (C.A.A.F. 2007) (permitting to trial counsel to note that an accused has failed to express remorse).

issue.

IV.

DURING CLEMENCY, SECOND LIEUTENANT JOHNSON DETAILED THE DEPLORABLE CONDITIONS OF HIS POST-TRIAL CONFINEMENT. ON APPEAL, HE PROVIDED SUPPLEMENTARY INFORMATION ON THESE CONDITIONS TO SUPPORT HIS ALLEGATIONS OF CRUEL AND UNUSUAL PUNISHMENT, AND TO SEEK SENTENCE APPROPRIATENESS RELIEF. THE LOWER COURT ERRED WHEN IT DECIDED IT COULD NOT CONSIDER THIS SUPPLEMENTARY EVIDENCE FOR ITS SENTENCE APPROPRIATENESS REVIEW.

Standard of Review

Whether Article 66, UCMJ, allows military courts of appeal to consider matters outside the entire record of proceedings is a question of law reviewed *de novo*. *Jessie*, 79 M.J. at 439-40. This Court reviews questions of statutory construction *de novo*. *United States v. Atchak*, 75 M.J. 193, 195 (C.A.A.F. 2016).

Law & Analysis

Through Article 66, UCMJ, Congress provided the Courts of Criminal Appeals (CCAs) “with plenary,

de novo power of review’ and the ability to ‘determine[], on the basis of the [entire] record’ which findings and sentence should be approved.” *United States v. Roach*, 66 M.J. 410, 413 (C.A.A.F. 2008) (quoting *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). Although this Court’s recent decision in *Jessie* constrains the CCAs’ review to those matters in the “entire record,” the Air Force Court misapplied such limitations to the present case. 79 M.J. at 445.

First, as the Air Force Court itself has previously acknowledged, *Jessie* did not overrule prior precedent that allowed the CCAs “to supplement the record when deciding issues raised by materials in the record.” *United States v. Frantz*, No. ACM 39657, 2020 CCA LEXIS 404, at *48 (A.F. Ct. Crim. App. Nov. 10, 2020) (unpub. op.) (quoting *Jessie*, 79 M.J. at 442). To fall under this exception, *Jessie* requires “that the apparent or alleged *error* appear[] within the record of trial.” *Id.* at *45 (emphasis in original). That is precisely what occurred here. 2d Lt Johnson raised his deplorable confinement conditions in his clemency matters, re-raised the matter on appeal, and then supplemented it with additional information. Under *Jessie*, and consistent with its own previous interpretation of that case,⁸ the Air Force Court was authorized to consider 2d Lt Johnson’s additional affidavits. It erred by concluding otherwise.

Assuming, *arguendo*, 2d Lt Johnson’s appellate affidavits did not supplement an issue he raised in clemency, the Air Force Court nevertheless erred by declining to consider these materials for its sentence appropriateness review. As the Navy Marine Court of Criminal Appeals (NMCCA) observed in *United*

⁸ *Frantz*, 2020 CCA LEXIS 404, at *48.

States v. Jacinto, where an appellant alleges cruel and unusual punishment in violation of the Eighth Amendment and Article 55, UCMJ, *Jessie* authorizes a CCA to attach outside-the-record documents associated with that allegation. 79 M.J. 870, 890 (N-M Ct. Crim. App. 2020). Because a CCA is statutorily required to only approve sentences that are correct in law and fact, the NMCCA concluded that it had “surely [had] the authority to attach those documents to the record and use them in considering whether a[n] [Eighth Amendment or Article 55, UCMJ] violation occurred and whether the sentence continues to be ‘appropriate.’” *Id.* The Air Force Court has made similar assumptions,⁹ with its Chief Judge going so far as to highlight the incongruity of a CCA considering certain matters when reviewing a sentence’s legality but declining to utilize those same matters to determine sentence appropriateness—which is a CCA’s “fundamental charge and mandate in accordance with the text of Article 66 [UCMJ] itself.” *United States v. Matthews*, No. ACM 39593, 2020 CCA LEXIS 193, at *17-18 (A.F. Ct. Crim. App. June 2, 2020) (unpub. op.) (J. Johnson, C.J., concurring in the result). This Court has yet to address the issue directly, although it is poised to do

⁹ *United States v. Lawler*, No. ACM 39699, 2020 CCA LEXIS 186, at *12 n.6 (A.F. Ct. Crim. App. May 28, 2020) (unpub. op.) (assuming that the Court “may consider the same declarations [it] considered to resolve Appellant’s claim under the Eighth Amendment and Article 55, UCMJ, to determine whether Appellant’s sentence is inappropriately severe.”) (citing *United States v. McGriff*, No. ACM 39306, 2018 CCA LEXIS 567, at *24-25 (A.F. Ct. Crim. App. 11 Dec. 2018) (unpub. op.), *rev. denied*, 78 M.J. 487 (C.A.A.F. 2019); *accord United States v. DeFalco*, No. ACM 39607, 2020 CCA LEXIS 164, at *13 n. 10 (A.F. Ct. Crim. App. 21 May 2020) (unpub. op.).

so in *Willman*, USCA Dkt. No. 21-0030/AF. In the interim, the Air Force Court's decision in the present case improperly expanded *Jessie's* holding, is contrary to the views of other CCAs, and is inconsistent with its own decisions.

WHEREFORE, 2d Lt Johnson respectfully requests that this Honorable Court grant review of this issue.

Respectfully Submitted,



MARK C. BRUEGGER
Senior Counsel
U.S.C.A.A.F. Bar No. 34247
Air Force Appellate Defense
Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
mark.c.bruegger.civ@mail.mil



SARA J. HICKMON, Capt, USAF
U.S.C.A.A.F. Bar No. 37207
Air Force Appellate Defense
Division
1500 W. Perimeter Road, Suite
1100
Joint Base Andrews NAF, MD
20762
(240) 612-4770
sara.hickmon@us.af.mil

Counsel for Appellant

**CERTIFICATE OF FILING AND
SERVICE**

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on September 6, 2023.

**CERTIFICATE OF COMPLIANCE WITH
RULES 21(b) and 37**

This Supplement complies with the type-volume limitation of Rule 21(b) because: this Supplement contains 6,780 words.

This Supplement complies with the typeface and type style requirements of Rule 37.

A handwritten signature in black ink, appearing to read 'M. Bruegger', with a stylized, flowing script.

MARK C. BRUEGGER

Senior Counsel

U.S.C.A.A.F. Bar No. 34247

Air Force Legal Operations Agency

Appellate Defense Division

1500 W. Perimeter Road, Suite 1100

Joint Base Andrews NAF, MD 20762

(240) 612-4770

mark.c.bruegger.civ@mail.mil