APPENDIX

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

United States,
Appellee

USCA Dkt. No. 25-0209/AF
Crim.App. No. 40486

v.

ORDER DENYING PETITION

Adam J.
Sherman,
Appellant

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is by the Court, this 30th day of September, 2025,

ORDERED:

That the petition is hereby denied.

For the Court,

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

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40486

UNITED STATES
Appellee

v.

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

Appeal from the United States Air Force Trial Judiciary

Decided 12 May 2025

Military Judge: Matthew P. Stoffel (arraignment and pretrial motions); Elijah F. Brown (trial); Nathan R. Allred (post-trial hearing).

Sentence: Sentence adjudged 16 March 2023 by GCM convened at Beale Air Force Base, California. Sentence entered by military judge on 23 May 2023: Dishonorable discharge, confinement for 13 years, reduction to E-1, and a reprimand.

For Appellant: Major Heather M. Bruha, USAF; Frank J. Spinner, Esquire.

For Appellee: Colonel Steven R. Kaufman, USAF; Lieutenant Colonel Thomas J. Alford, USAF;

Lieutenant Colonel J. Peter Ferrell, USAF; Major Jocelyn Q. Wright, USAF; Captain Heather H. Bezold, USAF; Mary Ellen Payne, Esquire.

Before RICHARDSON, MASON, and KEARLEY, *Appellate Military Judges.*

Senior Judge RICHARDSON delivered the opinion of the court, in which Judge MASON and Judge KEARLEY joined.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

RICHARDSON, Senior Judge:

A military judge sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of rape of a child in 2019 in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b.[1,2] The military judge sentenced Appellant to a dishonorable discharge, confinement for 13 years, reduction to the grade of E-1, and a reprimand.[3]

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[1] Unless otherwise noted, all references to the UCMJ, the Military Rules of Evidence (Mil. R. Evid.), and the Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] Appellant was acquitted of one specification of sexual abuse of the same child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b.

[3] Appellant requested deferment and waiver of forfeitures to support his wife and children. The convening authority granted these requests.

Appellant raises four assignments of error: (1) whether the finding of guilty is legally and factually insufficient; (2) whether the sentence to confinement is inappropriately severe; (3) whether relief is warranted because Appellant did not understand he had an opportunity to rebut post-trial victim matters prior to the convening authority's decision on action; and (4) whether trial defense counsel were ineffective when they "inexplicably failed to present favorable evidence at trial."[4] Also, though not raised as an assignment of error, we consider: (5) whether Appellant is entitled to relief for facially unreasonable appellate delay in accordance with *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), or in the alternative, Article 66(d)(2). UCMJ, 10 U.S.C. § 866(d)(2).

We have carefully considered issue (3) and find it does not require discussion or relief. *See United States v. Guinn*, 81 M.J. 195, 204 (C.A.A.F. 2021) (citing *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987)).

As to the remaining issues, we find no error that materially prejudiced Appellant's substantial rights.

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[4] Appellant initially raised issue (4) pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Appellate defense counsel personally argued issue (4) in their reply brief.

I. BACKGROUND

EM testified about three instances when Appellant sexually abused her. Appellant was found guilty of the second instance of sexual abuse; the first and third instances were not charged.[5] At the time of trial, EM was in sixth grade and still younger than 12 years.

EM lived with her father in Pennsylvania; her parents were divorced. EM's mother, AS, was married to Appellant. AS and Appellant lived near EM in Pennsylvania, then moved to California in 2018. The summer of 2018, Appellant and AS lived in base housing. Over the summer school break in 2019, EM stayed with AS, Appellant, and their three children in their home, a camper. In 2020, EM stayed with them not over the summer school break, but from August to October when she was enrolled in school online.

The first instance of sexual abuse EM detailed happened when she was around six years old, when Appellant and AS lived in Pennsylvania. Appellant told EM to get into the bed. Appellant rubbed some creamy substance "on [her] private area and with his mouth licked it." He also "touched [EM's] private area with his male part." Appellant and EM were unclothed from the waist down. Appellant told EM not to tell anybody, that it was their "secret."

The second instance EM described was over a summer when EM visited AS and Appellant in California. For around ten days during this time, the

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[5] The first instance was admitted pursuant to Mil. R. Evid. 414. It appears the Government charged the other instances as occurring in 2018 and 2019, but the evidence showed they occurred in 2019 and 2020. Appellant was found guilty of the specification with the time frame of "between on or about 1 January 2019 and on or about 31 December 2019."

family was vacationing at campgrounds in California; the other days they lived at a local campground. EM estimated she was seven or eight years old. One day in the camper, while her siblings were asleep and AS was out, Appellant asked, "Do you want to do our little secret?" Appellant removed EM's clothes from the waist down. Appellant got above[6] EM and "put his male parts in [EM's] lady private parts." EM was confused about what was happening. "It didn't really hurt, but it was just a very, like, weird feeling."

The third instance happened on a later visit to California. Appellant called EM into his bedroom and told her to remove her bottoms. He "began to touch [EM's vaginal area] with his male private parts and his hands," including putting his "boy part inside" EM. Appellant's mother entered the camper—but not the bedroom—briefly to drop something off, then left. Appellant told EM to put her clothes back on, and Appellant dressed himself.

EM clarified that both times in California, Appellant put his penis "more on the inside" of her vaginal canal than the outside, and that he did not ejaculate. EM testified her "eyes were probably closed for a majority of the time." After one of the instances in California, Appellant told EM not to tell anybody or she would not be able to go back to Pennsylvania to her dad.

Back in Pennsylvania, probably after the 2020 visit, EM and her father talked about her visit. She told her father that Appellant argued with her mother and yelled at the kids. EM's father asked whether

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[6] EM described Appellant as "crawling " and that "he got lower as he went."

Appellant ever hit or abused EM out of anger, and she said no. EM's father told EM that as long as she was safe out there, she would be going back the next summer.[7] Generally, EM looked forward to visiting her mother and siblings in California, but not Appellant.

Around February 2021, EM told her best friend XK what Appellant had done to her, but doubted XK "fully understood what [EM] told her."[8] XK thought EM used the word "rape." A few weeks later, at XK's bidding, EM told XK's stepmother CA, who, a couple months later, told EM's father and, in more detail, EM's stepmother. Within the month, EM underwent a child forensic interview and pediatric sexual assault examination—she was nine years old.

II. DISCUSSION

A. Legal and Factual Sufficiency

Appellant claims the Government did not prove all the elements beyond a reasonable doubt. Asserting a lack of legal sufficiency and factual sufficiency, Appellant focuses on the date and location of the sexual act. Additionally, for factual sufficiency, Appellant focuses on the believability of EM and her description of events.

1. Additional Background

CA was the first adult EM told about the abuse. CA testified about EM's demeanor: "You could see that

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[7] EM's father thought he made the comments after her last return from California in October 2020.

[8] EM was not sure whether she told her best friend about Appellant's actions before or after her father made the comment about safety.

she was upset. Her eyes were like glassed over. You could see that she was like getting teary-eyed and she was just pale." EM said to CA, "[Appellant] made me have sex." EM did not provide CA details; "[a]t that point [EM] broke down." Later, CA noticed "sex" and "what is sex" in XK's tablet history from February 2021.

EM's father testified about EM's bittersweet feelings towards her summers in California.

> She always desired to go to California to see her siblings because that was the one time of the year that she got to see them. And the same thing, she always desired, you know, to see her mom, and even the dog that was out there as well. Again, she always wanted to go, but the apprehension came at [Appellant's] . . . .

In response to questioning from trial defense counsel, EM's father stated, "There are still signs of trauma very frequently that occur with [EM]. So, I would say there are still long-lasting bits of trauma. I would say she's doing much better, but to say that there's no trauma would be absolutely false."

EM's stepmother testified about EM and Appellant. She remembered that in Pennsylvania when EM was around four years old, EM did not want to be dropped for visitation at AS's house when AS was not home but Appellant was. EM did not tell her stepmother why she was "scared" of Appellant. She also remembered that EM went to California in the summer of 2018, the summer of 2019, and the fall of 2020.

Dr. KM testified as an expert in the field of sexual assault forensic examination, as well as about her

examination of EM. She found no physical evidence of sexual assault. She described the sensation from a touch to the hymen as "uncomfortable" to "painful," and that the hymen will repair itself, with no scar. She generalized that, "kids don't understand what inside means." She noted that a penis that is "not completely erect or hard . . . [is] not causing as much injury as an erect penis would."

AS testified for the Defense. She confirmed that EM visited them over the summer of 2019 when they lived in the camper. She claimed she "never" left Appellant alone with EM during any of the California visits, but conceded during these visits they may have been alone when she showered and slept. EM's father testified that he believed AS to be untruthful.

2. Law

"Under Article 66(d), UCMJ, [10 U.S.C. § 866(d),] the Court of Criminal Appeals conducts a de novo review of the record for legal sufficiency, factual sufficiency, and sentence appropriateness." *United States v. McAlhaney*, 83 M.J. 164, 166 (C.A.A.F. 2020) (citation omitted). "Our assessment of legal and factual sufficiency is limited to the evidence produced at trial." *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citation omitted), *rev. denied*, 82 M.J. 312 (C.A.A.F. 2022).

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (citation omitted). "[T]he term 'reasonable doubt' does not mean that the evidence must be free from any conflict . . . ." *United*

States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (citation omitted). In 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. Bright*, 66 M.J. 359, 365 (C.A.A.F. 2008) (internal quotation marks and citations omitted). The evidence supporting a conviction can be direct or circumstantial. *See United States v. Long*, 81 M.J. 362, 368 (C.A.A.F. 2021) (citing Rule for Courts-Martial 918(c)) (additional citation omitted). "[A] rational factfinder[ ] could use his 'experience with people and events in weighing the probabilities' to infer beyond a reasonable doubt" that an element was proven. *Id.* at 369 (quoting *Holland v. United States*, 348 U.S. 121, 140 (1954)). The "standard for legal sufficiency involves a very low threshold to sustain a conviction." *King*, 78 M.J. at 221 (internal quotation marks and citation omitted).

For this case, "[t]he test for factual sufficiency is 'whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt.'" *Rodela*, 82 M.J. at 525 (second alteration in original) (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.'" *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (alteration in original) (quoting *Washington*, 57 M.J. at 399), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018).

To convict Appellant of rape of a child, the Government was required to prove the following elements beyond a reasonable doubt: (1) that Appellant committed a sexual act upon EM; and (2) that, at the time of the sexual act, EM had not attained the age of 12 years. *See* 10 U.S.C. § 920b.(a)(1); *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. IV, ¶ 62.b.(1). For the alleged "sexual act," the Government had to prove Appellant intentionally touched, not through the clothing, EM's genitalia with the intent to gratify his own sexual desire. *See* 10 U.S.C. § 920b.(h)(1); *MCM*, pt. IV, ¶ 62.a.(h)(1).

3. Analysis

We start first with Appellant's legal and factual sufficiency claims relating to the date and location of the offense. We agree that EM did not appear to "know what years the two instances in California happened." Appellant asserted, "After being pressed, [EM] said the first of two instances of sexual abuse occurring in California happened in a camper the first or second summer she was visiting." Indeed, the first instance of abuse in California was the summer of 2019. This was the second summer EM visited California, but the first summer visit where they stayed in the camper. A review of the evidence in the light most favorable to the Government makes clear that one instance of sexual abuse was in California in 2019—as alleged in Specification 2 of the Charge.

Next, we address Appellant's arguments for factual insufficiency. First, "the way [EM] described the alleged sexual assault does not follow common sense or the testimony of Dr. [KM]." We disagree. EM described Appellant getting above her before putting

his penis into her vaginal area. That EM did not notice Appellant using any lubrication and did not feel pain is not inconsistent with the expert testimony presented, or common sense. As a young child, EM may not have understood how far "inside" her body Appellant could have gone. EM's description is consistent with shallow or flaccid penetration and no ejaculation.

We reject Appellant's other arguments. Appellant asserts "zero signs of grooming," which ignores testimony that EM's reluctance to be alone with Appellant started when she was in Pennsylvania, as well as EM's testimony that his abuse of her started in Pennsylvania. Appellant asserts EM lied so she would not have to live in a camper in California, but our review of the evidence shows EM still wanted to visit her mother and siblings in California. Appellant suggests that XK researched sex to help EM make a credible claim of sexual abuse. Instead, we can interpret this evidence to show two pre-pubescent girls trying to understand and put words to what EM experienced as a result of Appellant's actions.

Viewing the evidence produced at trial in the light most favorable to the Prosecution, we conclude a rational trier of fact could have found the essential elements of the convicted offense beyond a reasonable doubt. *See Robinson*, 77 M.J. at 297–98. Furthermore, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we ourselves are convinced of Appellant's guilt beyond a reasonable doubt. *See Rodela*, 82 M.J. at 525.

B. Sentence Severity

Appellant contends that the sentence to "13 years' confinement—on top of a dishonorable discharge and [Appellant's] requirement to register as a sex offender—is inappropriately severe." Considering this Appellant and his offenses, we disagree.

1. Additional Background

In the presentencing proceedings, the Government presented a personal data sheet, six performance reports, three letters of counseling, and two letters of reprimand. EM presented a written unsworn statement. Appellant presented an Army Achievement Medal, four character letters, a photo presentation, and a written unsworn statement. No one testified in presentencing.

The Government argued the military judge should sentence Appellant to the mandatory dishonorable discharge, plus reduction to the grade of E-1 and "at least 20 years of confinement." Trial defense counsel argued for "an appropriate amount of confinement, no forfeitures, no reduction, and the mandatory dishonorable discharge." Trial defense counsel posited than an "appropriate" amount of confinement is that amount that would punish but also allow rehabilitation for reentrance as a productive member of society.

The military judge adjudged a dishonorable discharge, confinement for 13 years, reduction to the grade of E-1, and a reprimand.

2. Law

We review issues of sentence appropriateness de novo. *McAlhaney*, 83 M.J. at 167 (citing *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006)). Our authority

"reflects the unique history and attributes of the military justice system, [and] includes . . . considerations of uniformity and evenhandedness of sentencing decisions." *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (citations omitted). We may affirm only as much of the sentence as we find correct in law and fact. Article 66(d), UCMJ. In reviewing a judge-alone sentencing, we "must consider the appropriateness of each segment of a segmented sentence and the appropriateness of the sentence as a whole." *United States v. Flores*, 84 M.J. 277, 278 (C.A.A.F. 2024).

"We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (en banc) (per curiam) (alteration in original) (citation omitted). Although the Courts of Criminal Appeals are empowered to "'do justice[ ]' with reference to some legal standard," we are not authorized to grant mercy. *United States v. Guinn*, 81 M.J. 195, 203 (C.A.A.F. 2021) (quoting *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010)). In the end, "[t]he purpose of Article 66[ ], UCMJ, is to ensure 'that justice is done and that the accused gets the punishment he deserves.'" *United States v. Sanchez*, 50 M.J. 506, 512 (A.F. Ct. Crim. App. 1999) (quoting *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988)).

The maximum punishment authorized for rape of a child includes, *inter alia*, confinement for life without eligibility for parole and forfeiture of all pay and allowances. *See MCM*, pt. IV, ¶ 62.d.(1). A dishonorable discharge is mandatory. *Id.* Article 58b,

UCMJ, 10 U.S.C. § 858b, requires automatic forfeiture of all pay and allowances during a period of confinement when the sentence to confinement at a general court-martial is over six months.

A requirement to register as a sex offender is a collateral consequence of the conviction. *United States v. Palacios Cueto*, 82 M.J. 323, 327 (C.A.A.F. 2022) (quoting *United States v. Talkington*, 73 M.J. 212, 213 (C.A.A.F. 2014)). "The general rule concerning collateral consequences is that 'courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration.'" *Id.* (alteration in original) (quoting *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A. 1988)).

3. Analysis

Echoing *Sothen*, 54 M.J. at 296, "In maintaining uniformity and even-handedness, [Appellant] asks this Court to rely on the judges' experience distilled from years of practice in military law to determine 13 years' confinement in this case is inappropriately severe and to reassess the sentence." Using our experience, we disagree; Appellant's sentence is not inappropriately severe. In making this determination, we apply the general rule that we do not consider the collateral consequence of sex-offender registration as an aspect of the adjudged sentence. *See Palacios Cueto*, 82 M.J. at 327.

In support of his position, Appellant cites much of the same evidence he offered during his sentence hearing. After conducting a thorough review of the entire record, specifically considering the Appellant, the nature and seriousness of the offense, Appellant's

record of service, and all matters contained in the record of trial, we find Appellant's sentence is not inappropriately severe.

C. Ineffective Assistance of Counsel

Appellant personally contends his trial defense counsel should have called AC, a family friend of Appellant and AS, as a defense witness. Specifically, Appellant contends his trial defense counsel should have followed up on an entry in the Air Force Office of Special Investigations' (OSI) report of investigation (ROI) where AC claims to have heard a motive for EM to lie.

Additionally, both Appellant and his appellate defense counsel contend trial defense counsel should have elicited testimony from AS about Appellant's busy work schedule at the time of the allegations. Appellate defense counsel also assert trial defense counsel should have retrieved Appellant's employment records.

Appellant submitted a declaration from AS in support of his claim regarding his employment history. Based on Appellant's allegations, trial defense counsel—Major (Maj) NA and Captain (Capt) MG—each submitted a declaration. We consider the declarations submitted by AS and trial defense counsel in addressing Appellant's claims on this issue. *See United States v. Jessie*, 79 M.J. 437, 442 (C.A.A.F. 2020). We determined a post-trial evidentiary hearing was required to resolve any factual disputes between AS's assertions and trial defense counsel's assertions. *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); Article 66(f)(3), UCMJ, 10 U.S.C. § 866(f)(3). In our order directing the post-trial

hearing, we stated, "Appellant may file a brief addressing the military judge's findings of fact," and authorized the Government to respond to any such brief. After the hearing, Appellant and the Government each submitted a brief. We do not address matters in the briefs that go beyond the scope of our order to the military judge and his findings of fact thereon.

We find Appellant has not overcome the presumption of competent defense counsel.

1. Law

The Sixth Amendment[9] guarantees an accused the right to effective assistance of counsel. *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001). 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 assessing the effectiveness of counsel, we apply the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and begin with the presumption of competence announced in *United States v. Cronic*, 466 U.S. 648, 658 (1984). *See Gilley*, 56 M.J. at 124 (citation omitted).

The burden is on the appellant to demonstrate both deficient performance and prejudice. *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (citation omitted). "In determining whether an attorney's conduct was deficient we do not simply ask whether the attorney did everything possible that posed little or no risk to the client." *Palacios Cueto*, 82 M.J. at 329. "[C]ourts 'must indulge a strong presumption that counsel's conduct falls within the

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

wide range of reasonable professional assistance.'" *Datavs*, 71 M.J. at 424 (quoting *Strickland*, 466 U.S. at 689) (additional citation omitted). We consider the following questions to determine whether the presumption of competence 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) if defense counsel were ineffective, is there a reasonable probability that, absent the errors, there would have been a different result. *United States v. Palik*, 84 M.J. 284, 289 (C.A.A.F. 2024) (citing *Gooch*, 69 M.J. at 362). When considering the last question, "some conceivable effect on the outcome" is not enough; instead, an appellant must show a "probability sufficient to undermine confidence in the outcome." *Datavs*, 71 M.J. at 424 (internal quotation marks and citations omitted).

"[O]ur scrutiny of a trial defense counsel's performance is 'highly deferential,' and we make 'every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate conduct from counsel's perspective at the time.'" *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015) (omission in original) (quoting *Strickland*, 466 U.S. at 689). The burden is on the appellant to identify specific unreasonable errors made by his or her defense counsel. *United States v. Brownfield*, 52 M.J. 40, 42 (C.A.A.F. 1999) (citing *Strickland*, 466 U.S. at 689). We will not second-guess reasonable strategic or tactical decisions by trial defense counsel. *Mazza*, 67 M.J. at 475 (citation omitted). "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." *Datavs*, 71 M.J. at 424 (citations omitted). Counsel's advice to an accused, or counsel's "strategic" or "tactical" decision that is unreasonable, or based on inadequate investigation, can provide the foundation for a finding of ineffective assistance. *See Davis*, 60 M.J. at 474–75.

2. Additional Background and Analysis

a. Witness AC

During its investigation, OSI interviewed AC. This excerpt appears in OSI's summary of AC's statement:

> [AC] overheard [AC's son] ask [EM] about the allegations against [Appellant]. [AC] questioned if [EM] said the allegation to avoid traveling to [California (CA)] and [EM] replied her "friend" [no further information] told [EM] if she went to CA for the summer they would not be able to be together during the summer. [EM] then began to backtrack and deflect [AC's] questions.

AC testified on the defense motion to exclude Mil. R. Evid. 404(b) evidence. She testified about her relationship with Appellant, AS, and their children, and about Appellant's interactions with her children and AS's children. AC was not called as a witness on the merits or in pre-sentencing; however, AC provided a character letter for Appellant.

Through several witnesses, the Defense elicited testimony suggesting EM wanted to avoid going to California and, to that end, concocted the allegations against Appellant. For example, they brought out the following: when EM was in California over the

summer, she would be away from her best friend XK in Pennsylvania; the camper was hot and cramped, whereas EM had her own bedroom at home; in California EM had only one friend her own age, whom she saw sporadically, and had some responsibility for her young siblings; and Appellant and AS's parenting style was stricter than EM's father's.

In his brief to the court, Appellant claims that

> [w]ith respect to [AC], defense counsel had a clear duty to interview [AC] about the OSI ROI entry summarizing [AC's] interview in which she spoke to [EM] about [EM's] reason for not wanting to visit California during the summer. This would have further substantiated EM's motive to come up with a sexual assault claim in order to avoid any future potential visit to California.

In her declaration to this court, Capt MG indicates she interviewed AC twice before trial, the second time also with Maj NA. Capt MG said both interviews yielded the same information.

> [W]hen the Defense asked about whether [EM] ever disclosed to [AC] whether she either disliked visiting California or didn't want to spend her summers there, the Defense was provided with evidence to the *contrary*. In particular, [AC] informed the Defense that in her last conversation with [EM] *in 2021*, [EM] had expressed *excitement* and a *strong desire* to come back out to California in

> order to see her half-siblings and always seemed happy visiting the Shermans.[10]

The fact that EM wanted to return to California cuts both ways: EM wanted to go back to California, not avoid it, but it would mean going back to a person who sexually assaulted her. We find trial defense counsel provided a reasonable explanation for not presenting testimony from AC about whether EM desired to go to California. Moreover, we see no reasonable probability that, absent the claimed error, there would have been a different result. *Palik*, 84 M.J. at 289. The presumption of competence has not been overcome. *Id.*

b. Witness AS

Appellant's wife, AS, testified about how EM was never alone with Appellant. On direct examination by trial defense counsel, AS testified that she was "a stay-at-home mom" in 2018 and 2019. Additionally, Appellant's mother, NS, usually would accompany EM on her visits to California. AS agreed NS was a "constant presence" and the adult with whom she would leave the children when AS left the home without them.

Appellant asserts trial defense counsel should have examined AS during trial about Appellant's "limited opportunities . . . over a 39-day period in which he could have engaged in a sexual assault upon [EM]." Appellate defense counsel argue: "From her personal knowledge, [AS] could have testified in detail about [Appellant's] Air Force and civilian work schedules had she been appropriately prepared by

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[10] Maj NA's declaration uses these same words, only with different emphasis.

trial defense counsel. It would have been counsel's decision whether to offer corroborating evidence in the form of documents or text messages."

In her declaration to this court, AS states EM visited them for 39 days in the summer of 2019. "Had I been asked by the defense counsel I could have supplied very detailed information covering our family activities every day during that period, including documents and records that would have objectively corroborated my testimony." Appellant did not submit these documents or records, and AS does not further describe them. AS also states:

> I also could have supplied details about [Appellant's] work schedules in the Air Force and at [F] Motors, his off-duty civilian employment. I have records that would have corroborated my testimony. His work hours from 27 July to 13 August typically ran from the morning at [F], followed by reporting to Beale AFB at 2:30 pm and working late into the evening.

AS did not assert in her declaration that she ever told trial defense counsel that Appellant worked for F Motors. She ends her declaration:

> I cannot explain why the defense counsel did not seek this more detailed information and records. It would have been extremely easy to sit down with them and a calendar to go over every day of the 39-day period. I could have accounted for our daily activities with photographs, text messages, receipts and other documents that demonstrated what campgrounds we were in, how long it would have taken

> [Appellant] to travel to and from his work locations and timing.

AS did not assert she told trial defense counsel that she had such a calendar. In summary, AS contends that she had detailed documentation showing Appellant was not at the camper with EM at the time of the sexual assaults, and Appellant's trial defense counsel should have asked her for it.

Both Maj NA and Capt MG wrote at length in their declarations about their efforts to gather favorable evidence from Appellant and AS. They detail the times they asked Appellant and AS to provide them any evidence relating to the issues in the case. Capt MG stated:

> I even asked them to make a timeline showing when [EM] was visiting and when [AS] and [NS] were present as well as [Appellant's] work schedule at the time of [EM's] visits, in order to show when [Appellant] would (or more importantly would not have) had the opportunity to commit[ ] the alleged offenses. Both Maj [NA] and I repeatedly requested such evidence, whether as testimony from [AS], or documentary evidence. We never received any of that.

Maj NA summarized the Defense's efforts to get favorable evidence from Appellant and NS:

> From the very beginning of our representation of [Appellant], we requested that he and his wife provide us with *any* and *all* evidence that could've possibly existed that would've supported his claim of innocence at trial. Based on

> these conversations and the responsive documents and information provided to us, the Sherman's [sic] clearly understood this tasker and were ultimately the primary source of the evidence that the Defense utilized at trial. Stated differently, there was never any objective indicators to either myself [or] Capt [MG] that the Sherman's [sic] were in possession of the additional evidence that [AS] now claims was so readily available. While it is undisputed that Capt [MG] and I had a duty to investigate in preparation for trial, that duty does not require either of us to be clairvoyant about evidence that would've corroborated [AS's] testimony, especially when we had no objective indication that said evidence existed, if it exists as [AS] now maintains at all.

(Footnote omitted).

The military judge who conducted the fact-finding hearing this court ordered pursuant to *DuBay* and Article 66(f)(3), UCMJ, issued a five-page "*DuBay* Hearing - Findings of Fact" (Findings of Fact). The military judge found that Appellant's area defense counsel asked Appellant to provide "evidence that might be helpful in his case," "even if he did not think it was a big thing," and Appellant's senior defense counsel asked Appellant to provide "everything he possibly could related to the case." The military judge found that "[t]rial defense counsel had similar conversations with [AS] about the Appellant's case."

As to what was requested and provided, the military judge found: "Trial defense counsel asked

[AS] for information about the daily interactions between the Appellant and EM" and discussed "EM's biological father . . . and [Appellant and AS's] other children." "Appellant and/or [AS] provided a bill of sale for their camper, a video showing the layout of their camper, [AS's] Air Force enlistment contract, a binder[11] of documents related to EM and her trip to California, and the cell phone EM used when visiting California." (Footnotes omitted).

Regarding Appellant's employment, the military judge found: "Trial defense counsel asked the Appellant about his work schedule during the time period EM was visiting, to include asking about his employment at [F] Motors." "The Appellant told trial defense counsel that, during the time EM was visiting, he worked at [F] Motors in addition to being in the Air Force. The Appellant provided trial defense counsel the names of his employers at [F] Motors – Mr. and Ms. [M]. Appellant did not provide trial defense counsel with his work schedule." (Footnote omitted). "Trial defense counsel and [AS] also discussed the places where the Appellant was employed. [AS] responded to questions she was asked but did not offer additional information about the Appellant's schedule or whereabouts."

The military judge found that AS met with trial defense counsel "on several occasions" to discuss Appellant's case. AS had their contact information.

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11 The military judge found: "Trial defense counsel was also in receipt of a binder with over one hundred pages of information related to flight itineraries for EM's trip to California, campsite reservations for the summer of 2019, pictures, and copies of various text message conversations related to EM." (Footnote omitted).

"Trial defense counsel never refused to talk to [AS]." "Trial defense counsel accepted every piece of evidence [AS] offered them; trial defense counsel never refused any offer of evidence from [AS]."

Appellant has not demonstrated deficient performance of counsel regarding AS and Appellant's employment at F Motors. In her declaration, AS blames trial defense counsel for not getting from her "records" and "details about [Appellant's] work schedules in the Air Force and at [F] Motors, his off-duty civilian employment." However, trial defense counsel asked both Appellant and AS for any evidence that might help Appellant's case, and specifically asked Appellant about his employment at F Motors and asked AS about Appellant's places of employment. Appellant did not provide his trial defense counsel with his work schedule from F Motors. Appellant claims his trial defense counsel should have retrieved Appellant's employment records, and failure to do so was deficient performance. From our review of the record, however, it appears Appellant's trial defense counsel asked Mr. and Mrs. M about Appellant's employment history, but they did not—and perhaps could not—provide records. Even if we found deficient performance, we find no prejudice.

To determine prejudice, we ask whether, absent the claimed error, there is a reasonable probability that there would have been a different result. *See Palik*, 84 M.J. at 289. Even after a fact-finding hearing, the record provides no indication that Appellant's work schedule at F Motors would have provided an alibi defense or otherwise tended to show Appellant could not have committed the charged offense. The record shows that over several days in the summer of 2019, Appellant and his family were

together, vacationing in the camper, with NS nearby, which is consistent with EM's memory of the rape. Appellant has not shown a "probability sufficient to undermine confidence in the outcome." *Datavs*, 71 M.J. at 424 (internal quotation marks and citations omitted).

D. Timeliness of Appellate Review

1. Law

"[C]onvicted service members have a due process right to timely review and appeal of courts-martial convictions." *Moreno*, 63 M.J. at 135 (citing *United States v. Toohey*, 60 M.J. 100, 101 (C.A.A.F. 2004); *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37–38 (C.A.A.F. 2003)). Whether an appellant has been deprived of his due process right to speedy post-trial and appellate review, and whether constitutional error is harmless beyond a reasonable doubt, are questions of law we review de novo. *United States v. Prasad*, 80 M.J. 23, 29 (C.A.A.F. 2020) (citation omitted); *United States v. Arriaga*, 70 M.J. 51, 56 (C.A.A.F. 2011) (citing *Moreno*, 63 M.J. at 135).

A presumption of unreasonable delay arises when appellate review is not completed, and a decision is not rendered within 18 months of the case being docketed. *Moreno*, 63 M.J. at 142. A presumptively unreasonable delay triggers an analysis of the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Moreno*, 63 M.J. at 135 (additional citations omitted). *Moreno* adopted three types of prejudice arising from post-trial processing delay: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of a

convicted person's grounds for appeal and ability to present a defense at a rehearing. *Id.* at 138–39 (citations omitted).

"We analyze each factor and make a determination as to whether that factor favors the Government or the appellant." *Id.* at 136 (citation omitted). Then, we balance our analysis of the factors to determine whether a due process violation occurred. *Id.* (citing *Barker*, 407 U.S. at 533 ("Courts must still engage in a difficult and sensitive balancing process.")). "No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." *Id.* (citation omitted). However, where an appellant has not shown prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006).

A Court of Criminal Appeals may provide appropriate relief for excessive post-trial delay. Article 66(d)(2), UCMJ. Appropriate relief is not synonymous with meaningful relief. *United States v. Valentin-Andino*, __ M.J. __, No. 24-0208, 2025 CAAF LEXIS 248, at *7 (C.A.A.F. 31 Mar. 2025). "Although it is within a Court of Criminal Appeals' discretion to place its reasoning about Article 66(d)(2) relief on the record, it is not required to do so." *Id.* (citing *Winckelmann*, 73 M.J. at 16).

2. Procedural Background and Analysis

Appellant's case was docketed with the court on 28 June 2023. The delay in rendering this decision after 28 December 2024 is presumptively unreasonable. The reasons for the delay include: the

time required for Appellant to file his brief, which was filed with this court on 24 June 2024; the time required for the Government to obtain affidavits then file its answer on 12 September 2024; the time required to complete the fact-finding hearing ordered on 24 October 2024, with findings of fact dated 24 February 2025; and the time required for both parties to file their briefs regarding that hearing.[12] Appellant has made no specific assertion of his right to timely appellate review, nor claimed prejudice on this issue, and we find none. Because we find no particularized prejudice, and the delay is not so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system, we likewise find no due process violation. *See Toohey*, 63 M.J. at 362.

We also conclude there is no basis for relief under Article 66(d)(2), UCMJ, in the absence of a due process violation. Considering all the facts and circumstances of Appellant's case, we decline to exercise our Article 66(d), UCMJ, 10 U.S.C. § 866(d), authority to grant relief for the delay in completing appellate review.

III. CONCLUSION

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

Accordingly, the findings and the sentence are **AFFIRMED**.

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[12] Notably, Appellant filed for and was granted nine enlargements of time permitting his appellate defense counsel a full opportunity to review the case and submit Appellant's brief.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40486**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Adam J. SHERMAN	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

A military judge sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of rape of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b.[1,2] The military judge sentenced Appellant to a dishonorable discharge, confinement for 13 years, reduction to the grade of E-1, and a reprimand.

On 24 June 2024, Appellant submitted his assignments of error brief which included, inter alia, a claim that his trial defense counsel were ineffective when they "inexplicably failed to present favorable

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[1] Unless otherwise noted, all references to the UCMJ, and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] Appellant was acquitted of one specification of sexual abuse of the same child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b.

evidence at trial."[3] On 12 September 2024, the Government filed an answer to Appellant's assignments of error, and on 26 September 2024, Appellant's counsel filed a reply brief; both briefs addressed this claimed error. In addition to the briefs, the parties submitted declarations that addressed Appellant's complaint of ineffective assistance.[4]

I. BACKGROUND

Appellant was convicted of sexually abusing EM, his stepdaughter. Appellant is married to EM's mother, AS. The offense of which Appellant was convicted happened over the summer school break, when EM was visiting AS, Appellant, and their children at their home in a camper in California, where Appellant was stationed.

In his claim of ineffective assistance of counsel, Appellant asserts trial defense counsel should have examined AS during trial about Appellant's "limited opportunities . . . over a 39-day period in which he could have engaged in a sexual assault upon [EM]." Appellate defense counsel argue: "From her personal knowledge, [AS] could have testified in detail about [Appellant's] Air Force and civilian work schedules had she been appropriately prepared by trial defense counsel. It would have been counsel's decision

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[3] Appellant initially raised this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1992). Appellate defense counsel personally argued this issue in their reply brief.

[4] Appellant submitted a declaration from his wife, dated 23 June 2024. Appellant's trial defense counsel, Major NA, submitted a declaration dated 19 July 2024. Appellant's other trial defense counsel, Captain MG, submitted a declaration dated 5 August 2024. Appellant submitted his own declaration, but it related to a different asserted error.

whether to offer corroborating evidence in the form of documents or text messages."

In her declaration to this court, AS states EM visited them for 39 days in the summer of 2019. "Had I been asked by the defense counsel I could have supplied very detailed information covering our family activities every day during that period, including documents and records that would have objectively corroborated my testimony." AS also states:

> I also could have supplied details about [Appellant's] work schedules in the Air Force and at [FM] his off-duty civilian employment. I have records that would have corroborated my testimony. His work hours from 27 July to 13 August [2019] typically ran from the morning at [FM], followed by reporting to Beale AFB at 2:30 pm and working late into the evening.

She ends her declaration:

> I cannot explain why the defense counsel did not seek this more detailed information and records. It would have been extremely easy to sit down with them and a calendar to go over every day of the 39-day period. I could have accounted for our daily activities with photographs, text messages, receipts and other documents that demonstrated what campgrounds we were in, how long it would have taken [Appellant] to travel to and from his work locations and timing.

Both counsel for Appellant, Major (Maj) NA and Captain (Capt) MG, wrote at length in their

declarations about their efforts to gather favorable evidence from Appellant and AS. They detail the times they asked Appellant and AS to provide them any evidence relating to the issues in the case. Capt MG stated:

> I even asked them to make a timeline showing when [EM] was visiting and when [AS] and [Appellant's mother] were present as well as [Appellant's] work schedule at the time of [EM's] visits, in order to show when [Appellant] would (or more importantly would not have) had the opportunity to commit the alleged offenses. Both Maj [NA] and I repeatedly requested such evidence, whether as testimony from [AS], or documentary evidence. We never received any of that.

Maj NA summarized the Defense's efforts to get favorable evidence from Appellant and NS:

> From the very beginning of our representation of [Appellant], we requested that he and his wife provide us with *any* and *all* evidence that could've possibly existed that would've supported his claim of innocence at trial. Based on these conversations and the responsive documents and information provided to us, the Sherman's [sic] clearly understood this tasker and were ultimately the primary source of the evidence that the Defense utilized at trial. Stated differently, there was never any objective indicators to either myself of Capt [MG] that the Sherman's [sic] were in possession of the

> additional evidence that [AS] now claims was so readily available. While it is undisputed that Capt [MG] and I had a duty to investigate in preparation for trial, that duty does not require either of us to be clairvoyant about evidence that would've corroborated [AS's] testimony, especially when we had no objective indication that said evidence existed, if it exists as [AS] now maintains at all.

(Footnote omitted.)

II. DISCUSSION

Upon careful review of the filings, record of trial, and asserted error, we have found direct conflicts in the declarations on issues material to the ineffective assistance claim. We have determined that we cannot decide the legal issue without further proceedings. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). Therefore, we order a post-trial fact-finding hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967); *see also* Article 66(f)(3), UCMJ, 10 U.S.C. § 866(f)(3) (authorizing Courts of Criminal Appeals to "order a hearing as may be necessary to address a substantial issue").

Accordingly, it is by this court on this 24th day of October 2024,

ORDERED:

The record of trial is returned to The Judge Advocate General for referral to an appropriate convening authority for the purpose of directing a post-trial hearing in accordance with *DuBay*, 37 C.M.R. at 413, and Article 66(f)(3), UCMJ. A detailed military judge conducting the hearing shall have

broad authority to hear testimony, receive evidence, and enter findings of fact concerning Appellant's claim that trial defense counsel failed to gather and present favorable evidence relating to the whereabout of Appellant and his family, described *supra*. Appellate government counsel will ensure the military judge is provided with copies of the record of trial, Appellant's brief and reply brief, the Government's answer, AS's declaration, and the declarations of the trial defense counsel.

At a minimum, the following questions will be addressed during the hearing:

(1) Did trial defense counsel request from Appellant and/or AS evidence or leads to evidence relating to his case? Describe the circumstances of any such requests.

(2) Did trial defense counsel request from Appellant and/or AS evidence or leads to evidence specifically relating to Appellant's whereabouts during the time periods when EM was visiting at the camper in California? Describe the circumstances of any such requests.

(3) Did Appellant and/or AS offer to provide trial defense counsel with evidence (to include, *e.g.*, witness contact information, employment records, photographs, text messages, receipts) or leads to evidence relating to:

(a) Appellant's whereabouts during the timeperiods when EM was visiting at the camper in California? Describe the circumstances of any such offers; and

(b) the whereabouts of AS and/or her children during the time periods when EM was visiting at the

camper in California? Describe the circumstances of any such offers.

The military judge may address other matters that may arise during the fact-finding hearing that he or she deems pertinent to the issues in question. The military judge may also require the presence—including via virtual means—of any witnesses deemed necessary to address this matter. At the conclusion of the hearing, the military judge will provide this court with his or her written findings of fact.

We recognize the military judge has broad but not unlimited authority over the control of the courtroom, docketing, and rulings on continuances. *See United States v. Bowser*, 73 M.J. 889, 896 (A.F. Ct. Crim. App. 2014) (citations omitted), *aff'd*, 74 M.J. 326 (C.A.A.F. 2015) (mem.). Allowing for such matters, we find four months a sufficient period of time for the military judge to hold the post-trial hearing and, after the opportunity to review the transcript of the post-trial hearing, complete written findings of fact. Therefore, we require the Government to provide the military judge's written findings of fact to this court **not later than 24 February 2025**. Additionally, we require the Government to return the record of the post-trial hearing to this court for further review **not later than 30 days** after the military judge has completed the written findings of fact. Counsel for the Government shall promptly notify this court of any decisions of the military judge regarding docketing or continuances that may impact the ability of the Government to return the matters to this court by this deadline.

It is further ordered:

Appellant may file a brief addressing the military judge's findings of fact not later than 14 days following the court's receipt of the military judge's findings of fact and record of the post-trial hearing. The Government may file an answer brief not later than 14 days after the filing of Appellant's brief. If no brief is filed on behalf of Appellant, a brief on behalf of the Government may be filed within 14 days after expiration of the time allowed for the filing of a brief on behalf of Appellant.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

DEPARTMENT OF THE AIR FORCE

TRIAL JUDICIARY

UNITED STATES	)
	) *DuBAY* HEARING -
v.	)
	) FINDINGS OF FACT
ADAM J. SHERMAN	)
Senior Airman (E-4)	)
U.S. Air Force	) 21 February 2025

On 24 October 2024, the Air Force Court of Criminal Appeals (AFCCA) ordered a post-trial fact-finding hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). The hearing took place at Fort Leavenworth, Kansas, on 27-28 January 2025.

AFCCA directed a *DuBay* hearing to address, at a minimum, the following three questions:

> (1) Did trial defense counsel request from Appellant and/or AS evidence or leads to evidence relating to his case? Describe the circumstances of any such requests.
>
> (2) Did trial defense counsel request from Appellant and/or AS evidence or leads to evidence specifically relating to Appellant's whereabouts during the time periods when EM was visiting at the camper in California? Describe the circumstances of any such requests.
>
> (3) Did Appellant and/or AS offer to provide trial defense counsel with evidence (to include, *e.g.*, witness contact information, employment

records, photographs, text messages, receipts) or leads to evidence relating to:

> (a) Appellant's whereabouts during the time periods when EM was visiting at the camper in California? Describe the circumstances of any such offers; and
>
> (b) the whereabouts of AS and/or her children during the time periods when EM was visiting at the camper in California? Describe the circumstances of any such offers.

AFCCA's order makes clear that they are directing findings of fact only. As such, I will only provide findings of fact developed during the hearing responsive to the questions posed in

AFCAA's order. I will not provide legal analysis, as any legal analysis would exceed the order.

Considering the testimonial and documentary evidence admitted at the hearing, I make the following findings of fact.

FINDINGS OF FACT

Background

1. On 16 March 2023, the Appellant was convicted, contrary to his plea, at a general court-martial composed of military judge alone at Beale AFB, California, of one charge and one specification of rape of a child, in violation of Article 120b, Uniform Code of Military Justice.

2. At his court-martial, the Appellant was represented by Major (Maj) Nicholas Aliotta and Captain (Capt) Morgan Galusha.

3. Maj Aliotta currently serves as the Deputy Chief District Defense Counsel for District 2. He is stationed at Travis AFB, California. In late 2022, he was detailed to represent the Appellant at his court-martial.

4. Capt Galusha is currently stationed at Hurlburt Field, Florida, as the Chief of Adverse Actions at AFSOC/JA. From July 2021- July 2023, she served as the Area Defense Counsel (ADC) at Beale AFB. While serving as the ADC, Capt Galusha was detailed to represent the Appellant at his court-martial.

5. Ms. Amanda Sherman (Ms. A. Sherman) is the Appellant's spouse and EM's mother.

6. Ms. Nancy Sherman (Ms. N. Sherman) is the Appellant's mother.[1] In the spring/summer of 2019, Ms. N. Sherman lived with the Appellant and his family in their camper. On 27 July 2019, Ms. N. Sherman purchased a camper of her own.[2] She spent the rest of that summer living in her camper, which was parked next to the Appellant's camper.

7. Mr. Bruce McClasky is the owner of Frankenstein Motors. Around 2018, the Appellant began working at Frankenstein Motors when he was not on duty with

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[1] Prior to the Appellant's court-martial, Ms. N. Sherman accused the Appellant of abusing his biological children. These allegations were the subject of a defense motion in limine to exclude evidence pursuant to Military Rule of Evidence 404. The defense's pretrial motion was granted, and trial defense counsel elected to not pursue Ms. N. Sherman as a potential witness out of concern for potentially opening the door to the excluded evidence.

[2] *See* App. Ex. XXXVII; App. Ex. XXXVIII. Trial defense counsel never obtained any documentary evidence related to Ms. N. Sherman's camper purchase.

the Air Force. This employment continued until the Appellant's court-martial.

8. SrA Garrett Harkey enlisted in the Air Force in 2020. He is currently stationed at Tinker AFB, Oklahoma. In the summer of 2019, SrA Harkey was a high school student and worked at Frankenstein Motors with the Appellant. He saw the Appellant at Frankenstein Motors on nearly a daily basis. SrA Harkey does not recall being interviewed by trial defense counsel in 2023; however, he did provide a character letter for the Appellant.[3]

Did trial defense counsel request from Appellant and/or AS evidence or leads to evidence relating to his case? Describe the circumstances of any such requests.

9. Trial defense counsel requested from the Appellant and/or Ms. A. Sherman evidence or leads to evidence related to the Appellant's case.

> a) Capt Galusha began representing the Appellant around the time the report of investigation into the Appellant was published. During her representation, Capt Galusha had several conversations with the Appellant related to his case. As part of those conversations, Capt Galusha asked the Appellant to provide her with evidence that might be helpful in his case.
>
> b) Capt Galusha told the Appellant, as was her practice, that even if he did not think it was a big thing, to still provide it to her so that she could make the decision on whether it was

[3] *See* Def. Ex. F.

helpful to his case. She told him this included text messages, pictures, contact information of potential witnesses, and the like.

c) Maj Aliotta first reached out to Appellant via email in late 2022. In that email, Maj Aliotta introduced himself and requested a time to talk to the Appellant about his case.

d) Similarly, as was his practice, Maj Aliotta told the Appellant to provide trial defense counsel with everything he possibly could related to the case so that they could then make a battle plan for how to defend against the allegations.

10. Both trial defense counsel had several conversations with the Appellant, either in person or over the phone, in the leadup to trial. During those conversations, trial defense counsel told the Appellant to provide them anything and everything he had that he thought could help his case. Trial defense counsel asked that the Appellant be over inclusive in what he provided to them.

11. Conversations with Appellant also included trial defense counsel asking for names of potential witnesses.

12. Trial defense counsel had similar conversations with Ms. A. Sherman about the Appellant's case.

13. In response to trial defense counsel's requests for evidence, Appellant and/or Ms. A.

Sherman provided a bill of sale for their camper,[4] a video showing the layout of their camper,[5] Ms. A.

[4] Def. Ex. A.

[5] Def. Ex. B.

Sherman's Air Force enlistment contract,[6] a binder of documents related to EM and her trip to California,[7] and the cell phone EM used when visiting California.[8]

14. Appellant and/or Ms. A. Sherman also provided names of potential witnesses related to the case.

Did trial defense counsel request from Appellant and/or AS evidence or leads to evidence specifically relating to Appellant's whereabouts during the time periods when EM was visiting at the camper in California? Describe the circumstances of any such requests.

15. Trial defense counsel requested from the Appellant and/or Ms. A. Sherman evidence or leads to evidence specifically related to the Appellant's whereabouts during the time periods when EM was visiting the camper in California.

16. Trial defense counsel asked the Appellant about his work schedule during the time period EM was visiting, to include asking about his employment at Frankenstein Motors.

17. Trial defense counsel asked Ms. A. Sherman for information about the daily interactions between the Appellant and EM. They also asked Ms. A. Sherman about the Appellant's places of employment.

18. Trial defense counsel was also in receipt of a binder with over one hundred pages of information related to flight itineraries for EM's trip to California, campsite reservations for the summer of 2019,

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[6] Def. Ex. C.

[7] App. Ex. XXXI; App. Ex. XXXIII.

[8] *See* App. Ex. XXXV.

pictures, and copies of various text message conversations related to EM.[9]

Did Appellant and/or AS offer to provide trial defense counsel with evidence (to include, e.g., witness contact information, employment records, photographs, text messages, receipts) or leads to evidence relating to:

A. Appellant's whereabouts during the time periods when EM was visiting at the camper in California? Describe the circumstances of any such offers.

B. The whereabouts of AS and/or her children during the time periods when EM was visiting at the camper in California? Describe the circumstances of any such offers.

19. Appellant and Ms. A. Sherman provided trial defense counsel with evidence or leads to evidence related to the whereabouts of both Appellant and Ms. A. Sherman and her children during the time periods EM was visiting the camper in California. [10]

20. Trial defense counsel discussed with both Appellant and Ms. A. Sherman their family's whereabouts and what was going on when EM was visiting California.[11]

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[9] *See* App. Ex. XXXI; App. Ex. XXXIII

[10] *See* App. Ex. XXXI; App. Ex. XXXIII; Def. Ex. A; Def. Ex. C.

[11] Trial defense counsel reviewed the binder of evidence and EM's phone from the summer of 2019 that were provided to them by the Appellant and Ms. A. Sherman. *See* App. Ex. XXXI; App. Ex. XXXIII; App. Ex. XXXV. Trial defense counsel did not create a map or formal calendar chronology like those that were presented at the *DuBay* hearing. *See, e.g.,* App. Ex. XXXIV; App. Ex. XXXVI.

a) The Appellant told trial defense counsel that, during the time EM was visiting, he worked at Frankenstein Motors in addition to being in the Air Force. The Appellant provided trial defense counsel the names of his employers at Frankenstein Motors – Mr. and Ms. McClasky.[12] The Appellant did not provide trial defense counsel with his work schedule from Frankenstein Motors.

b) Ms. A. Sherman met with Appellant's trial defense counsel on several occasions, to include at least two formal pretrial interviews. During those meetings, they discussed the Appellant's case, which included Ms. A. Sherman answering questions about EM, EM's biological father, daily interactions between Appellant and EM, and the Shermans' other children.

c) Trial defense counsel and Ms. A. Sherman also discussed the places where the Appellant was employed. Ms. A. Sherman responded to questions she was asked but did not offer

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[12] Capt Galusha interviewed both Mr. and Ms. McClasky ahead of trial. She asked Mr. McClasky about Appellant's work schedule, including the days and hours he worked at Frankenstein Motors, with a focus on the time period that EM was visiting. Mr. McClasky did not provide any fidelity on Appellant's work schedule at Frankenstein Motors. Capt Galusha asked similar questions to Ms. McClasky and did not receive any more specificity on the Appellant's work schedule during the relevant time frame. Capt Galusha believes she asked Mr. and Ms. McClasky for timecards or other records that could establish the Appellant's schedule, but she cannot recall that for certain. The week of Appellant's court-marital, Mr. McClasky was present at Beale AFB and available to testify. He was told by someone to leave and was never called as a witness.

additional information about the Appellant's schedule or whereabouts.

d) Ms. A. Sherman had the contact information for Appellant's trial defense counsel.

e) Trial defense counsel never refused to talk to Ms. A. Sherman.

f) Trial defense counsel accepted every piece of evidence Ms. A. Sherman offered them; trial defense counsel never refused any offer of evidence from Ms. A. Sherman.

NATHAN R. ALLRED, Lt Col, USAF
Military Judge

A. No, I wasn't the only one.

CIVDC: No further questions.

MJ: Trial Counsel?

STC: Nothing beyond that.

MJ: Is this witness subject to recall?

CIVDC: We're calling-

MJ: Mr. Spinner?

CIVDC: I'm sorry. I was talking forward. Not subject to recall.

MJ: Trial Counsel?

STC: Yes, Your Honor.

MJ: Okay.

[The witness was duly warned, temporarily excused, and withdrew from the courtroom.]

MJ: Defense Counsel?

CIVDC: At this time, the defense calls Mr. McClaskey. His name is Bruce. His first name is Bruce, but he goes by Adrian.

MJ: Okay.

BRUCE ADRIAN MCCLASKEY

Civilian, was called as a witness for the defense, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY ASSISTANT TRIAL COUNSEL:

Q. Sir, could you please state your full name for the record?

23 A. Bruce Adrian McClaskey.

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1 Q. And sir, what's the current city and state that you live in?

2 A. Oroville, California.

3 ATC: Your witness.

4 **BY CIVILIAN DEFENSE COUNSEL:**

5 Q. Sir, do you have any problem with me calling you Adrian?

6 A. Not at all.

7 Q. Adrian, you're retired military?

8 A. Yes, sir.

9 Q. Can you briefly describe for the Judge your Air Force background?

10 A. Yes, sir. I joined in 1999. I came from active reserves. In California I was a U2

11 maintainer for 20 years. l3 deployments, a lot of time overseas, a lot of leadership positions.

12 really enjoyed my time in the miliary. Retired in 2019.

13 Q. And after you retired from the Air Force, what was - did you start a business?

14 A. Yes. So, about three years before I left the military, I went for a- I decided to step

15 out on my own and I opened Frankenstein Motors. During the last three years of service, I was

16 working day shift or swings, and I built a business. I build the auto repair shop. So, when I got

17 out of the military, I had income and a business.

18 Q. Where was Frankenstein Motors in relation to Beale Air Force Base?

19 A. About two minutes to the Southwest. Basically, right off the main road that comes

20 out of the base.

21 Q. Were you married at the time?

22 A. Yes, sir, I was married.

23 Q. And what's your wife's name?

79

1 A. Samantha McClaskey.

2 Q. Now, I assume you're aware of why you're here today, because you were a potential

3 witness in the trial of Airman Sherman in March of 2023. Is that correct?

4 A. That's correct. May I elaborate a little bit?

5 Q. No, I'm going to ask you – I'll ask the questions.

6 A. Absolutely.

7 Q. You're going to arrive at a term of phrase of, guided questions. So, at some point you

8 learned that Airman Sherman was going to be prosecuted, court-martialed and he was facing

9 trial.

10 A. Yes, sir.

11 Q. And so, somewhere along that way, you were presumably interviewed by defense

12 counsel.

13 A. Yes. I was - I believe I wrote two statements. I was interviewed by defense counsel,

14 and l believe I was subpoenaed but I don't remember. I was supposed to show up and I did show

15 up for a court on a day of court.

16 Q. Now, were you aware that there was a motion that would have been in January of that

17 year, and that the defense and the prosecution, with the concurrence Airman Sherman, agreed to

18 a stipulation of expected testimony from you and your wife? Were you aware of that?

19 A. No, I was not aware of that.

20 Q. In any event, you were not called to testify at any hearing in January of 2023?

21 A. No, that I'm aware of.

80

1 Q. About how many times did you have a face-to-face meeting with your [sic] defense

2 counsel in the case, if you recall? I know this is like six years ago or three years ago, and the

3 event was six years ago.

4 A. I recall speaking with them, but the number of times and really what it was about, is

5 fuzzy.

6 Q. Why are things - what is part of the reason things may be fuzzy?

7 A. Well, it's been a long time. There's been a lot of stuff that's gone by. During that

8 time I was dealing with some personal matters also, with my daughter and stuff like that. So, I

9 had a lot on my mind as I was navigating this. Other things were coming.

10 Q. In any event, did Airman Sherman work for you at some point?

11 A. Yes, Airman Sherman-worked for me.

12 Q. What is your recollection in terms of the approximate timeframe that he worked for

13 you?

14 A. I'd say it started probably early 2018. He came to get some work done and we hit it

15 off and we found out he was crew chief, and we hit it off as military and I realized he was a very

16 good mechanic and he started coming on and spending more time around, helping out until he

17 just became a part of the team.

18 Q. So, was it your understanding and one of the reasons the defense counsel wanted to

19 call you as a potential witness was because he worked for you and they were trying to track his

20 time, the days of the week that he worked for you?

21 A. Yes, sir.

22 Q. Now, was your wife a co-owner, was she active in the business?

81

1 A. Yes, she was a co-owner. She worked in the office the whole time. She was doing all

2 of the admin stuff, payroll and that kind of thing, marketing and accounting, yes, sir.

3 Q. So, in terms of the hours or the days that Airman Sherman showed up to work there,

4 did you keep a record yourself of his workdays and times or did your wife probably keep a better

5 record of the time he put in?

6 A. That would have been her role. My role in the business was mainly just being there,

7 putting things together, making sure stuff works.

8 Q. Now, I want to focus your attention on July and August of 2019. Did the defense,

9 who may questioned you or talked to you, did they focus in on the weeks of - starting the 5th of

10 July through about the 15th of august. Did they draw your attention to those weeks? When you

11 were interviewed, were you and your wife interviewed together or separate?

12 A. Separately.

13 Q. So, anyway, did they focus you on those particular dates and times regarding whether

14 you could, in 2023, reconstruct what the work hours were for Airman Sherman in that time

15 period of 2019?

16 A. Let me think for a moment, if you don't mind. Go back to kind of- it's been a while.

17 Q. Okay.

18 A. I remember them talking about work schedules and about character. I only remember

19 context of- it's been a while. I remember the context of the interviews, but what they actually

20 asked me, I wouldn't be able to sit up here and raise my hand and tell you exactly the words they

21 said. The context was, did he work for you, when did he work, what was the hours, kind of how

22 he interacted, that kind of thing with the timeframes. I don't believe there was directed, during

23 this time, during that time. I think it was more broad view of when he was there on a daily basis.

82

1 Q. Well, based on your best recall, what is your memory, as far as whether he came to

2 work before - he came to work for you before he went to Beale or that he worked at Beale and

3 then came to work for you or both? What do you recall about that?

4 A. So, his schedule was based on his Air Force schedule. So, say he worked days,

5 because of the location where he lived, it was so far away, he would actually come - if he

6 worked day shift, he would come to shop in uniform and change in uniform and start working.

7 What he did was he was like a turnover guy, because all of my employees stop at 5, and we

8 would update at 3 or 4. So, he would take that information and keep going on the important jobs.

9 And then Friday, Saturday, Sunday, he'd come in Friday, find stuff to do for the weekend, to get

10 everything finished up for the week. Then on into Saturday, Sunday, get that done and set us up

11 for the next week. He was really a integral part, he was there all the time. When he worked

12 swing shift, he'd come in in the morning and work with the guys in the morning, and then he'd

13 change and go to work. He'd shower sometimes and then change and go to work from there.

14 But he didn't - when he came from - when he was involved with the Air Force, he came straight

15 to the shop every time because the distance to the place where he lived, it was just easier for him

16 to do that.

17 Q. And about how many days a week would he show up at your place?

18 A. Most. It was - when he was working really full time, he was there almost every day.

19 I was also, building the business. He was there with me, we worked together constantly. On

20 days off, I remember he would leave to do stuff with the family and stuff like that. He'd ask me,

21 hey, I've got this scheduled, I've got that scheduled. But he was there just like I was. We were

22 building the business together.

83

1 Q. So, do you recall, in relation to the trial, what was the last time the defense counsel

2 prepared you to testify at the trial?

3 A. It would have been in the days right before the trial. They spoke to me a couple of

4 times. I remember them, similar to how you've talked to me. Similar to how we've talked. I

5 remember a similar type of conversations leading up to it. And my understanding the whole time

6 was, I'm showing up to do what we're doing here, until I walked into the building and sat there

7 for [inaudible]

8 Q. So, you showed up for trial. Were you just there one day or multiple days at the trial

9 proceeding?

10 A. I was there the first day, I believe. Let me think. I don't know if I was there the first

11 day or not. I was there the day they told me to be there.

12 Q. Right. And after you got there, how long did you wait - well, first of all, then they

13 told you to leave, correct?

14 A. Yes. They - would you like me to elaborate on both of those questions?

15 Q. Yes.

16 A. Okay. So, I showed up and I was speaking with Amanda. And we were in the main

17 lobby room, and people were going in and out and things were getting going. I believe it was the

18 defense or one of the paralegals came out and spoke to me, well, we don't need you, you need to

19 go. We didn't even talk about it, you need to go. We've got your statement, we've done all of

20 these things. And it was almost like somebody just said, go, have a nice day. I was making

21 phone calls from the parking lot, trying to figure out what had happened. It's just a very odd

22 thing to have somebody come up and say like, kick rocks, because that's what it felt like. I felt

23 like he just came up and said, kick rocks, get out of here. No explanations, nothing.

84

1 Q. So, you were prepared in March 2023, you were present, and you were ready to

2 testify regarding his work schedule at your business, beyond just the 2019 timeframe, but for the

3 prior years, 2018, 2019 that he worked there.

4 A. Yes.

5 Q. To this day, have you been given any explanation as to why you were released and

6 did not testify?

7 A. No, I didn't hear from anybody after that until we've spoken. That was the end of the

8 communication.

9 Q. Now, I want to talk about a slightly sensitive area. You're in the middle of getting a

10 divorce, correct?

11 A. Yes, sir.

12 Q. Did your wife - did she also show up and did they want - or was it just you that

13 showed up to testify, if you recall?

14 A. I know that they interviewed, got statements, and I believe she was supposed to

15 testify. I don't remember being there at the same time as her, though. But I was there. I'm not-

16 it's been a while, right. But I don't remember if she was there at that moment to testify or not. I

17 remember just being really confused because of the way they had set everything up and then

18 when it was all of a sudden over. I have a big memory of that was a lot of confusion about this

19 happening.

20 Q. Well, at any point did she share with you that she testified?

21 A. No, she did not testify either.

22 Q. And then finally, the sensitive area. Are you undergoing a divorce right now?

23 A. Yes, I'm in the middle of a divorce right now.

1 Q. And is it acrimonious?

2 A. I'm not exactly sure of the definition of that word, but in context, no. I would say it's

3 probably not. It's not good.

4 Q. But do you know if any records still exist in 2025 that go back to work schedules in

5 2019?

6 A. Would you like for me to elaborate on why we don't have that?

7 Q. Sure.

8 A. Judge, last fall I presented divorce paperwork to my soon to be ex-wife. She was a

9 business co-owner and ran all of our accounts and everything. She locked everything down,

10 cancelled all of our services and all of our stuff is online cloud-based stuff. So, every record

11 from my business that was electronic is now gone an my business no longer exists. So, I don't

12 have those records.

13 MJ: Thank you.

14 Q. If you had been asked for copies of work records in 2023, when you were prepared to

15 testify, would those record have been available at that time?

16 A. Yes, they would have been available at that time. All that stuff was electronically

17 kept. Every job he worked on was assigned in the system and is absent.

18 CIVDC: No further questions, Your Honor.

19 MJ: Thank you. Trial Counsel?

20 TC: Thank you, Your Honor

21 **CROSS-EXAMINATION**

22 **BY TRIAL COUNSEL:**

23 Q. Good afternoon, Mr. McClaskey.

1 A. Good afternoon, Captain.

Q. I want to talk to you more about the date you showed up for. Was the hearing that

you showed up to testify at in January or was it in March?

A. March.

Q. It was in March. And how do you know that it was in March?

A. That's when l showed up, I believe. I couldn't tell you, but that's when they said it

was.

Q. So, you showed up at the hearing because trial defense counsel told you that they

needed you to testify at that hearing?

A. They gave a subpoena to me. I was actually subpoenaed.

Q. So, you were served the subpoena. So, they had been preparing or you to testify at

that hearing which you were actually subpoenaed.

A. Yes, they had been preparing me.

Q. And you said that they had reached out to you a couple of times.

A. Yes.

Q. And they talked to you about Senior Airman Sherman's work schedule.

A. Yes.

Q. And like when you hired him?

A. Yes.

20 Q. And testified on direct that it was primarily your wife that kind of ran the scheduling

21 and things, right?

22 A. She really kind of tracked those things.

23 Q. And to your knowledge, they interviewed her, as well?

1 A. Yes.

2 Q. When they asked you about his work schedule, what did you tell them?

3 A. My assumption would be the same thing I told you guys. I don't remember the exact

4 conversation, but his schedule is his schedule. I wouldn't have told them anything different.

5 Q. That's fair. So, you would have told them that you hired him sometime in 2018?

6 A. Yes, early 20 I 8.

7 Q. That that when you met him, he was just a customer, showing up at the shop?

8 A. Yes.

9 Q. And that you guys hit it off.

10 A. Yes.

11 Q. And you decided to bring him on for a few jobs in the beginning?

12 A. Yes.

13 Q. And it progressed into him working there more often.

14 A. Yes.

15 Q. But in the beginning, in 2018 into 2019, it was still something like off and on jobs.

16 A. No.

17 Q. No. So, when did it change between ---

18 A. Very quickly in 2018.

19 Q. In 2018?

20 A. Yes. I saw how quickly he grabbed on to it.

21 Q. So, his schedule when he worked there, was he living - let me back up. Was he

22 living in base housing on Beale when he first started working there?

23 A. Yes.

1 Q. And at some point, are you aware that he moved into a camper?

2 A. Absolutely.

3 Q. And that they would take this camper up to Lake Minden or another RV park.

4 A. Yes. They were on a schedule with, I believe it was called A Thousand Trials. And

5 you pay a yearly fee, and you can stay at a certain park for a certain period of time and then you

6 have to move.

7 Q. And so, was it harder for him to come into work once they had moved further away in

8 the camper?

9 A. No.

10 Q. It wasn't harder for him to come in?

11 A. It was easier.

12 Q. It was easier for him to come in.

13 A. Yeah.

14 Q. When he lived in the camper, your testimony is that when he lived in the camper, he

15 would not come in less often than when he lived on Beale Air Force Base?

16 A. That is correct.

17 Q. Sir, do you remember talking to myself and Major Simpson yesterday?

18 A. Yes.

19 Q. And yesterday you told us that when he moved into the camper, that he came in less

20 often because it was further away?

21 A. Let me make sure I'm clear on this, okay?

22 Q. Uh huh.

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1 A. He lived further away, so he came in directly from work instead of going to the

2 camper, because it would have been more driving, more time, for him to go home. So, it made it

3 harder for him to go home, but he actually came to work.

4 Q. Yes, sir. But he came in to work less days. That's what you told us yesterday,

5 correct?

6 A. I don't believe the context of our conversation is translating properly. I may have - I

7 may not have---

8 Q. Did he or did he not come in less days when he lived further away?

9 A. He came in the same amount. It didn't change much. He just didn't go home.

10 Q. Let me ask it this way. Was he there every day?

11 A. Not every day, no.

12 Q. He would take time off.

13 A. Yes.

14 Q. And he would go home to his family in the evening.

15 A. He would take time off for things to do with the family.

16 Q. Would he go home at night?

17 A. [no response]

18 Q. Yes or no, would he go home at night?

19 A. I can't answer that question.

20 Q. Would he leave work, with you, after he finished the job?

21 A. Yes.

22 Q. And after he had been done working at the Air Force?

23 A. Yes.

1 TC: Your Honor, may I have a moment?

2 MJ: You may.

TC: I have no further questions, Your Honor.

MJ: Okay. Defense?

CJVDC: Just a couple of brief questions.

MJ: Okay.

REDIRECT EXAMINATION

BY CIVILIAN DEFENSE COUNSEL:

Q. Do you know who [EM] is?

A. Yes, sir.

Q. Who is she?

A. It would be his step-daughter.

Q. And in talking about when he took time off, I think in our interview yesterday, you talked about going to Pio Pico or something like that?

A. So, I remember him going to Yosemite. They took trips. So, when [EM] was out, he would come in when the kids were doing other stuff. But that's the time when they would take trips, they would go places.

Q. So, you do recall there was a time - although you don't recall the date, July or August 2019, but you know there was a time he went to those locations.

A. Yes, sir.

Q. And you recall they were at the same time that [EM] was with him.

A. Yes. The purpose of the trips was because she was visiting, and they could go and do

23 things with the family, to go on adventures and stuff.

91

1 Q. But then when he was nearby, Lake Minden, Lake of the Springs, he would be

2 working, coming to work.

3 A. Yes.

4 Q. Sufficiently nearby to work.

5 A. Yes.

6 CIVDC: Okay, I have no further questions, Your Honor.

7 MJ: Trial Counsel?

8 TC: No recross, Your Honor.

9 MJ*:* Oaky. Is this witness subject to recall?

10 CIVDC: Yes, Your Honor.

11 [the witness was duly warned, temporarily excused, and withdrew from the courtroom.)

12 MJ: Defense Counsel?

13 DC: Yes, Your Honor, I do have a copy of Appellate Exhibit XXXIII and XXXV.

14 MJ: Okay.

15 DC: Handing a copy to the government, the original to the court reporter, and a working

16 copy for Your Honor.

17 MJ: Thank you.

18 DC: Your Honor, at this time, the defense calls Senior Airman Garrett Harkey.

MJ: Okay.

[END OF PAGE]

SENIOR AIRMAN GARRETT ALONZO HARKEY

U.S. Air Force, was called as a witness for the defense, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY ASSIST ANT TRIAL COUNSEL:

Q. Sir, could you please state your full name and rank for the record?

A. Senior Airman Garrott Alonzo Harkey.

Q. And what is your current duty station, sir?

A. Tinker, Oklahoma.

ATC: Defense Counsel, your witness.

BY APPELLATE DEFENSE COUNSEL:

Q. Airman Harkey, were you in the military in July of 2019, in the summer?

A. No.

Q. When did you enlist?

A. September 2020.

Q. Where did you live in the summer of 2019?

A. In Linda, California.

Q. Do you know Senior Airman Adam Sherman?

19 A. Yes.

20 Q. How do you know him?

21 A. Through Frankenstein Motors.

22 Q. May I ask you to speak up, it's a little bit hard to hear you. Where did you say that

23 you met him?

1 A. At Frankenstein Motors.

2 Q. Did you work together?

3 A. Yes.

4 Q. So, I'm going to focus specifically on the summer of 2019. When would you see

5 Airman Sherman?

6 A. In the summer of 2019, I would see him when I was working at Frankenstein Motors.

7 He would come in - when he was on day shift, he would help closing the shop, getting things

8 ready for the weekend, basically, like clean-up. That's when I would see him. If he was on the

9 opposite shift, he would come in and work all day, basically, and then change into uniform there

10 and go to work at Beale.

11 Q. So, when you said-he worked days, you mean when he worked days at Frankenstein

12 Motors?

13 A. No, in the military. If he was on day shift in the military, he would be at Frankenstein

14 Motors after military.

15 Q. And when he worked nights, when would he be at Frankenstein Motors?

16 A. During the day.

17 Q. How often - how many days a week would you say you saw him?

18 A. Almost every day.

19 Q. And when you did work with him, how often would you see him change into a

20 uniform, one way or the other?

21 A. It would be once or twice in the day. He would change there, to go to work, come

22 back to work or to Frankenstein Motors, get out of his uniform and then start working again.

23 Q. So, when he worked days at Beale, he would come in after work at Beale.

1 A. Yes.

2 Q. And he would change out of his uniform.

3 A. Yes.

4 Q. And when he worked nights at Beale, he would come in, not in uniform, and work at

5 Frankenstein Motors?

6 A. No, he'd still change after that.

7 Q. Right. So, when he worked nights at Beale, he would not be in uniform when he

8 worked at Frankenstein Motors and then change to go to work at Beale. Is that right?

9 A. Yes.

10 Q. To the best of your recollection, did defense counsel ever interview you for Airman

17 Sherman's trial?

12 A. As in this one?

13 Q. No. ln 2023, do you recall if trial defense counsel ---

14 A. No, no.

15 Q. You don't recall or they didn't interview you?

16 A. I don't recall.

17 Q. Did - do you remember providing a character statement for Airman Sherman?

18 A. Yes.

19 Q. And for the record, that's Appellate Exhibit F [sic]. So, you were contacted to give a

20 character letter for Airman Sherman.

21 A. Yes.

22 Q. And you provided that to the defense?

23 A. Yes.

95

1 Q. And you---

2 MJ: Defense Counsel, I think that's Defense Exhibit F.

3 DC: Yes. I apologize, Your Honor, thank you. It's Defense Exhibit F.

4 Q. At any point in time in 2023, did you ever testify in Airman Sherman's court-martial?

5 A. No.

DC: Your Honor, a moment to confer with co-counsel?

MJ: You may.

[Defense counsels conferred.]

Q. Airman Harkey, just for a little bit of context. Were you in high school during that timeframe, 2019?

A. Yes.

Q. But in the summers is when you worked for -- the summer of 2019 is when you worked for Frankenstein Motors. Is that right?

A. Yes.

DC: Your Honor, I have nothing further.

MJ: Trial Counsel?

ATC: Yes, Your Honor.

CROSS-EXAMINATION

BY ASSIST ANT TRIAL COUNSEL:

Q. Senior Airman Harkey, you were self-described as the shop kid at Frankenstein Motors. Is that correct?

A. Yes.

Q. So, and by that, you were just kind of a young high school kid that worked there in your off time, correct?

A. Yes.

Q. So, you weren't an administrator or manager there?

A. No.

Q. You weren't tracking Senior Airman Sherman's work hours?

A. No.

Q. He didn't clock in and out with you?

A. No.

Q. The shop, when did that close on a daily basis?

A. 5:00 pm.

Q. So, it wasn't a 24/7 operation?

A. No.

Q. And despite your testimony here today, you don't know the exact dates and times that

Airman Sherman was at the shop, do you?

A. No.

ATC: No further questions for this witness.

MJ: Okay.

DC: Your Honor, may I have just a moment?

MJ: You may.

[Defense counsels conferred.]

DC: Thank you, Your Honor.

REDIRECT EXAMINATION

BY APPELLATE DEFENSE COUNSEL:

3 Q. So, while the shop closed to the public at 5:00 pm, when Airman Sherman came in

4 and worked nights at Frankenstein Motors, was he working past 5:00 pm?

5 A. Yes.

6 Q. You were just asked if you know the exact dates and times that Airman Sherman

7 worked that summer and you said, no. Is that right?

8 A. Yes.

9 Q. But if you were asked in 2023, close in time, would you have a better chance of

10 knowing, potentially, when you worked with him?

11 A. 2023, I was in Korea.

12 Q. But if you had been asked two years ago about when you worked with Airman

13 Sherman, would you have been able to look at your phone at text messages and photographs and

14 have a better idea of when you worked with Airman Sherman?

15 A. Yes.

16 DC: Nothing further, Your Honor.

17 MJ: Trial Counsel?

18 ATC: One moment, Your Honor.

19 MJ: You may.

20 [Trial counsels conferred.]

21 ATC: Nothing further, Your Honor.

22 MJ: Okay. Subject to recall?

23 DC: Yes, Your Honor.

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1 [The witness was duly warned, temporarily excused, and withdrew from the courtroom.]

2 MJ: Defense Counsel?

3 CIVDC: That's it, Your Honor, we don't any other evidence to present at this

4 proceeding, unless in rebuttal to the government's case.

5 MJ: We've been going for about an hour, it looks like. So, why don't we take a ten-

6 minute recess and then, Trial Counsel, we'll pick up with you case when we get back. Court's in

7 recess for 10 minutes. Thanks, carry on.

8 [The Article 39(a) session terminated at 1411 , 27 January 2025.]

9 **[END OF PAGE]**

10