

No. _____

IN THE
Supreme Court of the United States

JONATAN O. ROSARIO-MARTINEZ; LEO J. NAVARRO
AGUIRRE; JESUS MARTINEZ; ALEXANDER L. DRISKILL,
Petitioners,

v.

UNITED STATES,
Respondent.

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

PETITION APPENDIX

FREDERICK J. JOHNSON
DWIGHT H. SULLIVAN
United States Air Force
Appellate Defense Div.
1500 West Perimeter Road
Suite 1100
Joint Base Andrews, MD 20762
240-612-4770

KYLE W. RODEWALD
Counsel of Record
KATHERINE E. MALCOLM
Navy-Marine Corps
Appellate Defense Div.
1254 Charles Morris St., S.E.
Building 58, Suite 100
Washington, DC 20374
(202) 685-7296
Kyle.w.rodewald.mil@us.navy.mil

Counsel for Petitioners

APPENDIX

TABLE OF CONTENTS

Court of Appeals for the Armed Forces Opinion, <i>United States v. RosarioMartinez</i> , No. 25-0102 (Jun. 2, 2026).....	1a
Navy-Marine Corps Court of Criminal Appeals Opinion, <i>United States v. RosarioMartinez</i> , No. 202300154 (Dec. 18, 2024)	31a
Court of Appeals for the Armed Forces Order Denying Petition for Grant of Review, <i>United States v. Driskill</i> , No. 26-0087/AF (Apr. 16, 2026)	56a
Air Force Court of Criminal Appeals Opinion, <i>United States v. Driskill</i> , No. ACM 39889 (rem) (Nov. 14, 2025)	57a
Court of Appeals for the Armed Forces Opinion, <i>United States v. Driskill</i> , No. 23-0066 (Mar. 4, 2024)	89a
Air Force Court of Criminal Appeals Opinion, <i>United States v. Driskill</i> , No. ACM 39889 (f rev) (Aug. 23, 2022)	111a
Air Force Court of Criminal Appeals Opinion, <i>United States v. Driskill</i> , No. ACM 39889 (Dec. 14, 2021).....	162a

Court of Appeals for the Armed Forces Order Denying Petition for Grant of Review, <i>United States v. Martinez</i> , No. ACM 39903 (Mar. 25, 2026)	174a
Air Force Court of Criminal Appeals Opinion, <i>United States v. Martinez</i> , No. ACM 39903 (reh)(f rev) (Oct. 31, 2025).....	175a
Air Force Court of Criminal Appeals Remand Order, <i>United States v.</i> <i>Martinez</i> , No. ACM 39903 (reh) (Dec. 16, 2024).....	212a
Air Force Court of Criminal Appeals Opinion, <i>United States v. Martinez</i> , No. ACM 39903 (f rev) (May 31, 2022)	217a
Air Force Court of Criminal Appeals Opinion, <i>United States v. Martinez</i> , No. ACM 39903 (May 21, 2021)	330a
Court of Appeals for the Armed Forces Order Denying Petition for Grant of Review, <i>United States v. Navarro</i> <i>Aguirre</i> , No. 26-0100/AF (Feb. 25, 2026).....	341a
Air Force Court of Criminal Appeals Opinion, <i>United States v. Navarro</i> <i>Aguirre</i> , No. ACM 40354 (rem) (Nov 25, 2025).....	342a

Court of Appeals for the Armed Forces Opinion, <i>United States v. Navarro</i> <i>Aguirre</i> , No. 23-0146 (Jul 24, 2025).....	351a
Air Force Court of Criminal Appeals Opinion, <i>United States v. Navarro</i> <i>Aguirre</i> , No. ACM 40354 (Mar 11, 2024).....	380a

Constitutional, Statutory, and Regulatory Provisions Involved

1. Due Process Clause of the Fifth Amendment, U.S. CONST. amend. V	412a
2. Jury Trial Clause of the Sixth Amendment, U.S. CONST. amend. VI	412a
3. Article 16, Uniform Code of Military Justice, 10 U.S.C. § 816.....	412a
4. Article 51(a), Uniform Code of Military Justice, 10 U.S.C. § 851(a).....	414a
5. Article 52(a), Uniform Code of Military Justice, 10 U.S.C. § 852(a).....	414a
6. Rule for Courts-Martial 501(a), Manual for Courts-Martial, United States (2024 ed.)	415a

7. Rule for Courts-Martial 921(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2024 ed.)	416a

1a

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

UNITED STATES
Appellee

v.

Jonatan O. ROSARIOMARTINEZ, Corporal
United States Marine Corps, Appellant

No. 25-0102

Crim. App. No. 202300154

Argued November 19, 2025—Decided June 2, 2026

Military Judges: Ryan C. Lipton (arraignment),
Benjamin A. Robles (motions), and Adam L.
Workman (trial and post-trial)

For Appellant: *Captain Katherine Malcolm*, USMC
(argued).

For Appellee: *Lieutenant Erin H. Bourneuf*, JAGC,
USN (argued); *Major Mary Claire Finnen*, USMC, and

Brian K. Keller, Esq. (on brief); Colonel Iain D. Pedden, USMC.

Judge HARDY delivered the opinion of the Court, in which Chief Judge OHLSON, Judge SPARKS, and Judge JOHNSON joined. Judge MAGGS filed a separate opinion concurring in the judgment.

Judge HARDY delivered the opinion of the Court.

The Government charged Appellant with two specifications of sexual assault under Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920. A general court-martial consisting of an eight-member panel with enlisted representation acquitted Appellant of the first specification but found Appellant guilty of the second specification. Based on information learned during a “hot wash” session¹ with the senior panel member, Captain (Capt) Sierra, Appellant’s military trial defense counsel came to believe that Appellant’s panel misunderstood how nonunanimous verdicts and hung juries work in the military justice system and erroneously thought that a minimum of six votes were required to convict or to acquit Appellant on each charge. Appellant’s defense counsel obtained an affidavit from Capt Sierra affirming this misunderstanding and further stating that the panel initially conducted several rounds of

¹ A hot wash is a term used by military personnel for an informal, post-trial meeting between participants in a court-martial to review the high and low points of the proceedings. *United States v. RosarioMartinez*, 85 M.J. 535, 540 n.11 (N-M. Ct. Crim. App. 2024).

voting where three or more members voted to find Appellant not guilty of the second specification. The affidavit went on to state that if the members had properly understood the voting rules, Capt Sierra would have filled out the findings worksheet to reflect findings of not guilty for both specifications.

After obtaining Capt Sierra's affidavit, Appellant's defense counsel filed a post-trial motion asking the military judge to correct the verdict pursuant to Rules for Court-Martial (R.C.M.) 922 and 1104. After receiving briefs from both parties and conducting a post-trial Article 39(a) hearing,² the military judge issued a written ruling declining to consider Capt Sierra's affidavit and denying Appellant's motion. The United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed. *RosarioMartinez*, 85 M.J. at 545.

On appeal to this Court, we specified the following issue:

Did the military judge err in finding the affidavit of the senior member to be incompetent evidence under MRE 606(b)(2)(C) and in denying Appellant's motion for appropriate relief to correct an error in the findings worksheet?

² See Article 39(a), 10 U.S.C. § 839(a) (authorizing hearings outside the presence of the members for specific purposes).

United States v. RosarioMartinez, 85 M.J. 463 (C.A.A.F. 2025) (order granting review).

For the reasons set forth below, we hold that the military judge did not abuse his discretion when he declined to consider Capt Sierra's affidavit after finding that it was not competent evidence. We therefore affirm the findings and sentence as affirmed by the NMCCA.

I. Background

The Government charged Appellant with two specifications of sexual assault under Article 120, UCMJ, following the victim's report that Appellant had assaulted her in her barracks room after the two had gone out drinking together. The two specifications were pleaded in the alternative based on contingencies of proof. The first specification was charged under the theory that Appellant performed a sexual act upon the victim when he knew or reasonably should have known that she was asleep. The second specification was charged under the theory that Appellant performed a sexual act upon the victim without her consent.

A. Appellant's Court-Martial

Appellant's general court-martial consisted of eight members with enlisted representation.

Following the presentation of evidence, the military judge instructed the members on voting, including the following:

The concurrence of at least three-fourths of the members present when the vote is taken is required for any finding of guilty. Since we have eight members, that means six members must concur in any finding of guilty.

If you have at least six votes of guilty of any offense, then that will result in a finding of guilty for that offense. *If fewer than six members vote for a finding of guilty, then your ballot resulted in a finding of not guilty.* You may reconsider any finding prior to its being announced in open court. However, after you vote, if any member expresses a desire to reconsider any finding, open the court and the president should announce only that a consideration of a finding has been proposed.

(Emphasis added.) Neither party objected to the instructions or requested any additional instructions. The military judge did not provide a written copy of the voting instructions to the panel.

The panel deliberated for two days. On two separate occasions, the members requested to reopen the court-martial, but neither of these occasions concerned questions about the findings worksheet or the panel instruction on voting. After the panel

reached a verdict, the military judge reviewed the findings worksheet and asked Capt Sierra to announce the panel's findings. Capt Sierra stated that the court-martial found Appellant not guilty of the first specification, but guilty of the second specification—sexual assault without consent—under Article 120, UCMJ. After Appellant elected to be sentenced by the military judge, the military judge excused the panel and instructed the members not to discuss their deliberations with anyone unless ordered to do so by a court. That same day, the military judge sentenced Appellant to a dishonorable discharge and eighteen months of confinement.

B. Capt Sierra's Affidavit

In the days following trial, Appellant's two defense counsel conducted a hot wash with Capt Sierra, the senior panel member, to receive feedback on their advocacy. During the conversation, Capt Sierra asked how the military justice system handles hung juries. Appellant's counsel explained to Capt Sierra that hung juries do not exist in the military, and that when fewer than three-quarters of the panel vote to convict, the result is an acquittal. Upon hearing this, Capt Sierra said "[w]ell, then we acquitted your client" or words to that effect. Capt Sierra further told Appellant's counsel that the panel had conducted multiple votes in the absence of any vote to reconsider—several of which rendered fewer than six votes for guilty—before the panel finally reached six votes in favor of finding Appellant guilty of the second specification. At this point, Appellant's counsel ended

their conversation with Capt Sierra and sought guidance from their supervisors.

After being encouraged by their supervisors to seek additional information from Capt Sierra, Appellant's counsel met with Capt Sierra again the next day. At this second meeting, Capt Sierra executed an affidavit describing what he had shared with defense counsel the day before. The affidavit stated that: (1) the members had a mistaken understanding of the military judge's instructions and believed that six votes were required either to convict or to acquit Appellant; (2) several rounds of votes had been taken by the panel using secret ballots with three or more members voting to find Appellant not guilty of the second specification; and (3) if the members properly understood the voting rules, Capt Sierra would have filled out the findings work-sheet to reflect findings of not guilty for both specifications.³ The affidavit ended with a request by Capt Sierra to "correct the findings worksheet to accurately reflect the correct findings of the panel."

C. Appellant's Motion for Appropriate Relief

A few days after his defense counsel obtained the affidavit, Appellant filed a motion for appropriate relief asserting that the finding of guilty announced by Appellant's court-martial was erroneous. In his

³ A redacted copy of the affidavit is attached to this opinion in the Appendix.

motion, Appellant asked the military judge to correct the alleged error in the members' findings worksheet as revealed by Capt Sierra. Although Military Rule of Evidence (M.R.E.) 606(b)(1) generally prohibits a military judge from receiving a member's affidavit about the panel's deliberations, Appellant argued that Capt Sierra's affidavit qualified as competent evidence that the military judge could consider under the rule's exception for testimony about a mistake in entering the findings on the findings form. See M.R.E. 606(b)(2)(C). Appellant further argued that the military judge had the authority to correct the error on the findings form under both R.C.M. 922 and R.C.M. 1104.

After the Government filed a written response in opposition to Appellant's motion, the military judge conducted an Article 39(a) hearing to address Appellant's motion for appropriate relief and a second unrelated motion. The military judge declined Appellant's request to produce Capt Sierra to provide sworn testimony, but he did hear argument on the motion from both parties.

Eleven days later, the military judge issued a written ruling denying Appellant's motion. The military judge held that he could not consider Capt Sierra's affidavit pursuant to M.R.E. 606 because it was a forbidden inquiry into the panel's deliberative process and did not fall under any M.R.E. 606(b) exception. The military judge concluded that the specific M.R.E. 606(b)(2)(C) exception asserted by Appellant applied to "clerical errors" and was therefore not implicated by the statements in the

affidavit. The military judge emphasized that: (1) the senior member provided a copy of the findings worksheet to the military judge at the conclusion of deliberations; (2) the worksheet was filled out correctly and indicated a finding of guilty for the second specification; and (3) the senior member responded affirmatively to the military judge's question whether the worksheet accurately reflected the members' findings.

Assuming *arguendo* that the affidavit or Capt Sierra's sworn testimony would be proper evidence for the court's consideration, the military judge further held that the evidence would still be improper to impeach the findings under R.C.M. 923.⁴ The military judge determined that the findings were proper on their face and that under

R.C.M. 923 voting irregularities would not be a proper basis to impeach the findings.

The convening authority took no action on the findings and approved the sentence. Appellant appealed to the NMCCA but did not challenge the military judge's ruling on his motion for appropriate relief.⁵ In his petition to this Court, Appellant raised

⁴ R.C.M. 923 states: "Findings that are proper on their face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member."

⁵ On appeal before the NMCCA, Appellant asserted two assignments of error: "(1) whether unlawful command influence (UCI) occurred during the members' deliberations; and (2)

three issues and supplemented his petition with a single issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). This Court declined to grant review of any of those issues, but specified the following issue for review:

Did the military judge err in finding the affidavit of the senior member to be incompetent evidence under MRE 606(b)(2)(C) and in denying Appellant's motion for appropriate relief to correct an error in the findings worksheet?

RosarioMartinez, 85 M.J. at 463 (order granting review).

II. Discussion

A. Preservation of the M.R.E. 606(b)(2)(C) Issue

Before we can consider the specified issue, the Government raises a threshold question that we must address. Noting that Appellant failed to challenge the military judge's denial of his motion for appropriate relief before the NMCCA, the Government argues that the military judge's ruling is now "law of the case" and that Appellant should be bound by the military judge's

whether Appellant was entitled to a unanimous verdict." *RosarioMartinez*, 85 M.J. at 538.

decision. Although the Government concedes that the law-of-the-case doctrine is discretionary, the Government argues that this case does not involve the kind of “manifest injustice” that this Court has previously recognized as justifying a departure from our usual practice.

Because this Court specified the issue whether the military judge erred when he denied Appellant’s motion for appropriate relief, the Government’s objection is really a question about this Court’s authority to specify and address the issue more than it is a question about whether Appellant waived the issue or should be estopped from raising it before this Court. When questions arise about our authority and the answers are not specified by the UCMJ, this Court typically turns to the Supreme Court for guidance about federal appellate courts’ authority to review an issue. *See B.M. v. United States*, 84 M.J. 314, 317 (C.A.A.F. 2024), *cert. denied*, 145 S. Ct. 984 (2024) (discussing the limitations that this Court places on its own authority to act as a prudential rather than a legal matter).

To answer the Government’s question, we look to the Supreme Court’s practice with respect to its analogous “pressed or passed upon” jurisprudence. When the Supreme Court exercises its appellate jurisdiction over the inferior federal courts, it is settled practice that the Supreme Court generally will not consider issues “not pressed or passed upon” by the court below even when the court otherwise has jurisdiction. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). However,

this practice is prudential, and the Supreme Court reserves discretion to address issues not pressed or passed upon by the court below in “exceptional cases.” *Id.* In most cases, the Supreme Court declines to address issues not pressed or passed upon below. *See, e.g., Heckler v. Campbell*, 461 U.S. 458, 468 n.12 (1983) (declining to address an issue that was not raised below because it was not an exceptional case); *United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001) (same); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 237 (1990) (same), *holding modified by City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004); *FTC v. Grolier Inc.*, 462 U.S. 19, 23 n.6 (1983) (same); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958) (same); *Blair v. Oesterlein Mach. Co.*, 275 U.S. 220, 225 (1927) (same); *Duignan v. United States*, 274 U.S. 195, 200 (1927) (same).

But in “exceptional circumstances,” the Supreme Court has departed from its usual practice. *United States v. Mendenhall*, 446 U.S. 544, 551 n.5 (1980) (citing *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Duignan*, 274 U.S. at 200). For example, in *Carlson v. Green*, the Supreme Court addressed a question on the merits that was not raised at either the district court or the court of appeals. 446 U.S. 14, 17 n.2 (1980). Although the Supreme Court recognized it normally does not decide issues not presented below, it also noted that it was not precluded from doing so. *Id.* In *Carlson*, where “the issue [was] squarely presented and fully briefed,” the Supreme Court decided to exercise its discretion to address the “important, recurring issue” on the merits in the interest of judicial administration. *Id.*

In this case, neither party contests this Court's jurisdiction over this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2024). Having found good cause to consider whether the military judge erred by denying Appellant's motion for appropriate relief, this Court specified the M.R.E. 606(b)(2)(C) issue, which was then fully briefed and argued by the parties. Although we agree with the Government that we could—and normally would—decline to answer that question on the grounds that it was not pressed or passed upon by the NMCCA below, we believe that this is an exceptional case that warrants departure from our general practice.

In this case, Appellant's defense counsel investigated and preserved the M.R.E. 606(b)(2)(C) issue immediately upon meeting with Capt Sierra. The issue was fully briefed by both parties and litigated before the military judge who issued a nine-page written ruling denying Appellant's motion. Neither party has suggested that their ability to litigate the case before this Court has been prejudiced in any way by the fact that Appellant failed to raise the issue before the NMCCA. Similarly, our review of the issue has not been inhibited by the fact that the issue was not pressed or passed upon below. Considering that this case addresses the military justice system's unique application of nonunanimous verdicts and involves a claim of critical importance—whether the findings worksheet accurately reflected the findings of the panel—we exercise our discretion to depart from our usual practice and address the issue on the merits.

B. Whether the Military Judge Erred by Denying Appellant's Motion for Appropriate Relief

1. Standard of Review

This Court applies principles of statutory construction when construing the Military Rules of Evidence and reviews questions of statutory construction de novo. *United States v. Kohlbek*, 78 M.J. 326, 330 (C.A.A.F. 2019). When a verdict's validity is challenged, a military judge has broad discretion to determine whether to investigate the verdict and, if so, what kind of investigation to perform. *United States v. Lambert*, 55 M.J. 293, 295-96 (C.A.A.F. 2001). This Court reviews those decisions only for abuse of discretion. *Id.* at 296. A military judge "abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Kelly*, 72 M.J. 237, 242 (C.A.A.F. 2013) (citation omitted) (internal quotation marks omitted).

2. Discussion

The military judge denied Appellant's motion after determining that Capt Sierra's affidavit was not competent evidence that the military judge could consider under M.R.E. 509 and M.R.E. 606 because no

exception under M.R.E. 606(b)(2) applied. M.R.E. 509 instructs that panel deliberations “are privileged to the extent that such matters are privileged in trial of criminal cases in the United States district courts” except as provided in M.R.E. 606. Turning to M.R.E. 606(b)(1), that rule generally prohibits members from testifying about the panel’s deliberations, including “any statement made or incident that occurred during the deliberations” or “any member’s mental processes concerning the finding or sentence.” The rule also bars a military judge from “receiv[ing] a member’s affidavit or evidence of a member’s statement on these matters.” *Id.*

These prohibitions are subject to three exceptions under M.R.E. 606(b)(2), which permit member testimony about whether:

(A) extraneous prejudicial information was improperly brought to the members’ attention;

(B) unlawful command influence or any other outside influence was improperly brought to bear on any member; or

(C) a mistake made in entering the finding or sentence on the finding or sentence forms.

The third exception was added to the rule in 2013. *See* Exec. Order No. 13,643, 78 Fed. Reg. 29559 (May 15, 2013) (adding M.R.E. 606(b)(2)(C)). To date, this

Court has yet to formally consider the new exception's scope.

Appellant argues that the M.R.E. 606(b)(2)(C) exception applies to the facts of this case because—as explained in Capt Sierra's affidavit—the panel members misunderstood the voting procedures and thus made a “mistake” (as contemplated by M.R.E. 606(b)(2)(C)) when they completed the findings worksheet by marking “guilty” when they had initially voted to find Appellant “not guilty.” Appellant contends that the exception's plain language allows for testimony in these circumstances, which Appellant describes as “a failure to properly memorialize the outcome of the initial, valid vote.” We disagree.

M.R.E. 606(b)(2)(C) permits testimony about “a mistake made in entering the finding” on the appropriate form. The *Manual for Courts-Martial, United States* does not provide any additional guidance about the exception's application. In such circumstances, the President has directed that courts-martial apply “the Federal Rules of Evidence and the case law interpreting them.” M.R.E. 101(b)(1). Accordingly, when this Court previously considered M.R.E. 606's exceptions in *United States v. Loving*, 41 M.J. 213, 239 (C.A.A.F. 1994), this Court looked to Fed. R. Evid. 606 and the corresponding Advisory Committee Notes for guidance about the scope of M.R.E. 606 and its exceptions.

In *Loving*, the appellant sought to introduce affidavits obtained from three members nearly four

years after his court-martial was held alleging that the panel failed in multiple ways to follow the military judge's instructions during sentencing deliberations. *Id.* at 232. This Court held that members' post-trial affidavits were not competent evidence as to any improper voting procedures during the sentencing deliberations. *Id.* at 236-39. This Court recognized that M.R.E. 606 and Fed. R. Evid. 606 were "identical" other than the military rule's reference to unlawful command influence. *Id.* at 235. This Court further noted that this construction "is consistent with the statutory mandate in Article 36(a), UCMJ, 10 USC § 836(a)," which empowers the President to promulgate procedures that "'apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.'" *Id.*

As we did in *Loving*, we look again to the federal rule and the Advisory Committee Notes for guidance about the scope of the analogous federal exception. In addition to being the approach recommended by M.R.E. 101(b)(1), doing so is consistent with the President's actions in 2016, when he amended the Military Rules of Evidence to bring them into greater alignment with the Federal Rules of Evidence. See Manual for Courts-Martial; Amendments to Appendix 22, 81 Fed. Reg. 15278-01, 15289 (Mar. 22, 2016).

Fed. R. Evid. 606 was amended in 2006 to allow judges to consider evidence about "a mistake in entering the verdict onto the verdict form." Fed. R. Evid. 606(b)(3) advisory committee note to the 2006 amendment. Seven years later, the President added

M.R.E. 606(b)(2)(C) to the list of exceptions in the military rule. See Exec. Order No. 13,643, 78 Fed. Reg. 29559 (May 15, 2013). Today, M.R.E. 606(b) remains essentially identical to Fed. R. Evid. 606(b), except for minor changes to accommodate court-martial terminology.

The Advisory Committee Note addressing the 2006 amendment to Fed. R. Evid. 606(b)(3) instructs that the rule was amended in direct response to “a divergence between the text of the Rule and the case law that has established an exception for proof of clerical errors.” Fed. R. Evid. 606 advisory committee note to the 2006 amendment (citing *Plummer v. Springfield Term. Ry.*, 5 F.3d 1, 3 (1st Cir. 1993) (holding “that juror testimony regarding an alleged clerical error, such as announcing a verdict different than that agreed upon, does not challenge the validity of the verdict or deliberation of mental processes, and therefore is not subject to Rule 606(b)”); *Teevee Toons, Inc. v. MP3 Com. Inc.*, 148 F. Supp. 2d 276, 278 (S.D.N.Y. 2001) (noting that Fed. R. Evid. 606(b) was previously silent regarding inquiries designed to confirm the accuracy of a verdict)). The Note clarified that the exception was to be narrow—that testimony concerning “clerical errors” committed while entering findings in the findings work-sheet triggers the exception, but testimony pertaining to misunderstandings about the consequences of the jury’s results or *the misapplication of instructions* are explicitly prohibited because they pertain to the jurors’ mental processes.⁶ *Id.*

⁶ Part of the Advisory Committee Note for the 2006 amendment reads “[t]he broader exception [for allowing proof of mistakes in

Here, Capt Sierra's affidavit fails to identify any evidence of a clerical mistake being made when he entered the panel's findings on the findings worksheet. Instead, the affidavit documents the panel's alleged misunderstanding and misapplication of the military judge's instructions for voting during deliberations. Thus, this case would seem to fall squarely within the Advisory Committee's guidance that forbids testimony challenging the jury's misapplication of the judge's instructions.

Nevertheless, Appellant urges us to adopt an expansive interpretation of M.R.E. 606(b)(2)(C) and follow the United States Court of Appeals for the Fifth Circuit's approach in *United States v. Dotson*, where that court held that the district court did not err when it heard testimony from the jury foreman about the jury's deliberations and then corrected the verdict to show that the defendant was acquitted—rather than found guilty—of a single count. 817 F.3d 1127, 1130 (5th Cir. 1987). We decline Appellant's invitation for three reasons.

entering the verdict] is rejected because an inquiry into whether the jury misunderstood or misapplied an instruction goes to the jurors' mental processes underlying the verdict, rather than the verdict's accuracy in capturing what the jurors had agreed upon." *Id.* The Note further explains that the amendment's exception "is limited to cases such as where the jury fore-person wrote down, in response to an interrogatory, a number different from that agreed upon by the jury, or mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty." *Id.* (citation omitted) (internal quotation marks omitted).

First, as Appellant concedes, the Fifth Circuit's decision in *Dotson* was issued decades before the addition of the exception for clerical errors to Fed. R. Evid. 606(b). Thus, it provides little insight into the application of the current federal rule, and even less into the scope of M.R.E. 606(b)(2)(C).

Second, in *Dotson*, the judge did not consider any testimony from the jurors about *how* the jury reached its verdict. The jurors only stated that the verdict announced in court did not match their actual vote. Here, Capt Sierra's affidavit does not even mention the panel's final vote. Instead, it focuses on the early stages of the panel's deliberations and the panel's misunderstanding of the military judge's instructions.

And finally, unlike the jury in *Dotson*, Appellant does not contest that the verdict announced at his trial accurately reflected the ultimate determination of the panel. In *Dotson*, the jury had to consider fourteen criminal counts: ten against Dotson and four against his co-defendant. 817 F.2d at 1128-29. The announced verdict found Dotson guilty of all ten counts against him, but according to the jury foreman and two other jurors, the announced verdict did not reflect the jury's vote with respect to count ten. *Id.* They stated that the jury voted unanimously to acquit Dotson of count ten rather than find him guilty. *Id.* Thus, the verdict form contained a clerical error because it did not accurately reflect their vote.

In this case, even if the affidavit is construed in the light most favorable to Appellant, *Loving*, 41 M.J. at 239, it falls short of suggesting that the announced sentence is not what was actually agreed upon by the panel. Appellant argues that there was a mistake in the panel's *process*, not that the announced verdict failed to accurately represent the panel's final determination. Appellant may be correct that the panel could have—or even should have—stopped their deliberations after their first secret vote, but they did not stop. The panel continued deliberating and, ultimately, at the conclusion of those deliberations, the court-martial voted to find Appellant guilty of Specification 2. Unlike in *Dotson*, there is no suggestion that the verdict announced in court did not reflect the panel's final vote or their ultimate intention to find Appellant guilty of Specification 2.

We agree with the military judge that the exception under M.R.E. 606(b)(2)(C) should be construed narrowly and did not apply to the error alleged by Appellant in this case. Accordingly, the military judge did not abuse his discretion when he determined that the affidavit did not fall under the M.R.E. 606(b)(2)(C) exception and was, therefore, not competent evidence. Because he could not lawfully consider Capt Sierra's affidavit, the military judge did not abuse his discretion when he denied Appellant's motion for appropriate relief.

III. Conclusion

For the reasons cited above, we affirm the findings and sentence as affirmed by the United States Navy-Marine Corps Court of Criminal Appeals.

APPENDIX

UNITED STATES MARINE CORPS

UNITED STATES

v.

Affidavit

JONATON
ROSARIOMARTINEZ
U.S. Marine Corps

Date: 4 February 2023

SWORN AFFIDAVIT

I, REDACTED declare under penalty of perjury:

1. I was the senior member in the trial of U.S. v. Cpl Rosariomartinez.
2. During deliberations we were not provided a written copy of the procedural instructions for voting.
3. It was our understanding that in order to reach a verdict we needed either 6 votes in favor of guilty or 6 votes in favor of not guilty for both specifications.

4. We called for a vote at least 5-6 times.
5. We voted using secret written ballot.
6. The first vote where all members were decided had 3 or more members vote in favor of not guilty for both specifications. That vote was completed using secret written ballot.
7. At no time prior to this vote did we have 6 or more members vote in favor of guilty to either specification.
8. We incorrectly did not complete the findings worksheet after each finding that would have resulted in a not guilty verdict because we did not believe we had reached the required number of votes for a finding of not guilty.
9. Since the time the incorrect findings worksheet was read aloud in open court, I have learned that I should have filled out the findings worksheet consistent with the first vote of the panel which resulted in a finding of not guilty to both specifications.
10. Had we known the proper procedure we would have filled out the findings worksheet correctly to return a finding of not guilty.

24a

11. I would like to correct the findings worksheet to accurately reflect the correct findings of the panel.

12. I can be reached via e-mail at REDACTED.

REDACTED

U.S. Marine Corps

Sworn to and subscribed before me this 4th day of Feb, 23.

REDACTED

Name: REDACTED

Rank: REDACTED

Branch: REDACTED

10 U.S. Code § 1044a

Judge MAGGS, concurring in the judgment.

The specified issue in this case is: “Did the military judge err in finding the affidavit of the senior member to be incompetent evidence under [Military Rule of Evidence (M.R.E.)] 606(b)(2)(C) and in denying Appellant’s motion for appropriate relief to correct an error in the findings worksheet?” The Court answers the specified issue in the negative and therefore affirms the findings and sentence in this case.

I agree that the findings and sentence in this case should be affirmed, but my reasoning is different. I am persuaded by the Government's argument that the Court should not reach the merits of the specified issue because Appellant abandoned the issue when he did not raise it in his appeal to the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA). I therefore respectfully concur only in the judgment of the Court and do not concur in the Court's opinion.

I. Discussion

The Court correctly states the key facts relevant to this appeal. Appellant moved the military judge for appropriate relief on the basis of an affidavit by a member of the court-martial indicating that the members had not followed applicable voting rules when they found him guilty of one specification of sexual assault. The Government opposed the motion, arguing that M.R.E. 606(b) prevented the military judge from considering the member's affidavit.

M.R.E. 606(b)(1) provides that "a member of a court-martial may not testify about any . . . incident that occurred during the deliberations of that court-martial" and that the "military judge may not receive a member's affidavit . . . on these matters."

In a written ruling, the military judge denied relief based on M.R.E. 606. In so doing, the military judge recognized that M.R.E. 606(b)(2)(C) creates an

exception that allows a member to testify about whether “a mistake was made in entering the finding or sentence on the finding or sentence forms.” But the military judge ruled that this exception did not apply. Rather, the military judge found “that the affidavit from the senior member produced by the defense [was] an inquiry into the deliberative process.” The affidavit was therefore incompetent evidence and “the court [was] foreclosed from considering matters that occurred during the members’ deliberative process.”

Appellant appealed to the NMCCA, raising two issues. Issue I was: “Did unlawful command influence occur during deliberations where the members discussed the Marine Corps and [Sexual Assault Prevention and Response] policies that any consumption of alcohol renders a person unable to consent to sexual activity and that alleged sexual assault victims have to be believed?” Issue II was: “Was Appellant entitled to a unanimous verdict?” In his brief, Appellant described the military judge’s ruling on his motion for appropriate relief, but he did not argue that the military judge had erred by not considering the member’s affidavit under the exception in M.R.E. 606(b)(2)(C). On the contrary, every time Appellant mentioned the voting procedures, his arguments concerned the asserted unlawful command influence or his right to a unanimous verdict. The NMCCA, accordingly, did not rule on the challenge now presented under M.R.E. 606(b)(2)(C). *United States v. RosarioMartinez*, 85 M.J. 535, 541-42 (N-M. Ct. Crim. App. 2024).

The Court also correctly states the law concerning the abandonment of issues on appeal. The United States Supreme Court has explained that “[o]rdinarily an appellate court does not give consideration to issues not raised below.” *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). But the Supreme Court has qualified this general principle by recognizing that “[t]here may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below.”¹ *Id.* at 557.

This Court has adopted the same general principle and qualification. In *United States v. Parker*, this Court explained:

When a party does not appeal a ruling, the ruling of the lower court normally becomes the law of the case. See *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002). The law-of-the case doctrine, however, is a matter of appellate policy, not a binding legal doctrine. Because

¹ Another exception is the “cross-appeal doctrine” described in *United States v. Am. Ry. Exp. Co.*, 265 U.S. 425, 435 (1924). The cross-appeal doctrine is the “familiar principle of appellate practice . . . that ‘[a]n appellee . . . may defend the judgment below on a ground not earlier aired.’” *United States v. Perkins*, 78 M.J. 381, 386 n.8 (C.A.A.F. 2019) (second alteration in original) (emphasis added) (quoting *Greenlaw v. United States*, 554 U.S. 237, 250 n.5 (2008)). The cross-appeal doctrine does not apply to the issue now before this Court because *Appellant* is *challenging* a ruling on a ground that he did not raise at the NMCCA.

the law-of-the-case doctrine is discretionary, it need not be applied when the lower court's decision is "clearly erroneous and would work a manifest injustice." *Id.* at n.* (citing *United States v. Williams*, 41 M.J. 134, 135 n.2 (C.M.A. 1994)).

62 M.J. 459, 464 (C.A.A.F. 2006).²

After correctly describing the facts and the law, the Court then holds that this appeal is an "exceptional case" in which the Court should consider an argument that Appellant did not raise before the NMCCA. This is where I part company with the Court's opinion. In my view, this appeal is not an "exceptional case"—as the Supreme Court has used that term—for three reasons.

² Most federal courts use the term "abandonment" to describe the principle that appellants are precluded from arguing issues that they failed to raise in their appellate briefs. 16AA *Wright & Miller's Federal Practice & Procedure* § 3974.1 (5th ed. 2020). In *Parker*, however, this Court referred to this principle as the "law-of-the-case doctrine." 62 M.J. at 464. This description may be confusing because other authorities define the "law-of-the-case doctrine" as "[t]he doctrine that when a point or question arising in the course of a lawsuit has been finally decided, the legal rule or principle announced as applicable to the facts governs the lawsuit in all its later stages and developments." *Law of the Case*, *Black's Law Dictionary* (12th ed. 2024). Under this definition, the law-of-the-case doctrine would serve the more specific function of preventing a decision of a higher court from being relitigated after remand to a lower court. 18B *Wright & Miller's Federal Practice & Procedure* § 4478 (3d ed. 2019) (explaining that a ruling of a superior court "binds a lower court on remand to the law of the case established on appeal").

First, this case reached the NMCCA and this Court through “normal adversarial litigation.” *Sims v. Apfel*, 530 U.S. 103, 109 (2000). While the Supreme Court has recognized that “the reasons for a court to require issue exhaustion are much weaker” when a “proceeding is not adversarial” in nature, *id.* at 110, this appeal concerns a fully adversarial criminal case. Appellant had every incentive and a full and fair opportunity to challenge the military order before the NMCCA but he did not do so.

Second, Appellant offers no good reason for not having raised the issue on appeal to the NMCCA. On the contrary, in his briefs before this Court, his enigmatic position is that he somehow “raised this issue on appeal under other exceptions to M.R.E. 606(b)(2).” But as described above, Appellant never argued that the military judge erred by not considering the member’s affidavit under M.R.E. 606(b)(2)(C).

Third, this is not a case where settled law demonstrates “the proper resolution is beyond any doubt” or a case “where ‘injustice might otherwise result.’” *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941)). On the contrary, as the Court’s opinion correctly recognizes, there was no settled law regarding the specified issue because this Court had never formally considered the scope of the exception in M.R.E. 606(b)(2)(C). An appellate court cannot always be expected to refrain from correcting unraised errors “if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public

reputation of judicial proceedings.” *United States v. Atkinson*, 297 U.S. 157, 160 (1936). But here there was no obvious error in the military judge’s ruling.

The Supreme Court’s principles on abandonment are important because the justice system depends on orderly litigation. For example, as we have remarked many times, this Court benefits greatly from a thorough consideration of issues by a Court of Criminal Appeals. E.g., *United States v. Shafran*, 85 M.J. 420, 425 n.3 (C.A.A.F. 2025) (commending the Court of Criminal Appeals for its thorough and persuasive analysis). This benefit is lost when we consider arguments that were not presented to a Court of Criminal Appeals. Better results are more likely when we decline to act on a question not raised below, “without prejudice to the disposition of the question wherever appropriately presented.” *Blair v. Oesterlein Mach. Co.*, 275 U.S. 220, 225 (1927).

II. Conclusion

For these reasons, I respectfully concur in the judgment.

31a

*This opinion is subject to administrative correction
before final disposition.*

United States Navy-Marine Corps
Court of Criminal Appeals

Before

DALY, GROSS, and de GROOT

Appellate Military Judges

UNITED STATES

Appellee

v.

Jonatan O. ROSARIOMARTINEZ

Corporal (E-4), U.S. Marine Corps

Appellant

No. 202300154

Decided: 18 December 2024

Appeal from the United States Navy-Marine Corps
Trial Judiciary

Military Judge:

Ryan C. Lipton (arraignment)

Benjamin A. Robles (motions)

Adam L. Workman (trial and post-trial)

Sentence adjudged 27 January 2023 by a general court-martial convened at Marine Corps Base Camp Lejeune, North Carolina, consisting of members with enlisted representation. Sentence in the Entry of Judgment: confinement for 18 months and a dishonorable discharge.¹

For Appellant:

Lieutenant Morgan Sanders, JAGC, USN

For Appellee:

Lieutenant Rachel E. Noveroske, JAGC, USN

Major Mary-Claire Finnen, USMC

Judge GROSS delivered the opinion of the Court in which Senior Judge DALY and Judge de GROOT joined.

¹ Appellant was credited with 32 days' confinement credit.

PUBLISHED OPINION OF THE COURT

GROSS, J:

For over one hundred years, courts in the United States have flatly prohibited the admission of juror testimony to impeach a verdict, except in sharply limited circumstances.² The Supreme Court, explaining the prohibition, stated

There is little doubt that post-verdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process.³

Appellant now asks us to condone such an investigation, invade the deliberative process of his court-martial by attaching declarations of two

² *Tanner v. United States*, 483 U.S. 107, 117 (1987).

³ *Id.* At 120.

members relating to their closed deliberations, and reverse his conviction. We decline to do so.

A general court-martial composed of members with enlisted representation convicted Appellant, contrary to his pleas, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ).⁴ The military judge imposed a sentence of confinement for 18 months and a dishonorable discharge.

Before us, Appellant asserts two assignments of error which we rephrase as follows: (1) whether unlawful command influence (UCI) occurred during the members' deliberations; and (2) whether Appellant was entitled to a unanimous verdict.⁵ In support of Appellant's first AOE, he sought to attach three declarations—two from members of the court-martial and one from his trial defense counsel—which the Government opposed. We then ordered briefing on six specified issues relating to Appellant's motion to

⁴ 10 U.S.C. § 920.

⁵ We find that pursuant to *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), Appellant is not entitled to a unanimous verdict. On 3 June 2024, Appellant filed a motion to file a supplemental AOE claiming that this Court erred in denying his motion to attach supplemental matters to the record in support of his first AOE. On 24 June 2024, we denied Appellant's motion to file a supplemental AOE stating that Appellant's claim of error had already been properly preserved and that the reason for our denial of the motion to attach would be addressed in our opinion on the merits.

attach.⁶ Having considered the entire record of trial and the briefs of the parties, including the briefs on the specified issues, we now set forth our reasons for our previous denial of Appellant's motion to attach.

Upon review of the record as a whole, and Appellant not having challenged the factual sufficiency of his convictions, we find that Appellant's conviction and sentence are correct in law, that his

⁶ I: Should the affidavits be analyzed as potential evidence of unlawful command influence, improper outside influence, or extraneous prejudicial information?

II: Is *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020), the appropriate framework to analyze the motion to attach?

III: If *Jessie* is the proper framework for this Court's analysis, where was the issue raised in the record?

IV: If this Court determines a portion of an affidavit may be attached to the record, must that affidavit be attached in its entirety or may it be redacted?

V: Under what legal theory would trial defense counsel's affidavit be attached to the record?

VI: Would a violation of the military judge's order proscribing the parties and their agents from communicating with the members affect the competency of the evidence contained in the affidavits being offered?

sentence is correct in law and fact, and that no prejudicial error to his substantial rights occurred.⁷

I. Background

Appellant was charged with two specifications of sexual assault, one for committing a sexual act on Lance Corporal (LCpl) Oscar without her consent, and one for committing a sexual act on LCpl Oscar when he knew, or reasonably should have known, that she was asleep. The two specifications were based upon the same incident and were pleaded in the alternative based on contingencies of proof. The members convicted Appellant of sexual assault without consent, but acquitted him of the specification that alleged that LCpl Oscar was asleep. Appellant then elected to be sentenced by military judge.

A lengthy exposition of the facts surrounding Appellant's conviction is largely unnecessary for our consideration of the assigned errors, except to note that on the night in question, the evidence showed that Appellant sexually assaulted LCpl Oscar after the two had been drinking together at a bar earlier in the evening. At trial, Appellant's defense focused largely on issues of consent and mistake of fact as to consent.

Appellant elected to be tried by members with enlisted representation. During voir dire, the military judge asked the detailed members whether any of them had received training during their time in the

⁷ Articles 59 and 66, UCMJ.

Marine Corps about what “consent” means and what qualifies as consent. All members said that they had. Shortly after asking that question, the military judge excused the members and took a brief recess. He then brought back all of the members and read them the definition of consent from the Military Judges’ Benchbook.⁸ After reading the legal definition of consent, the military judge asked if the members agreed to follow the instruction and all members agreed that they would.

1. Voir Dire and Captain Jordan.

During individual voir dire, the military judge and counsel questioned Captain (Capt) Jordan, who indicated that he had been confused about what definition of consent to use as a potential member in hearing the case. Capt Jordan stated that he felt that the Marine Corps had a “black and white definition” of what consent is, and that under that definition, if “an individual does drink alcohol they can no longer consent.”⁹ Capt Jordan also described a conversation that he had with the other potential members during the brief recess before the military judge read them the legal definition of consent.

Capt Jordan described this conversation as focusing on the definition of consent and the “Marine Corps policy” on consent. He said that he did not direct his question at any particular potential member, but rather “just opened [it] to the room.”¹⁰ After the

⁸ Dep’t of the Army Pam. 27-9, Military Judges’ Benchbook, para. 3a-44-2, Note 5.

⁹ R. at 140-142

¹⁰ R. at 141.

military judge again asked Capt Jordan if he could follow the instruction that the military judge had given on consent, Capt Jordan said that he could. However, Capt Jordan went on to say that he believed that Marine Corps policy on consent dictated that a person cannot consent after drinking alcohol, and that policy did not conflict with the military judge's definition. The Government challenged Capt Jordan for actual bias and the Defense joined the challenge, which the military judge granted.

After Capt Jordan's disclosure regarding the discussion in the deliberation room, the military judge and the parties asked some, but not all, of the potential members about Capt Jordan's discussion regarding the definition of consent. The military judge imposed no limitations on voir dire by either side, and both sides engaged in extensive questioning of each member of the venire. Appellant and the Government each challenged two members for cause, with Appellant joining in both Government challenges (one of which was the previously mentioned Capt Jordan). The military judge granted all four challenges for cause, and eight panel members were ultimately selected to hear Appellant's case.

Of the empaneled members, two recalled the discussion, three did not recall the discussion, and three were not asked about it. All of the empaneled members affirmed that they would follow the military judge's definition of consent, and all eight said they would remain open to evidence that a person could consent to sex after drinking alcohol, even if the person drank to the point of memory loss.

2. Post-trial and Captain Sierra.

After trial, Appellant's two military trial defense counsel (TDC), at the urging of their superiors, reached out to members of the panel to conduct a "hot wash."¹¹ The senior member of the panel, Capt Sierra, agreed to meet with TDC to discuss the trial. At one point during the meeting, Capt Sierra asked TDC a question about how "hung juries" work in the military. Appellant's TDC explained that under court-martial procedures a panel is not required to be unanimous, and if the number of votes for guilty was less than three quarters of the panel that would result in a not-guilty verdict. Capt Sierra then told Appellant's TDC that the panel had numerous votes where three or more members voted for a finding of not guilty before finally reaching six votes for guilty.

Appellant's detailed TDC then sought further guidance from their superiors before asking Capt Sierra to sign an affidavit attesting to what he had just told them. Capt Sierra signed the affidavit and Appellant filed a motion for a post-trial Article 39(a) session seeking to "correct the findings worksheet" pursuant to R.C.M. 922. Capt Sierra's affidavit did not include any information regarding what the members discussed during deliberations, only referring to the multiple votes taken.

¹¹ R. at 790. A "hot wash" is a term used by military personnel for a meeting between participants to conduct a quick review of the high and low points of an exercise. "A QDR "Hot Wash" – War on the Rocks" available at <https://warontherocks.com/2014/03/a-qdr-hot-wash/> (last visited 2 December 2024).

Prior to holding a post-trial Article 39(a) session under Rule for Courts-Martial (R.C.M.) 1104 on the Defense motion, the military judge sent an email to all counsel, stating “all parties and their agents are ORDERED to CEASE and DESIST communicating with any members.”¹² The military judge then heard argument on the Defense motion, found that Capt Sierra’s affidavit was a prohibited disclosure under Mil. R. Evid. 509 and that it did not meet any of the exceptions set forth in Mil. R. Evid. 606. Specifically, the military judge found that the affidavit did not raise any claim of extraneous prejudicial information being brought to the members’ attention, nor did it allege that unlawful command influence or any other outside influence was improperly brought to bear on any member. With respect to the Defense claim that “a mistake was made in entering the finding” the military judge found that the members did not make a mistake, but rather correctly announced their findings even though the affidavit appeared to state that the members had violated the military judge’s instructions on voting and reconsideration.

3. Appeal, Capt Romeo, 1stLt Hotel, and SSgt Papa.

On appeal, Appellant sought to attach three additional declarations: two from other members of Appellant’s court-martial and one from one of Appellant’s TDC, Capt Romeo. We denied Appellant’s motion to attach on 10 May 2024, concluding that the

¹² App. Ex. LXVII (capitalization in original).

declarations of the members constituted incompetent evidence. We describe them below and provide analysis to explain what drove our decision to deny the motion to attach.

The declarations of 1st Lieutenant (1stLt) Hotel and Staff Sergeant (SSgt) Papa described the same voting procedure as does Capt Sierra's affidavit, but added additional details. 1stLt Hotel stated that after the members initial vote failed to produce six votes for either a conviction or acquittal that "some members discussed the USMC and SAPR policy relating to: 'having to believe her' when discussing the alleged victim."¹³ SSgt Papa stated that, during further deliberations after the initial vote "all members discussed the USMC and SAPR policy relating to: if someone has been drinking then they can't consent to sexual activities."¹⁴

Captain Romeo's declaration merely stated that he was unaware that members had discussed either of the aforementioned policies during deliberations. He further stated that if he had known that the policies were discussed, he would have filed a motion for unlawful command influence.

II. DISCUSSION

¹³ Decl. of 1stLt Hotel.

¹⁴ Decl. of SSgt Papa.

A. The motion to attach the affidavits of 1st Lieutenant Hotel, Staff Sergeant Papa, and Captain Romeo is denied.

To assist and inform our decision whether to attach the declarations to the record, we ordered the parties to brief six specified issues. Having now considered the briefs of the parties and the declarations, we find that we can resolve the question of whether to attach the declarations based on our finding that they do not meet any of the exceptions under Mil. R. Evid. 606(b) and are therefore not competent evidence.¹⁵

1. Law

a. Competence of member testimony and declarations

Military Rule of Evidence 509 states, “[e]xcept as provided in Mil. R. Evid. 606, the deliberations of ... courts-martial ... are privileged to the extent that such matters are privileged in trial of criminal cases

¹⁵ The Government urges us to find that *Jessie* precludes attaching evidence of UCI that was not raised in the record at trial as a whole. While we need not decide whether *Jessie* acts as a bar to our consideration of matters outside the record related to UCI, we note that our sister court, in a well-reasoned opinion, found that the CAAF’s opinion in *Jessie* did not alter the authority of a CCA to attach matters relating to UCI to the record. See *United States v. Tucker*, 82 M.J. 553 (C.G. Ct. Crim. App. 2022).

in the United States district courts...”¹⁶ Mil. R. Evid. 606 prohibits a member from testifying “about any statement made or incident that occurred during the deliberations of that court-martial.”¹⁷ The rule recognizes three exceptions: (1) whether extraneous prejudicial information was improperly brought to the members attention; (2) whether unlawful command influence or other outside influence was improperly brought to bear on any member; and (3) whether a mistake was made in entering the findings or sentence.¹⁸

“In general, inquiries into jury verdicts and deliberations are looked upon with strong disfavor.”¹⁹ The Manual for Courts-Martial (MCM) implements this general restriction on questioning members about their deliberations. In other cases we have found that members cannot be questioned about their deliberations and voting except as provided in Mil. R. Evid. 606. The MCM “prohibits questioning court members about their deliberations and voting except as provided in Mil. R. Evid. 606. R.C.M. 923 permits the impeachment of findings which are proper on their face only when an exception contained in Mil. R. Evid. 606 exists.”²⁰

¹⁶ Mil. R. Evid. 509.

¹⁷ Mil. R. Evid. 606(b)(1).

¹⁸ Mil. R. Evid. 606(c).

¹⁹ *United States v. Thomas*, 39 M.J. 626, 632 (N-M.C.M.R. 1993) (cleaned up).

²⁰ *Id.*

“The purpose of this rule is to protect freedom of deliberation, protect the stability and finality of verdicts, and protect court members from annoyance and embarrassment.”²¹ “[A]n appellant has the burden of showing that something was said or done during deliberations which falls under an exception contained in R.C.M. 923 and Mil. R. Evid. 606(b) that reasonably could have affected the verdict before appellant is entitled to depositions or in-court questioning of court members regarding their deliberations.”²²

Courts have repeatedly cautioned that even when an exception to the general prohibition on receiving evidence of deliberations might apply, the extent of inquiry into deliberations must be limited.

We caution counsel and court members to be mindful of the obligation to protect the secrecy of deliberations. Even when the exceptions to Mil.R.Evid. 606(b) are triggered, disclosures should be limited to the fact and nature of the extrinsic evidence; the impact of the extrinsic evidence or influence on the deliberations or voting should not be disclosed.²³

Pronouncements like this demonstrate that the overarching policy with respect to questioning

²¹ *United States v. Loving*, 41 M.J. 213, 236 (C.A.A.F. 1994).

²² *Thomas*, 39 M.J. at 634.

²³ *United States v. Straight*, 42 M.J. 244, 251 (C.A.A.F. 1995).

members about their deliberations is that such questioning is to be avoided unless narrowly tailored to a specific exception.

In response to our first specified issue, Appellant only claimed that the declarations were evidence of unlawful command influence. He made no attempt to claim that they were evidence of extraneous prejudicial information or other outside improper influence. We therefore analyze the declarations primarily under the theory of UCI.²⁴

b. Unlawful Command Influence

“Unlawful command influence is the mortal enemy of military justice. Where it is found to exist, judicial authorities must take those steps necessary to preserve both the actual and apparent fairness of the

²⁴ We also considered whether the declarations were evidence of extraneous prejudicial information. However, the caselaw supports that extraneous prejudicial information does not include matters that a member brings to the deliberation room, including knowledge of training or policy. *Straight*, 42 M.J. at 250 (“[E]vidence of information acquired by a court member during deliberations from a third party or from outside reference materials may be extraneous prejudicial information which is admissible under Mil.R.Evid. 606(b) to impeach the findings or sentence. [But] the general and common knowledge a court member brings to deliberations is an intrinsic part of the deliberative process, and evidence about that knowledge is not competent evidence to impeach the members' findings or sentence.”).

criminal proceeding.”²⁵ To make a *prima facie* case of actual unlawful command influence, an accused bears the initial burden of presenting “some evidence” of UCI— facts that if true would constitute UCI.²⁶ “Although this burden is low, the accused must present more than mere allegations or speculation.”²⁷

“[T]he use of command meetings to purposefully influence the members in determining a court-martial sentence violates Article 37, UCMJ.”²⁸ However, even when there is no intent to influence a court-martial proceeding, “the mere ‘confluence’ of the timing of such meetings with members during ongoing courts-martials and their subject matter dealing with court-martial sentences can require [a rehearing].”²⁹

In *United States v. Dugan*, the Court of Appeals for the Armed Forces (CAAF) confronted the issue of what constituted “some evidence” of UCI during deliberations.³⁰ In *Dugan*, a member sent the defense counsel a letter setting forth concerns with respect to comments made by other members during deliberation on sentence. The CAAF identified two statements that required additional fact finding and

²⁵ *United States v. Lewis*, 63 M.J. 405, 407 (C.A.A.F. 2006) (cleaned up).

²⁶ *United States v. Gilmet*, 83 M.J. 398, 403 (C.A.A.F. 2023).

²⁷ *Id.*

²⁸ *United States v. Baldwin*, 54 M.J. 308, 310 (C.A.A.F. 2001).

²⁹ *Id.* (Citing *United States v. Brice*, 19 M.J. 170, 172 n. 3 (C.M.A. 1985)).

³⁰ *United States v. Dugan*, 58 M.J. 253, 258 (C.A.A.F. 2003).

the piercing of the deliberative privilege under Mil. R. Evid. 509 and 606. The first was a comment that a bad-conduct discharge “was a given” for the types of charges of which the Appellant was convicted. The second was a statement by a member of the panel “that our sentence would be reviewed by the convening authority and we needed to make sure our sentence was sending a consistent message.” The letter went on to state that “[a]nother member pointed out that we needed to make sure it didn't look like we took the charges too lightly ... He or she said it was especially important because our names would be identified as panel members.”³¹

We recently addressed UCI in the context of deliberation in the case of *United States v. Longshore*.³² There, the appellant sought to introduce evidence in the form of an affidavit from a member who claimed that the members conducted straw polls, read their notes to each other, and that one member commented that “as servicemembers, [they had] a duty to send a message that sexual assault is not tolerated in the Navy.”³³ We determined there that the language used in deliberations did not raise “some evidence” of UCI.

Appellant invites our attention to our sister court’s decision in *United States v. Schloff*, where the Army

³¹ *Id.* at 255.

³² *United States v. Longshore*, No. 202200177, 2024 CCA LEXIS 56 (N-M. Ct. Crim. App. Feb. 6, 2024), *rev. denied*, M.J. , 2024 CAAF LEXIS 414, (C.A.A.F. July 19, 2024).

³³ *Id.* at *19.

Court of Criminal Appeals (ACCA) reversed a conviction based on UCI during deliberations on findings.³⁴ In *Schloff*, the ACCA ordered a *DuBay* hearing³⁵ after one of the members averred that another member had argued that the Army could not afford to seem weak on sexual harassment and sexual assault.³⁶ Following the *DuBay* hearing, the ACCA found that the Government could not prove beyond a reasonable doubt that UCI had not impacted the appellant's court-martial.³⁷

The CAAF has considered the issue of sexual assault training and whether the mere mention of such training constituted UCI in *United States v. Washington*.³⁸ In *Washington*, the trial counsel introduced testimony that the appellant had attended such training (referred to in the Army as “SHARP training”) as evidence rebutting the appellant's reasonable mistake of fact defense. In rejecting the appellant's UCI claim, the CAAF stated, “[t]he SHARP training was not done for the purpose of influencing the trial, no one argued at trial that the SHARP training reflected the law, the military judge properly instructed the members, and the members

³⁴ *United States v. Schloff*, No. ARMY 20150724, 2018 CCA LEXIS 350 (Army Ct. Crim. App. Feb. 5, 2018) (unpublished).

³⁵ *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

³⁶ *Schloff*, 2018 CCA LEXIS 350 at *2.

³⁷ *Id.*

³⁸ *United States v. Washington*, 80 M.J. 106 (C.A.A.F. 2020).

agreed that they could follow the military judge's instructions.”³⁹

2. Discussion

We hold that we cannot consider the declarations of either 1stLt Hotel or SSgt Papa, because the declarations do not fit within one of the very narrow exceptions to the general prohibition on members providing evidence of deliberations. Because we determined that we cannot attach the declarations of 1stLt Hotel and SSgt Papa, the declaration of Capt Romeo is irrelevant to any matter raised in the record.

In reaching our decision on the whether the declarations here show “some evidence” of UCI, we find no reason to depart from our decision in *Longshore*, that a generalized statement by a member regarding a “duty to send a message that sexual assault is not tolerated in the Navy” is insufficient to meet an appellant’s initial burden under *Biagase*.⁴⁰ We find the circumstances of Appellant’s case to be more akin to that of *Longshore* and *Washington* than the circumstances involved in *Dugan* and *Schloff*.

We begin by noting that controlling precedent conclusively holds that much of the declarations of 1stLt Hotel and SSgt Papa are completely covered by the privilege in Mil. R. Evid. 509 and therefore

³⁹ *Id.* at 113.

⁴⁰ *Longshore*, 2024 CCA LEXIS 56 at *20.

completely inappropriate for inclusion in a declaration. These matters include discussing the number of times the members voted and the number of members who voted for a specific outcome.⁴¹ The inclusion of these statements in the declarations was a violation of black letter law protecting the sanctity of the deliberations of the court-martial, and we agree completely with the military judge's order to the parties to cease and desist from communicating with the members, particularly regarding these topics.⁴²

The central issue for this case, however, is whether the members' statements regarding the discussion of various alleged Marine Corps and "SAPR" policies fall

⁴¹ See *Loving*, 41 M.J. at 237; *Thomas*, 39 M.J. at 634 ("Even prior to the adoption of the Military Rules of Evidence, post-trial affidavits alleging errors in voting procedures, to include erroneous reconsideration, were considered incompetent evidence.")

⁴² The parties did not fully brief the question of whether the military judge's order had continuing effect on Appellate Defense Counsel, or whether a violation of such an order would render the declarations at issue invalid. While we need not consider the matter to resolve Appellant's case, we once again pause to disavow the dubious practice of counsel conducting post-trial interviews of members. Nor should litigants view our decision today as an invitation to seek more detailed information from members to determine whether UCI occurred in the deliberation room. The military judge was well within his authority to restrict the parties' communications with members in his ruling. Federal Courts have repeatedly upheld such orders and required counsel to petition the court for permission to interview jurors. "Courts simply will not denigrate jury trials by afterwards ransacking the jurors in search of some ground, not previously supported by evidence, for a new trial." *United States v. Riley*, 544 F. 2d 237, 242 (5th Cir. 1976). Further, as the CAAF noted, "[t]o the extent there is any justification for post-trial interviews (of members), impeaching a verdict is not one of them." *United States v. Ovando-Moran*, 48 M.J. 300, 304 (C.A.A.F. 1998).

within an exception contained in Mil. R. Evid. 606(b). These statements are specifically: “During ... deliberations, some members discussed the USMC and SAPR policy relating to: having to believe her when discussing the alleged victim”;⁴³ and “during ... deliberations, all members discussed the USMC and SAPR policy relating to if someone has been drinking alcohol then they can’t consent to sexual activities.”⁴⁴ After evaluation of the contents of the declarations, however, we find that the declarations do not contain “some evidence” of UCI and therefore cannot be attached to the record. These references to SAPR training are more innocuous than the explicit use of training by the Government (over Defense objection) that the CAAF held did not constitute UCI in Washington. They were not introduced by the Government, and the military judge repeatedly admonished the members to only consider the evidence and law as he instructed.

Regarding 1stLt Hotel’s declaration, we find no evidence in the record regarding a “USMC [or] SAPR policy relating to: having to believe” an alleged victim, nor does Appellant ask us to take judicial notice that such a policy even exists. We are therefore left without any information regarding what 1stLt Hotel meant by his declaration, and we decline to engage in a fishing expedition to suss out its meaning. Nor do we believe that a *DuBay* hearing is appropriate given that this line in the declaration on its face does not implicate a Mil. R. Evid. 606 exception to Mil. R. Evid. 509.

⁴³ Decl of 1stLt Hotel, para. 3

⁴⁴ Decl of SSgt Papa, para. 4.

There was discussion on the record regarding a Marine Corps policy or training that said that anyone who had one drink of alcohol could not consent to sexual activity. This was primarily through the voir dire of Capt Jordan. While Capt Jordan did discuss his understanding of a “one drink” policy with the military judge and the parties, and admitted to discussing the definition of “consent” with the other members prior to individual voir dire, there is no evidence that Capt Jordan took any action with the intent of influencing the court-martial. Indeed, the record is unclear as to whether, and to what extent, Capt Jordan even discussed policy issues with the members prior to the military judge recalling them and instructing them on the definition of consent.

What this case therefore lacks is any evidence that someone attempted to use policy considerations to influence the deliberations of the members. The members’ passing reference to discussion of Marine Corps policy during deliberation, without more, does not rise to the level of 2ndLt Green’s letter in Dugan, nor does it even rise to the level of concern the Army court had in Schloff. There is no evidence that any member who heard Appellant’s case had recently been to a training espousing any policy on sexual assault and consent, nor is there any evidence that any member stated that the panel was obligated to follow such a policy in their deliberations, or even that the policy was to be considered. Courts have repeatedly stated that if members discuss irrelevant matters during deliberations, courts will not question or permit external inquiry into these matters absent a

very narrow set of circumstances. The fact that the members discussed purported Marine Corps policies, without more, simply does not demonstrate a violation of Article 37.

B. Appellant is not entitled to reversal of his convictions based on UCI.

Having decided that we cannot attach the declarations of 1stLt Hotel and SSgt Papa, we must still determine whether there is some evidence of UCI in the record. We begin by again recognizing that the threshold for an appellant to raise the issue of UCI is very low. However, it still must be more than mere speculation.⁴⁵

Here, the record is completely lacking anything beyond conjecture and speculation regarding the question of UCI. Appellant seeks to place much emphasis on Capt Jordan's revelation during voir dire that he had a discussion with the other members about the definition of consent during a brief recess of less than 15 minutes following the military judge's group voir dire session. However, careful review of Capt Jordan's colloquy with the military judge reveals that, rather than injecting Marine Corps policy into the deliberation room, Capt Jordan was confused about his role as a potential member. No other member recalled this discussion as being directive in nature. (In fact, most members who were questioned

⁴⁵ *Gilmet*, 83 M.J. at 403.

did not recall the conversation at all, and those who did found it unremarkable).

When the military judge questioned the members, they all agreed that they would disregard Marine Corps policy and decide Appellant's case solely based on the facts presented and the law as the military judge instructed. After voir dire, the only mention of SAPR training or Marine Corps policy in the record of trial was by Appellant's civilian defense counsel during closing argument, who argued that the SAPR training was wrong in saying that a person who had any alcohol could not consent. Appellant then requested that the military judge advise the members of the definition of a "competent person" from the Military Judges' Benchbook, which the military judge did.⁴⁶

The discussion of SAPR training throughout this trial was unremarkable. The military judge took great pains to ensure that the members understood the law and agreed to follow the law. Each of the members agreed that they could do so. Even if we were to attach those parts of the declarations of 1stLt Hotel and SSgt Papa to the record relating to policy discussions in the deliberation, we still would not find that there is some evidence of UCI in this case. There is simply no evidence that anyone sought to influence the members of this court through SAPR training, or that the members were so influenced.

⁴⁶ Dep't of the Army Pam. 27-9, para. 3a-44-2, note 6.

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred.⁴⁷ The findings and sentence are **AFFIRMED**.

U.S. NAVY-MARINE
CORPS COURT OF
CRIMINAL APPEALS

FOR THE COURT:
/s/
MARK K. JAMISON
Clerk of Court

⁴⁷ Articles 59 & 66, UCMJ.

56a

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

United States, USCA Dkt. No. 26-0087/AF
 Appellee Crim.App. No. 39889

v.

ORDER DENYING PETITION

Alexander L.
Driskill,
 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 16th day of April, 2026,

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 (Johnson)
 Appellate Government Counsel (Payne)

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

No. ACM 39889 (rem)

UNITED STATES
Appellee

v.

Alexander L. DRISKILL
Airman (E-2), U.S. Air Force, Appellant

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

Decided 14 November 2025

Military Judge: Willie J. Babor; Dayle P. Percle
(remand).

Sentence: Sentence adjudged on 4 November 2019 by GCM convened at Ramstein Air Base, Germany; Aviano Air Base, Italy; and Buckley Air Force Base, Colorado. Sentence entered by military judge on 2 March 2020, and reentered on 20 January 2022: Dishonorable discharge, confinement for 40 years and 9 months, forfeiture of all pay and allowances, and reduction to E-1.

For Appellant: Major Frederick J. Johnson, USAF.

For Appellee: Colonel G. Matt Osborn, USAF; Colonel Matthew D. Talcott, USAF; Lieutenant Colonel J. Pete Ferrell, USAF; Lieutenant Colonel Jenny A. Liabenow, USAF; Major Vanessa Bairos, USAF; Major Brittany M. Speirs, USAF; Major Jocelyn Q. Wright, USAF; Mary Ellen Payne, Esquire.

Before JOHNSON, DOUGLAS, and MCCALL,
Appellate Military Judges.

Chief Judge JOHNSON delivered the opinion of the court, in which Judge MCCALL joined. Senior Judge DOUGLAS filed a separate opinion concurring in the result.

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

JOHNSON, Chief Judge:

Appellant's case is before this court for a third time. A military judge found Appellant guilty, in accordance with his pleas and pursuant to a pretrial agreement (PTA), of one specification of wrongful possession of obscene cartoons in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934.¹ Contrary to his pleas, a general court-

¹ As noted in this court's previous opinion, the specifications covered the time period from 11 October 2016 to 27 March 2018. References to the punitive articles of the UCMJ are to the *Manual for Courts-Martial, United States* (2016 ed.). Further, the Military Justice Act of 2016, National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 5001–5542 (23 Dec. 2016), as fully implemented by Exec. Order 13,825, 83 Fed. Reg. 9889 (8 Mar. 2018), applied to Appellant's court-martial and post-trial processing. Unless otherwise noted, all other references to the UCMJ, Rules for Courts-Martial, and Military

martial composed of officer members found Appellant guilty of the Additional Charge including one specification of rape of a child (Specification 1) and one specification of sexual abuse of a child (Specification 2), both in violation of Article 120b, UCMJ, 10 U.S.C. § 920b. The members sentenced Appellant to a dishonorable discharge, confinement for 40 years and 9 months, forfeiture of all pay and allowances, and reduction to the grade of E-1.^{2,3,4}

The procedural history of this case is described in this court's 2022 opinion. See *United States v. Driskill*, No. ACM 39889 (f rev), 2022 CCA LEXIS 496, at *2–5 (A.F. Ct. Crim. App. 23 Aug. 2022) (unpub. op.), *rev'd*, 84 M.J. 248 (C.A.A.F. 2024) (*Driskill II*). For purposes of this opinion a condensed version will suffice. This court previously reviewed this case twice. Upon initial review, this court remanded the record because the convening authority failed to take action as required on Appellant's entire sentence. *United States v. Driskill*, No. ACM 39889, 2021 CCA LEXIS 672, at *11–12 (A.F. Ct. Crim. App. 14 Dec. 2021) (unpub. op.) (*Driskill I*). Following remand, this court's subsequent review affirmed the findings but approved only so much of the sentence as provided for a dishonorable discharge, confinement for 30 years, forfeiture of all

Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

² The military judge merged the specifications of rape of a child and sexual abuse of a child for sentencing.

³ After trial, the convening authority suspended the adjudged forfeitures of all pay and allowances for six months, release from confinement, or expiration of term of service, whichever was sooner, with suspension commencing on 18 November 2019.

⁴ Appellant was credited with 278 days in pretrial confinement.

pay and allowances, and reduction to the grade of E-1. *Driskill II*, unpub. op. at *2, 57–58.

The United States Court of Appeals for the Armed Forces (CAAF) granted review and held that Appellant’s conviction for wrongful possession of obscene cartoons in violation of Article 134, UCMJ, violated prohibitions against double jeopardy. *United States v. Driskill*, 84 M.J. 248, 249–50 (C.A.A.F. 2024). The CAAF set aside the findings as to that charge and specification and dismissed them with prejudice. *Id.* at 257. The CAAF remanded the case to this court to conduct “a new review under Article 66, UCMJ,” 10 U.S.C. § 866, specifically directing this court to “evaluate the impact of [the CAAF’s] dismissal of the Charge and its Specification on both (1) the findings of the Additional Charge and its Specifications and (2) the sentence.” *Id.*

I. BACKGROUND

Before the current charges and specifications were preferred in this case, Appellant was tried in a separate general court-martial at Aviano Air Base, Italy. *Id.* at 250. In that case, the Government charged Appellant with three specifications of violating Article 134, UCMJ, while he was stationed in Italy. The first two specifications alleged child pornography offenses and the third specification alleged knowing and wrongful possession of obscene cartoons in violation of 18 U.S.C. § 1466(b)(1). *Id.* After the close of the evidence, the military judge dismissed this latter specification because she concluded 18 U.S.C. § 1466(b)(1) “is not a statute of extraterritorial jurisdiction.” *Id.* at 251. However, she declined to dismiss the specification with prejudice because she

held the court-martial lacked jurisdiction to try that offense. *Id.* Appellant was later acquitted of the remaining two child pornography specifications. *Id.*

After the conclusion of his first court-martial, the Government charged Appellant in the instant case with one specification of possession of obscene cartoons under Clause 2 of Article 134, UCMJ. The Government also charged Appellant with two new specifications under an Additional Charge, alleging rape of a child and sexual abuse of a child in violation of Article 120b, UCMJ. Appellant's daughter, WD, was the named victim in both of the Article 120b, UCMJ, specifications. Before trial, Appellant's trial defense counsel filed a motion to dismiss the possession of obscene cartoons specification on the grounds of former jeopardy. The military judge denied that motion.

Following this ruling, Appellant, pursuant to a PTA, pleaded guilty to the possession of obscene cartoons. After the military judge accepted Appellant's guilty plea, the parties proceeded to litigate the Additional Charge and its two specifications. A panel of members convicted Appellant of both Article 120b, UCMJ, specifications. As noted above, this court's subsequent review affirmed the findings as entered, but reduced Appellant's term of confinement to 30 years as a matter of sentence appropriateness.

The CAAF later set aside the findings on the Charge and Specification for possession of obscene cartoons and dismissed the Charge and Specification with prejudice. *Id.* at 257. The CAAF concluded that the prosecution of this offense was barred due to former jeopardy because the first court-martial had

jurisdiction to prosecute Appellant for this offense, jeopardy attached during the first court-martial, and the specification for possessing obscene cartoons was for the same offense as in the first court-martial. *Id.* at 253–54. Our superior court then remanded the case for a “new review under Article 66, UCMJ,” with specific direction to “evaluate the impact” of the dismissal of the Article 134, UCMJ, charge and specification on the remaining findings of guilty as to the Article 120b, UCMJ, offenses and the sentence. *Id.* at 257.

We conclude the error with respect to former jeopardy did not affect the findings as to the Article 120b, UCMJ, offenses, and we reassess the sentence in light of the CAAF’s dismissal of the Article 134, UCMJ, charge.

II. DISCUSSION

A. Additional Background

Appellant entered into a PTA whereby he agreed to plead guilty to the wrongful possession of obscene cartoons in violation of Article 134, UCMJ, while pleading not guilty to the Article 120b, UCMJ, offenses. Appellant further agreed to enter into a reasonable stipulation of fact which would include, *inter alia*, that although Appellant did not know how many obscene cartoons he possessed, “the number was well in excess of 100.” The PTA further provided:

In exchange for what [Appellant] ha[s] offered to do via the proposed pretrial agreement . . . the Convening Authority agrees to direct the trial counsel to offer into evidence (1) an agreed upon exhibit

containing no more than 100 cartoon images in support of the Specification of the Charge, and (2) an exhibit containing no more than 50 images to be used for purposes of [Mil. R. Evid.] 404(b). The exhibit containing no more than 100 cartoon images in support of the Specification of the Charge will be attached to the stipulation of fact as Attachment 1. The exhibit containing no more than 50 images to be used for purposes of [Mil. R. Evid.] 404(b) will be marked as a Prosecution Exhibit for Identification. The images in Attachment 1 will not contain hearsay (text in any language). If any of the images contained on the exhibit marked as a Prosecution Exhibit for Identification contain text in any language, [Appellant] reserve[s] the right, through counsel, to object to those images and their accompanying text on a hearsay basis, and to have [Appellant's] objection heard by the Military Judge. [A]ppellant also reserves the right to object to the images contained on the exhibit marked as a Prosecution Exhibit for Identification on any other applicable basis, except foundation, which [Appellant] agree[s] to waive via this pretrial agreement offer.

During the military judge's providency inquiry with respect to Appellant's plea of guilty to possession of obscene cartoons, the Government admitted a stipulation of fact as Prosecution Exhibit 1 (PE 1).

Consistent with the PTA, in the stipulation Appellant admitted *inter alia* that he possessed well in excess of 100 obscene cartoons on his electronic devices, and that he possessed these obscene cartoons “because, to him, they were sexually arousing.” Attached to PE 1 was a sealed computer disc that contained 100 of the obscene cartoons Appellant possessed, which included depictions of young girls in various sexually explicit situations, including engaging in sexual acts with adult men.

Pursuant to Mil. R. Evid. 404(b), the military judge allowed the Government to use the attachment to PE 1 as evidence of Appellant’s motive and intent with respect to the litigated Article 120b, UCMJ, offenses Appellant was charged with committing on his daughter WD. In addition, the military judge permitted the Government to introduce a second disc containing 50 more cartoon images Appellant possessed as Prosecution Exhibit 2 (PE 2), also as evidence of Appellant’s motive and intent as to the Article 120b, UCMJ, offenses under Mil. R. Evid. 404(b).⁵ The images in PE 2 were of a generally similar nature to those in the attachment to PE 1.

During the Government’s opening statement, trial counsel referred to Appellant being “sexually aroused” by the obscene cartoons, and in particular images of

⁵ More precisely, the military judge permitted the Government to use the images from the attachment to PE 1 and from PE 2 as evidence of motive with respect to Specifications 1 and 2 of the Additional Charge, and as evidence of intent with respect to Specification 2 of the Additional Charge. The military judge explained this was because “there’s no intent requirement for Specification 1 of the Additional Charge,” rape of a child in violation of Article 120b, UCMJ.

what “appear to be children performing sexual acts on their fathers.”

When the Government published the attachment to PE 1 to the court members, the military judge instructed them:

This evidence, that the accused knowingly and wrongfully possessed obscene cartoons, may be considered for the limited purpose of it’s [sic] tendency, if any, to prove [Appellant’s] motive to commit Specification 1 or 2 of the Additional Charge, as well as to prove that [Appellant] intended to commit the offense alleged in Specification 2 of the Additional Charge.

You may not consider this evidence for any other purpose, and you may not conclude or infer from this evidence that [Appellant] is a bad person or has criminal tendencies and that, therefore, he committed the offenses alleged in the Additional Charge.

The military judge provided a similar instruction when the Government published PE 2 to the court members.

At trial, Appellant’s spouse HD testified about a conversation she had with Appellant while they were living in Italy with WD. In this conversation, Appellant became emotional and told HD that “he couldn’t stop looking at little girls.” When HD asked Appellant to explain, he showed her images of child pornography on his computer, specifically “children engaging in sexual acts.” When HD asked Appellant “if he would ever touch a child, a little girl,” Appellant

responded, “I don’t know, because I can’t even stop looking at a picture.” HD testified she told Appellant she would consider not divorcing him or turning him in if he got “rid of” the child pornography and promised he would “never do this again.” Appellant then destroyed two USB drives as HD watched. Regarding this evidence, the military judge provided the court members a similar Mil. R. Evid. 404(b) instruction as he had with the attachment to PE 1 and PE 2. Specifically, the military judge instructed the members could consider evidence Appellant “may have shown [HD] images of child pornography, and commented on his willingness to commit crimes similar to those in the images” only as evidence of motive as to Specifications 1 and 2 of the Additional Charge and evidence of intent as to Specification 2 of the Additional Charge.

The court members were informed at several points that Appellant had pleaded guilty to the Charge and Specification alleging possession of obscene cartoons in violation of Article 134, UCMJ.

During closing argument, trial counsel referred several times to the obscene cartoons and Appellant’s admission that he found them sexually arousing.

When the military judge delivered his instructions on findings he advised the court members:

An accused may be convicted based only on evidence before the court, and not on evidence of a general criminal disposition. Each offense must stand on its own and you must keep the evidence of each offense separate.

Stated differently, if you find or believe that the accused is guilty of one offense,

you may not use that finding or belief as a basis for inferring, assuming, or proving that he committed any other offense. If evidence has been presented which is relevant to more than one offense, you may consider that evidence with respect to each offense to which it is relevant.

The burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt. Proof of one offense carries with it no inference that the accused is guilty of any other offense.

The military judge also repeated the instruction that evidence Appellant “knowingly and wrongfully possessed obscene cartoons” could be considered only “for the limited purpose of its tendency, if any, to prove the accused’s motive to commit Specification 1 or 2 of the Additional Charge, as well as to prove that the accused intended to commit the offense alleged in Specification 2 of the Additional Charge.”

B. 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. 2023) (citation omitted).

The Fifth Amendment⁶ guarantees that “[n]o person shall . . . be subject, for the same offense, to be

⁶ U.S. CONST. amend. V.

twice put in jeopardy of life or limb.” U.S. Const. amend. V, cl. 2. This provision consists of three separate constitutional guarantees for an accused: (1) protection against a second prosecution for the same offense after an acquittal; (2) protection against a second prosecution for the same offense after a conviction; and (3) protection against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Article 44, UCMJ, 10 U.S.C. § 844, incorporates these same constitutional guarantees for service members. *United States v. Easton*, 71 M.J. 168, 170 (C.A.A.F. 2012) (citation omitted).

Where an error is of constitutional dimensions, an appellate court may not affirm the result unless the error was harmless beyond a reasonable doubt. *United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004). This “standard is met where a court is confident that there was no reasonable possibility that the error might have contributed to the conviction.” *United States v. Prasad*, 80 M.J. 23, 29 (C.A.A.F. 2020) (citations omitted).

In order to convict Appellant of rape of a child as alleged in Specification 1 of the Additional Charge, the Government was required to prove: (1) Appellant committed a sexual act on WD, to wit penetrating her mouth with his penis; and (2) at the time WD was under the age of 12 years. *See Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*), pt. IV, ¶ 45b.a.(a). In order to convict Appellant of sexual abuse of a child as alleged in Specification 2 of the Additional Charge, the Government was required to prove: (1) Appellant committed a lewd act on WD by causing her to touch, directly or through clothing, his genitalia; (2) at the time WD was under the age of 12

years; and (3) Appellant did so with the intent to gratify his sexual desire. 2016 *MCM*, pt. IV, ¶ 45b.a.(c).

Mil. R. Evid. 404(b) provides that evidence of a crime, wrong, or other act by a person is generally not admissible as evidence of the person's character in order to show the person acted in conformity with that character on a particular occasion. However, such evidence may be admissible for another purpose, including, *inter alia*, proving motive or intent with respect to a charged offense. Mil. R. Evid. 404(b)(2).

Court members are presumed to follow the military judge's instructions absent evidence to the contrary. *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000).

C. Analysis

As an initial matter, as stated above, the CAAF set aside this court's prior opinion in *Driskill II* in its entirety and directed a new Article 66, UCMJ, review. *Driskill*, 84 M.J. at 257. Following the remand from the CAAF, both parties addressed the impact of the dismissal of the Charge and Specification on the other findings and the sentence, which the CAAF directed this court to consider. However, neither party has asked this court to readdress any of the other issues this court addressed previously in *Driskill II*. See *Driskill II*, unpub. op. at *14–36, 43–58. Having reviewed this court's prior opinion, and in the absence of any new argument from the parties, we resolve these issues—excepting the issue of former jeopardy—consistent with this court's prior opinion, with the additional caveat that we readdress the question of sentence appropriateness at the conclusion of our opinion below.

1. Effect on Remaining Findings of Guilty

Turning to the question our superior court directed us to address, Appellant contends this court should set aside the findings of guilty as to the Article 120b, UCMJ, offenses because those findings were improperly influenced by the erroneous prosecution for possessing obscene cartoons in violation of Article 134, UCMJ. In the alternative, Appellant contends that if this court affirms the Article 120b, UCMJ, convictions, it should remand the case for a rehearing as to the sentence. Appellant further alternatively argues that if this court instead reassesses the sentence, it should approve no more than 15 years of confinement. In contrast, the Government contends this court should affirm the remaining findings of guilty and reassess Appellant's sentence to the same sentence it previously affirmed in *Driskill II*, including a 30-year term of confinement, or at most reduce that term of confinement by four months.⁷

Neither party's analysis explicitly tests the impact of Appellant's erroneous prosecution for possessing obscene cartoons for harmlessness beyond a reasonable doubt, despite the CAAF's finding of constitutional error. *See Driskill*, 84 M.J. at 250, 256;

⁷ The Government's position with regard to the sentence is facially somewhat contradictory. On one hand, the Government asserts "Appellant is well-deserving of his 30-year confinement sentence." On the other hand, the Government contends this court should "affirm the findings and sentence in this case." The Government appears to overlook the fact that when the CAAF set aside this court's opinion in *Driskill II*, it also set aside the reduction of Appellant's term of confinement from the adjudged 40 years and 9 months to 30 years. Viewed as a whole, in light of the circumstances, we understand the Government's position to be that this court should approve a 30-year term of confinement.

Mason, 59 M.J. at 424. Instead, both parties employ the “three-pronged test to assess the danger” of impermissible spillover stated in *United States v. Kerr*: “(1) whether the evidence of one offense would be admissible proof of the other; (2) whether the military judge has provided a proper limiting instruction; and (3) whether the findings reflect an impermissible crossover.” 51 M.J. 401, 406–07 (C.A.A.F. 1999) (quoting *United States v. Southworth*, 50 M.J. 74, 76 (C.A.A.F. 1999)). In *Southworth*, 50 M.J. at 76–78, and *United States v. Curtis*, 44 M.J. 106, 128–29 (C.A.A.F. 1996), the CAAF used these factors to determine that military judges did not abuse their discretion by denying motions to sever offenses. In *Kerr*, the CAAF applied this test to determine whether the appellant “was prejudiced by the spillover effect” of evidence of uncharged misconduct, concluding he was not. 51 M.J. at 406–07.

However, we find the test articulated in *Kerr* to be of limited value in the instant case. Unlike *Kerr*, *Southworth*, and *Curtis*, here we must test a constitutional error for harmlessness beyond a reasonable doubt. Although the individual elements of the *Kerr* test bear consideration as part of the totality of the circumstances, the ultimate question remains whether we can be confident beyond reasonable doubt Appellant’s erroneous prosecution for possession of obscene cartoons did not contribute to his Article 120b, UCMJ, convictions. See *Prasad*, 80 M.J. at 29.

Considering the circumstances as a whole, we are satisfied beyond a reasonable doubt the error did not influence Appellant’s convictions for rape of a child and sexual abuse of a child. The essential questions include (1) what, if anything, would have transpired differently at Appellant’s court-martial with respect

to the litigated Article 120b, UCMJ, offenses if the double jeopardy violation had not occurred, and (2) how might these differences have affected the outcome. Of course, without the Article 134, UCMJ, charge, there would have been no guilty plea, no PTA, and no stipulation of fact. These are significant differences in themselves, but the essential question is how these changes would have affected the litigation of the contested offenses. We find three significant points that warrant discussion: use of the obscene images as Mil. R. Evid. 404(b) evidence of Appellant's motive and intent; informing the court members that Appellant had pleaded guilty to the wrongful possession of obscene cartoons; and Appellant's admission in PE 1 that he found the obscene images sexually arousing.

First, we find the Government would have introduced some number of the obscene images that were the subject of the Article 134, UCMJ, charge as Mil. R. Evid. 404(b) evidence of motive and intent of the Article 120b, UCMJ offenses, even if the possession of obscene images had not been charged. Appellant's possession of a large number of sexually explicit cartoon images of young girls, including young girls engaged in sexual acts with adult men, was relevant evidence of a particular sexual interest in young girls. Such an interest indicated a motive for Appellant to commit sexual acts with his then approximately two-year-old daughter WD. It is true the PTA anticipated the parties would agree upon no more than 100 images to be attached to the stipulation of fact as evidence of Appellant's guilt of the Article 134, UCMJ, offense, and that the Government would offer an additional exhibit with no more than 50 additional images as a separate prosecution exhibit.

However, this provision was styled as a commitment by the convening authority in exchange for Appellant's guilty plea rather than a concession by Appellant. The PTA terms did not prohibit the Defense from opposing the use of these images as Mil. R. Evid. 404(b) evidence of the contested offenses. However, at trial, although the Defense objected to file names and certain words included with images in PE 2, they did not object to the attachment to PE 1 or PE 2 as Mil. R. Evid. 404(b) on relevance grounds. This suggests both parties believed the obscene images were Mil. R. Evid. 404(b) evidence of motive and intent. In any event, whether the Defense had opposed the images or not, we are convinced that without the guilty plea and PTA the Government would have successfully introduced some representative sample of the large number of obscene images of young girls to support the inference Appellant had motive and intent to commit sexual acts with WD, with appropriate limiting instructions similar to those the military judge provided at trial.

Next, we have considered that the court members were informed at various points that Appellant pleaded guilty to wrongfully possessing obscene cartoons. However, the military judge provided appropriate anti-spillover instructions to the effect that Appellant's guilt of that offense could not be used to infer, assume, or prove he was guilty of the contested offenses. Court members are presumed to follow the military judge's instructions absent evidence to the contrary. *Taylor*, 53 M.J. at 198. We do not find such evidence here. Accordingly, we conclude the information Appellant pleaded guilty to with respect to the Article 134, UCMJ, charge did not

contribute to his convictions for the contested offenses.

Turning to Appellant's admission in the stipulation of fact that he found the obscene images sexually arousing, his sexual interest was plainly implied by his possession of a large number of such images even if he had not explicitly admitted it. The images in question are pornographic as well as obscene. Although during argument trial counsel might not have been able to recite Appellant's own words to the court members in quite the same way, trial counsel would have been able to direct the court members to the same inferences and conclusions. This is particularly so when the obscene images are viewed in conjunction with his wife HD's testimony that Appellant had showed her a collection of images of child pornography, admitted he could "not stop looking at little girls," and said he did not know if he would "ever touch a child, a little girl." We conclude beyond a reasonable doubt the findings as to the contested offenses would have been the same regardless of the existence of this admission in the stipulation of fact.

Considering the entirety of the evidence and the totality of the circumstances,⁸ we are convinced beyond a reasonable doubt the findings as to rape of a child and sexual abuse of a child in violation of Article 120b, UCMJ, would have been unchanged had the double jeopardy violation not occurred.⁹

⁸ For a more detailed description and analysis of the evidence supporting Appellant's convictions for rape of a child and sexual abuse of a child, see *Driskill II*, unpub. op. at *5–23.

⁹ In addition, to the extent the *Kerr* test described *supra* applies to our inquiry, we find all three prongs weigh in favor of finding

2. Sentence Reassessment

Next we consider whether, in light of the CAAF’s dismissal of the Article 134, UCMJ, charge, we can reliably reassess Appellant’s sentence, or instead must remand the case for a rehearing on the sentence. *See United States v. Winckelmann*, 73 M.J. 11, 15–16 (C.A.A.F. 2013). Our task is to discern whether we can “determine to [our] satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity.” *Id.* at 15 (quoting *United States v. Moffeit*, 63 M.J. 40, 41 (C.A.A.F. 2006)) (additional citation omitted). Because the error was of constitutional dimensions, we must ensure a reassessment excises the prejudice beyond a reasonable doubt. *See Mason*, 59 M.J. at 424. We find that we can reliably reassess.

First, we find there has not been a dramatic change in the penalty landscape and Appellant’s exposure. *See id.* The maximum imposable punishment for the convicted offenses remains unchanged, including *inter alia* confinement for life without the possibility of parole and a mandatory dishonorable discharge. This factor favors reassessment.

no impermissible spillover. 51 M.J. at 406–07. With regard to the first prong, as described above, evidence of the obscene cartoons would have been admissible proof of the Article 120b, UCMJ, offenses to the extent that they demonstrated motive and intent consistent with Mil. R. Evid. 404(b). In other words, the impact of the obscene cartoon evidence would have been much the same with or without the Article 134, UCMJ, charge. As to the remaining prongs, the military judge did provide appropriate limiting instructions, and the findings do not reflect improper spillover given the strength of the proper evidence of the Article 120b, UCMJ, offenses.

Second, Appellant was sentenced by court members rather than the military judge. *See id.* at 16. This factor favors a rehearing.

Third, the remaining offenses “capture the gravamen of the criminal conduct included within the original offenses.” *Id.* By multiple measures, the significance of Appellant’s convictions for rape of a child and sexual abuse of a child was far greater than that of his conviction for possession of obscene cartoons. This factor favors reassessment.

Fourth, the remaining offenses of rape of a child and sexual abuse of a child are of a type the judges of this court “have experience and familiarity with.” *Id.* This factor also favors reassessment.

In addition, recognizing these four factors are “illustrative, but not dispositive,” we note an additional significant aspect of this case. *Id.* at 15. The court members adjudged a term of confinement of 40 years and 9 months, but in *Driskill II* this court reduced the term of confinement to 30 years as a matter of sentence appropriateness. *Driskill II*, unpub. op. at *57. We are confident beyond a reasonable doubt that without the Article 134, UCMJ, conviction, the court members would have sentenced Appellant to at least 30 years in confinement. In addition, we find such a term of confinement is not inappropriately severe for the remaining convictions. Accordingly, we reassess Appellant’s sentence to a dishonorable discharge, confinement for 30 years, forfeiture of all pay and allowances, and reduction to the grade of E-1.

D. Post-Trial Delay

On 1 April 2024, Appellant’s record of trial was redocketed with this court following the CAAF’s

remand. Appellant requested and was granted 11 enlargements of time, over the Government's opposition, before filing his brief on 27 May 2025. The Government timely filed its response on 26 June 2025, and Appellant filed a reply brief on 3 July 2025.

“[C]onvicted servicemembers have a due process right to timely review and appeal of courts-martial convictions.” *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citations omitted). In *Moreno*, the CAAF established a presumption of facially unreasonable delay “where appellate review is not completed and a decision is not rendered within eighteen months of docketing the case before the Court of Criminal Appeals.” 63 M.J. at 142. Where there is a facially unreasonable delay, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): “(1) the length of the delay; (2) the reasons for the delay; (3) the appellant’s assertion of the right to timely review and appeal; and (4) prejudice [to the appellant].” *Id.* at 135 (citations omitted). The CAAF identified three types of cognizable prejudice for purposes of an appellant’s due process right to timely post-trial review: (1) oppressive incarceration; (2) “particularized” anxiety and concern “that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision;” and (3) impairment of the appellant’s grounds for appeal or ability to present a defense at a rehearing. *Id.* at 138–40 (citations omitted). Where there is no qualifying prejudice from the delay, there is no due process violation unless the delay is so egregious as to “adversely affect the public’s perception of the fairness and integrity of the military justice system.” *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). We review de novo an appellant’s entitlement to relief for

post-trial delay. *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) (citing *Moreno*, 63 M.J. at 135).

Over 18 months have elapsed since Appellant's record of trial was redocketed with this court. Therefore, under *Moreno*, there is a facially unreasonable delay. We have considered the *Barker* factors and find no violation of Appellant's due process rights. Appellant has not specifically alleged cognizable prejudice from the delay, and under the circumstances we do not discern any oppressive incarceration, particularized anxiety or concern, impairment to any further appeal, and no rehearing has been directed. Absent prejudice, we find the delay—primarily attributable to Appellant's 11 motions for enlargement of time—has not been so egregious as to adversely affect the perception of the military justice system. Accordingly, we find no violation of Appellant's due process rights; nor do we find any relief warranted in the absence of a due process violation. See 10 U.S.C. § 866(d)(2); *United States v. Valentin-Andino*, 85 M.J. 361, 364 (C.A.A.F. 2025).

III. CONCLUSION

We reassess the sentence to a dishonorable discharge, confinement for 30 years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The remaining findings of guilty as to Specifications 1 and 2 of the Additional Charge and the Additional Charge, and the sentence, as reassessed, are correct in law and fact, and no additional 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). The findings of guilty as to Specifications 1 and 2 of the Additional Charge and the Additional Charge, and the sentence, as reassessed, are **AFFIRMED**.

DOUGLAS, Senior Judge (concurring in the result):

I concur in the result for the remaining findings of guilty and the sentence. However, I write separately because, in my opinion, our new Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, *de novo* review, hinges upon two separate standards of review of disparate evidence.

Because our superior court set aside one of Appellant's convictions, determined after a guilty plea and pursuant to a pretrial agreement, we must decide which evidence, if any, is available for our consideration of whether the remaining findings and sentence are correct in law and fact, or whether any error occurred that was materially prejudicial to the substantial rights of Appellant. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c).

A. Harmless Beyond a Reasonable Doubt: The Stipulation of Fact

At trial, Appellant entered a plea of guilty to violating one specification of Article 134, UCMJ, 10 U.S.C. § 934, knowing and wrongful possession of obscene cartoons. Appellant agreed he would "enter into a reasonable stipulation of fact." The stipulation of fact was entered as evidence, and labeled Prosecution Exhibit 1 (PE 1).

PE 1 is a two-page document and was used by the trial judge in his providency inquiry with Appellant. Paragraph five reads as follows:

The [Appellant] agrees and admits that he wrongfully possessed obscene cartoons. The cartoons were obscene in that their sexual content was patently offensive in light of community standards. Finally, the cartoons possessed by the [Appellant] lacked serious literary, artistic, political, or scientific value. The [Appellant] did not possess these obscene cartoons for any artistic reason. *The [Appellant] possessed these obscene cartoons because, to him, they were sexually arousing.*

(Emphasis added).

Appellant informed the members of his guilty plea and agreed that PE 1 could be used as evidence of the contested findings. Trial counsel referred to the emphasized language above, in part, to rationalize for the members Appellant's actions as alleged in the contested findings.

Independent of the stipulation of fact, Appellant's spouse, HD, testified that after Appellant showed her certain images of children on his computer, she asked him if "he got off on this?" Appellant replied, "Why does anybody look at pornography, [HD]?" The trial judge admitted this evidence under Mil. R. Evid. 404(b), as well as additional evidence, discussed below.

A plea agreement may include a promise by the accused to plead guilty to, or to enter a "confessional" stipulation. R.C.M. 705(b)(1). "Confession" means an

acknowledgement of guilt. Mil. R. Evid. 304(a)(1)(B). The Fifth Amendment right against self-incrimination¹ and Article 31, UCMJ, 10 U.S.C. § 831, apply during pretrial and trial stages. *United States v. Scott*, 51 M.J. 326, 329 (C.A.A.F. 1999).

Where an error is of constitutional dimensions, an appellate court may not affirm the result unless the error was harmless beyond a reasonable doubt. *United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004). An error is harmless beyond a reasonable doubt when the error did not contribute to Appellant's conviction or sentence. *United States v. Hills*, 75 M.J. 350, 357 (C.A.A.F. 2016). This "standard is met where a court is confident that there was no reasonable possibility that the error might have contributed to the conviction." *United States v. Prasad*, 80 M.J. 23, 29 (C.A.A.F. 2020) (citations omitted).

Here, Appellant agreed that the confessional stipulation of fact, for the offense set aside, could be used against him for the contested offenses. Because the trial judge admitted it not only for the providency inquiry, but also for these purposes, this is error. However, I find it harmless error.

First, Appellant's confession, as written in PE 1, that he "*possessed these obscene cartoons because, to him, they were sexually arousing*" does not prove most, if not all, of the elements of either remaining conviction (rape of a child and sexual abuse of a child). The two elements of child rape include a sexual act against WD, and that she had not yet attained the age of 12. The three elements of sexual abuse of a child

¹ U.S. CONST. amend. V.

include a lewd act upon WD, that she had not yet attained the age of 12, and that his intent was to gratify his sexual desire. At best, Appellant's confession that the cartoon images were sexually arousing could be used to explain his intent for the lewd act upon WD. Assuming Appellant's confession satisfies element three of the offense of sexual abuse of WD, the Government still must prove the remaining elements of both offenses.

Second, Appellant's confession was redundant to the sarcastic response he made to his spouse. She asked him, did he "get off" on the images he possessed and showed her. In more precise terms, HD asked Appellant if he was sexually aroused by looking at the images he showed her. His sarcastic reply, "why does anybody look at pornography," was in effect, an affirmative, "yes." Therefore, even without the confessional stipulation of fact, the Government admitted another confession, albeit through a witness, and under Mil. R. Evid. 404(b).

Therefore, I am confident admitting the confessional stipulation of fact did not contribute to Appellant's remaining convictions. *Hills*, 75 M.J. at 375.

B. Abuse of Discretion: The Evidence of Crimes, Wrongs, or Other Acts

One evening, HD asked Appellant to tuck her into bed. They discussed whether either was hiding anything from the other. Appellant admitted he had been hiding something for some time. Appellant then told HD that he "could not stop looking at little girls." HD was confused. They walked from the bedroom to their living room, where Appellant had his laptop computer. Appellant and HD sat down, and Appellant

began to show HD images. The images were of child pornography. HD then asked Appellant if he “got off on this,” which Appellant replied, “Why does anybody look at pornography, [HD]?” HD asked how he came to have these images, and Appellant explained he searched for them on the “black web.” HD asked Appellant if he would ever “touch a child, a little girl.” Appellant replied, “I don’t know because I can’t even stop looking at a picture.” HD told Appellant to “get rid” of these images, and if he agreed to not look at these images again, she would not divorce him or report him. In front of her, Appellant threw one USB (Universal Serial Bus) drive into their fireplace and another he “tore into pieces” and threw in the trash. HD believed those were the only devices he had that contained images of this type. The next morning, Appellant denied that he would ever touch a child.

In response to a defense motion to exclude portions of HD’s testimony, the trial judge ruled admissible under Mil. R. Evid. 404(b) that (1) Appellant showed images of child pornography to HD, and that (2) Appellant commented to HD upon his willingness to commit similar acts upon children to those demonstrated in the images.

The trial judge explained this evidence was to show motive as to both child rape and sexual abuse of a child, and intent as to sexual abuse of a child. The rationale was due to the similarity between the admitted Mil. R. Evid. 404(b) evidence and the charged offenses.

Specific to motive, the trial judge ruled that the trier of fact, when considering Appellant’s motives for committing the contested offenses could consider the charged acts served as an “outlet for the emotion of

lust.” Specific to intent, the trial judge ruled that the trier of fact, when considering Appellant’s intent in the commission of sexual abuse of a child, could consider Appellant’s state of mind.

For both motive and intent, the trial judge determined the similarity was sufficient between the admitted Mil. R. Evid. 404(b) evidence and the alleged crimes to satisfy the three-part test of *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989). The trial judge relied primarily upon the rationale provided in *United States v. Hays*, 62 M.J. 158, 164 (C.A.A.F. 2005).

PE 1 has one attachment: a disc containing 100 cartoon images. Pursuant to the pretrial agreement, PE 1, including the attachment, would be admitted “in support of” the now set aside offense. The 100 cartoon images were lawfully seized by the Government. At trial, Appellant and counsel for both sides agreed the use of these images would be to show Appellant’s “motive with respect to both [remaining offenses], and his intent with respect to the second [offense (sexual abuse of a child)].”

PE 2 is a separate disc containing an additional 50 cartoon images. This exhibit was also referenced in the pretrial agreement. Explicitly, this exhibit would be admitted “for purposes of [Mil. R. Evid.] 404(b) . . .” The trial judge ruled PE 2 would be admitted under Mil. R. Evid. 404(b) “consistent with the 404[(b)] ruling earlier in this case.” These images were also lawfully seized by the Government.

We review the trial judge’s decision to admit or exclude evidence for abuse of discretion. *United States v. Greene-Watson*, 85 M.J. 340, 345 (C.A.A.F. 2025) (citing *United States v. Wilson*, 84 M.J. 383, 390

(C.A.A.F. 2024)). Trial judges abuse their discretion if: (1) the findings of fact upon which they predicate their ruling are not supported by the evidence of record; (2) they use incorrect legal principles; or (3) their application of the correct legal principles to the facts is clearly unreasonable. *Id.*

Trial judges are tasked with giving proper instructions including limiting instructions to preclude spillover from one offense to another distinct offense. *See United States v. Southworth*, 50 M.J. 74, 76–78 (C.A.A.F. 1999).

“Evidence of a crime, wrong, or other act . . . may be admissible for another purpose, such as proving motive . . . [or] intent” Mil. R. Evid. 404(b)(2); *United States v. Wilson*, 84 M.J. 383, 390 (C.A.A.F. 2024).

“Motive evidence shows the doing of an act by a particular person by evidencing an emotional need in that person which could have incited or stimulated that person to do that act in satisfaction of that emotion.” *United States v. Whitner*, 51 M.J. 457, 461 (C.A.A.F. 1999) (citing *United States v. Watkins*, 21 M.J. 224, 227 (C.M.A. 1986)). Possession of a “large number” of sexual materials in the military barracks room, including some depicting acts similar to those particularly charged, reasonably suggests an emotional need for committing the charged misconduct. *See id.* (citing *United States v. Rhea*, 33 M.J. 413, 422 (C.M.A. 1991)) (additional citation omitted).

When considering whether uncharged misconduct constitutes admissible evidence of intent under Mil. R. Evid. 404(b), we consider “whether Appellant’s state of mind in the commission of both the charged and

uncharged acts was sufficiently similar to make the evidence of the prior acts relevant on the intent element of the charged offenses.” *United States v. Hays*, 62 M.J. 158, 164 (C.A.A.F. 2005) (quoting *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)). “Extrinsic acts of evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor’s state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.” *Id.* (quoting *United States v. Tanksley*, 54 M.J. 169, 176 (C.A.A.F. 2000) (quoting *Huddleston v. United States*, 485 U.S. 681, 685 (1988))).

Appellate courts apply a three-part test “to assess the danger of spillover: (1) whether the evidence of one offense would be admissible proof of the other; (2) whether the military judge has provided a proper limiting instruction; and (3) whether the findings reflect impermissible crossover.” *United States v. Kerr*, 51 M.J. 401, 406 (C.A.A.F. 1999) (citing *Southworth*, 50 M.J. at 76–78, and then citing *United States v. Curtis*, 44 M.J. 106, 128 (C.A.A.F. 1997)).

Here, regardless of the references in the pretrial agreement to the cartoon image exhibits, and despite Appellant’s agreement the members could consider the cartoon exhibits for the contested offenses, the trial judge thoroughly reviewed the facts, and the case law before providing his rulings. There were multiple motions and motions hearings, with witnesses, evidence, and arguments. After meticulous analysis, the trial judge admitted two portions of HD’s testimony, the attachment to PE 1, and PE 2 under Mil. R. Evid. 404(b), for motive and intent. For purposes of this de novo review, Appellant objects on appeal, to our consideration of all this evidence.

Appellant contends the trial judge admitted this evidence contrary to impermissible spillover.

I find the trial judge did not abuse his discretion. The trial judge's facts are well supported by the evidence. His applied the correct legal principles and his application of the correct legal principles was reasonable and measured.

Appellant's spouse, HD, explained the context in which Appellant showed her images of "child pornography" on his computer. When HD asked Appellant if he would ever "touch a child, a little girl" Appellant replied, "I don't know because I can't even stop looking at a picture." Evidence of Appellant looking at images described by HD as child pornography and commenting to HD upon his willingness to commit similar acts upon children to those demonstrated in the images is permitted under Mil. R. Evid. 404(b)(2) to prove motive and intent. Although motive is not an element of either contested offense, motive evidence explains the emotional need Appellant could have had which incited him to commit the sexual and lewd acts upon his child, WD. *Whitner*, 51 M.J. at 461. Intent is an element of sexual abuse. Intent evidence can explain Appellant's state of mind in the commission of the charged acts when the uncharged acts are sufficiently similar. *Hays*, 62 M.J. at 158. The images are sufficiently similar, as evidenced by HD's reaction to being shown images of "child pornography," and then in the same conversation, asking her husband if he was sexually aroused by looking at these images, and then asking if he would ever touch a little girl.

The cartoon images admitted against Appellant as proof of the contested offenses totaled 150. The trial

judge reasoned they were admissible under Mil. R. Evid. 404(b)(2) as evidence of motive and intent, consistent with his previous ruling regarding HD's testimony. Appellant's possession of a significant number of images, involving adult men, and female children, including some depicting acts similar to those particularly charged, reasonably suggests an emotional need for committing the charged offenses. *Whitner*, 51 M.J. at 461 (citing *Rhea*, 33 M.J. at 422).

I have carefully considered whether the evidence admitted under Mil. R. Evid. 404(b) constitutes impermissible spillover. *Kerr*, 51 M.J. 401. As already discussed *supra*, the Mil. R. Evid. 404(b) evidence was properly admitted. The trial judge crafted appropriate and narrow limiting instructions and provided them to the members at every logical and relevant stage of the proceedings. The findings do not reflect impermissible crossover. The child witness, WD, testified live at trial. Her mother, HD, and grandfather testified to her outcry statements. A forensic interviewer also testified at trial. Numerous additional witnesses testified for the Government as well as for the Defense. The findings reflect the members found Appellant guilty of the contested offenses beyond a reasonable doubt. Having determined all three parts of the *Kerr* test are satisfied, I do not find prejudicial spillover.

After reviewing the entire record and considering whether the remaining findings of guilty, and the sentence, as reassessed, are correct in law and fact, and whether any error materially prejudicial to the substantial rights of the Appellant occurred, I find no error that materially prejudices a substantial right of Appellant. Therefore, I would affirm the remaining findings and sentence, as reassessed.

89a

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

UNITED STATES
Appellee

v.

Alexander L. DRISKILL, Airman
United States Air Force, Appellant

No.23-0066

Crim. App. No. 39889

Argued October 25, 2023—Decided March 4, 2024

Military Judges: Willie J. Babor (trial) and Dayle
P. Percle (remand)

For Appellant: *Major Frederick J. Johnson* (argued);
Major Kasey W. Hawkins (on brief); *Mark C. Bruegger*,
Esq.

For Appellee: *Captain Jocelyn Q. Wright* (argued);
Colonel Matthew D. Talcott, *Lieutenant Colonel James*
P. Ferrell, *Lieutenant Colonel G. Matt Osborn*, and
Mary Ellen Payne, Esq. (on brief).

Judge MAGGS delivered the opinion of the Court, in which Chief Judge OHLSON, Judge SPARKS, Judge HARDY, and Judge JOHNSON joined.

Judge MAGGS delivered the opinion of the Court.

In this appeal, Appellant challenges the finding that he is guilty of violating Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2012), by possessing obscene cartoons. Appellant argues that trying him for the alleged offense violated the prohibitions against double jeopardy in the Fifth Amendment and Article 44(a), UCMJ, 10 U.S.C. § 844 (2012), because another court-martial had previously tried him for the same offense. Applying this Court's recent precedent in *United States v. Rice*, 80 M.J. 36 (C.A.A.F. 2020), we agree with Appellant and grant appropriate relief.

I. Background

The applicable version of Article 134, UCMJ, commonly known as the “General Article,” provides:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Article 134, UCMJ, 10 U.S.C. § 934 (2012).¹

In a portion of the *MCM* applicable to this case, the President parsed the language of Article 134, UCMJ, and explained its meaning as follows:

Article 134 makes punishable acts in three categories of offenses not specifically covered in any other article of the code. These are referred to as

“clauses 1, 2, and 3” of Article 134. Clause 1 offenses involve disorders and neglects to the prejudice of good order and discipline in the armed forces. Clause 2 offenses involve conduct of a nature to bring discredit upon the armed forces. Clause 3 offenses involve noncapital crimes or offenses which violate Federal law including law made applicable through the Federal Assimilative Crimes Act.

MCM pt. IV, para. 60.c.(1). Although the President’s explanations of the UCMJ are not binding on this Court, *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017), this Court followed an earlier, similar version of this explanation in *United States v. Leonard*, 64 M.J. 381, 382-83 (C.A.A.F. 2007) (following *MCM* pt. IV, para. 60.c.(1) (2005 ed.)).

Appellant’s first court-martial took place in 2018. He was charged with three specifications of violating

¹ The version of Article 134, UCMJ, in the 2012 edition of the U.S.C. is reprinted in *Manual for Courts-Martial, United States* app. 2 (2016 ed.) (*MCM*). The parties agree that this version of Article 134, UCMJ, governs this case. We do not address the subsequent amendment to Article 134, UCMJ.

Article 134, UCMJ. The third specification alleged that Appellant violated clause 3 of Article 134, UCMJ, by possessing obscene cartoons in violation of a federal criminal statute, 18 U.S.C. § 1466A(b)(1). The specification averred that:

[Appellant] did, at or near Italy, between on or about 11 October 2016 and on or about 27 March 2018, knowingly and wrongfully possess obscene cartoons, to wit: visual depictions of minors engaging in sexually explicit conduct, and that said visual depictions were transported in foreign commerce by computer, in violation of 18 U.S. Code Section 1466A(b)(1), an offense not capital.

Section 1466A(b)(1) addresses the possession of obscene cartoons, stating:

Any person who, *in a circumstance described in subsection (d)*, knowingly possesses a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that—

(1)(A) depicts a minor engaging in sexually explicit conduct; and

(B) is obscene

....

... shall be subject to [certain specified] penalties.

Id. (emphasis added). One of the circumstances, described in subsection (d), is that “any visual depiction involved in the offense has been . . . transported in interstate or foreign commerce by any

means.” *Id.* § 1466A(d)(4). Another circumstance is that “the offense is committed in the special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.” *Id.* § 1466A(d)(5).

Appellant pleaded not guilty to the charge and all three of its specifications. After the close of evidence, Appellant contended in his argument on findings that there was not enough evidence to prove the third specification. He stated that he could not have violated § 1466A(b) while he was in Italy because § 1466A “is not a statute of extraterritorial application.” Appellant, in an additional filing requested by the military judge in regard to this issue, asked the military judge to dismiss the specification with prejudice “because jeopardy has attached.”²

The military judge dismissed the third specification. She concluded that Congress had intended for § 1466A “to apply only within the jurisdictional limits of the United States.” On this basis, she held that the court did not have jurisdiction to try the third specification. The military judge, however, did not agree with Appellant that the specification should be dismissed with prejudice. The military judge ruled: “The lack of extraterritoriality within . . . § 1466A does not foreclose prosecution for the offense alleged, it only forecloses prosecution under the current charging scheme.”³

² From the materials before us, it is unclear how trial defense counsel’s closing argument challenging the jurisdictional element became characterized as a motion to dismiss by the military judge.

³ The military judge found Appellant not guilty of the two other specifications in the charge sheet.

Appellant's second court-martial occurred in 2019. Appellant was charged with one specification of violating Article 134, UCMJ, and two specifications of violating Article 120b, UCMJ, 10 U.S.C. § 920b (2012). The specification under Article 134, UCMJ, was similar to the obscene cartoons specification dismissed at the first court-martial, but it alleged a violation of clause 2 of Article 134, UCMJ, instead of clause 3. The specification asserted that Appellant "did, at or near Italy, between on or about 11 October 2016 and on or about 27 March 2018, knowingly and wrongfully possess obscene cartoons, such conduct being of a nature to bring discredit upon the armed forces."

Appellant moved to dismiss the specification under Article 134, UCMJ, on grounds that trying him for this offense would violate the double jeopardy prohibitions in the Fifth Amendment of the United States Constitution and Article 44(a), UCMJ, because he had already been tried for the same offense at his first court-martial. The military judge in the second court-martial denied the motion, relying on the statement by the military judge in the first court-martial that dismissal of the specification was for lack of jurisdiction and therefore did not foreclose alleging the offense under a different charge. Appellant thereupon petitioned the United States Air Force Court of Criminal Appeals (AFCCA) for a writ of mandamus, asking the AFCCA to set aside the military judge's denial of his motion to dismiss the specification. The AFCCA denied the writ. *In re Driskill*, Misc. Dkt. No. 2019-03, 2019 CCA LEXIS 281, at *3-4, 2019 WL 2896472, at *2 (A.F. Ct. Crim. App. July 2, 2019) (unpublished) (order).

Following these rulings, Appellant pleaded guilty to the specification under Article 134, UCMJ, subject

to the understanding that the double jeopardy issue he had raised was not waived. Appellant pleaded not guilty to the additional specifications under Article 120b, UCMJ, but the court-martial found him guilty of these offenses following a trial. The court-martial sentenced Appellant to a dishonorable discharge, confinement for forty years and nine months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority did not modify the findings or sentence.

On appeal, the AFCCA concluded that no violation of the prohibitions against double jeopardy in the Fifth Amendment and Article 44(a), UCMJ, had occurred. *United States v. Driskill*, No. ACM 39889 (f rev), 2022 CCA LEXIS 496, at *42-43, 2022 WL 3589824, at *14 (A.F. Ct. Crim. App. Aug. 23, 2022) (unpublished). The AFCCA reasoned that jeopardy had not attached to the specification concerning obscene cartoons at the first court-martial because that specification “was dismissed for lack of jurisdiction—grounds wholly unrelated to Appellant’s guilt or innocence—and that the dismissal came before Appellant was acquitted of the remaining specifications.” *Id.* at *42, 2022 WL 3589824, at *14. Rejecting Appellant’s other arguments, the AFCCA affirmed the findings. *Id.* at *4-5, 2022 WL 3589824, at *2. The AFCCA, however, reassessed the sentence, reducing the period of confinement to thirty years. *Id.* at *57, 2022 WL 3589824, at *20.

This Court granted review of the following issue:

In Appellant’s first court-martial, the military judge dismissed the charge of wrongful possession of obscene cartoons after closing arguments. Did the

Government's reprosecution of Appellant for the same offense violate the Fifth Amendment and Article 44's prohibitions against double jeopardy?

United States v. Driskill, 83 M.J. 327 (C.A.A.F. 2023) (order granting review). As discussed below, we answer in the affirmative and grant appropriate relief.

II. Standard of Review and Governing Law

The granted double jeopardy issue is a question of law that we must answer de novo. *United States v. Hutchins*, 78 M.J. 437, 444 (C.A.A.F. 2019).

Three prohibitions against “double jeopardy” apply to courts-martial. *United States v. Rice*, 80 M.J. 36, 40 n.8 (C.A.A.F. 2020). The Double Jeopardy Clause of the Fifth Amendment provides: “No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. Similarly, Article 44(a), UCMJ, provides: “No person may, without his consent, be tried a second time for the same offense.” And Rule for CourtsMartial (R.C.M.) 907(b)(2)(C) requires dismissal of a charge or specification if “[t]he accused has previously been tried by court-martial or federal civilian court for the same offense.”

Applying these three prohibitions requires multiple steps. One step is determining whether the accused has been “twice put in jeopardy” or, stated differently, “tried twice.” Answering this question is sometimes complicated because not every court-martial proceeding counts as a “trial” for purposes of the Fifth Amendment, Article 44, UCMJ, and R.C.M. 907(b)(2)(C). Several rules address this issue. Most relevant here is this Court’s holding in *United States*

v. Easton that jeopardy attaches pursuant to Article 44(a), UCMJ, “when evidence is introduced” and that “once jeopardy has attached, an accused may not be retried for the same offense.”⁴ 71 M.J. 168, 172 (C.A.A.F. 2012). R.C.M. 907(b)(2)(C)(i)(I) similarly provides, in pertinent part, that a court-martial proceeding is not considered a trial pursuant to the double jeopardy doctrine unless “[i]n the case of a trial by military judge alone, presentation of the evidence on the general issue of guilt has begun.” Another relevant rule is that jeopardy cannot attach if the court-martial lacks jurisdiction. R.C.M. 907(b)(2)(C)(iv) states: “No court-martial proceeding which lacked jurisdiction to try the accused for the offense is a trial in the sense of this rule.”

Another step in applying the prohibitions against double jeopardy is determining whether the accused is truly being tried twice “for the same offense.” When specifications allege offenses under different statutory provisions, this step requires courts to look closely at the elements of each of the alleged offenses. In *Blockburger v. United States*, 284 U.S. 299, 303-04 (1932), the Supreme Court considered whether a single sale of morphine could violate separate sections of a federal criminal statute that prohibited the sale of narcotics and, thus, be considered separate

⁴ Following *Easton*, Article 44 was amended to specify that jeopardy attaches differently depending on the forum. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5226, 130 Stat. 2000, 2910-11 (2016). In the case of a trial by military judge alone, jeopardy attaches on the presentation of evidence; in the case of a trial by member panel, jeopardy attaches when the members have been impaneled. See Article 44(c)(1)(A)-(2)(A), UCMJ, 10 U.S.C. § 844(c)(1)(A)-(2)(A) (2018); R.C.M. 907(b)(2)(C)(i)(I)-(II).

offenses. One section of the statute prohibited the sale of narcotics except in their original packaging. *Id.* at 303. Another section prohibited the sale of narcotics absent a written order. *Id.* at 303-04. The Supreme Court in *Blockburger* announced the following general test for deciding whether two offenses are the same for purposes of double jeopardy: “[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied . . . is whether each provision requires proof of a fact which the other does not.” *Id.* at 304. Applying this test, the Supreme Court held that the narcotic charges at issue for the one sale were not for the same offense because each of the two respective sections of the criminal statute required proof of a fact that the other did not. *Id.*

While the *Blockburger* test generally applies in courtsmartial, this Court in *Rice* declined to follow “the strict application of *Blockburger* in the context of the intentionally capacious Article 134, UCMJ.” 80 M.J. at 42. The Court in *Rice* held instead that only some “differences are valid ones when determining what constitutes the same offense for purposes of a double jeopardy analysis involving Article 134, UCMJ.” *Id.* at 43. Because the two specifications under comparison in this case both allege violations of Article 134, UCMJ, a detailed review of *Rice* is necessary to explain the applicable law.

In *Rice*, the United States first prosecuted the accused in a federal district court. *Id.* at 38. One count of the indictment alleged that the accused had possessed child pornography in violation of 18 U.S.C. § 2252A. *Id.* at 38 & n.2. To establish a violation of this civilian criminal statute, the government had to prove that the child pornography at issue had been

transported in interstate commerce or produced with materials that had been transported in interstate commerce. *Id.* at 38 n.2. The Court identified this requirement as a “jurisdictional element” of § 2252A. *Id.* at 40. A “jurisdictional element” is an element that links a statute to one of the legislative powers of Congress enumerated in the United States Constitution, such as the power to regulate interstate commerce in U.S. Const. art. I, § 8, cl. 3. *Torres v. Lynch*, 578 U.S. 452, 457 (2016).

The government subsequently tried the appellant in *Rice* by court-martial. 80 M.J. at 38. Two specifications of the charges against him in the court-martial alleged that he had possessed child pornography in violation of clause 2 of Article 134, UCMJ. *Id.* The appellant argued that trying him by court-martial for these two specifications would contravene the prohibition against double jeopardy because the government had already prosecuted him in federal district court for the same offense. *Id.* at 39. The government responded that per *Blockburger*, the two specifications in the court-martial did not allege the “same offence” for which he was tried in the federal district court because the § 2252A offense required proof of transportation in interstate commerce, while the offense charged under clause 2 of Article 134, UCMJ, required proof that the offense was service discrediting. *Id.* at 40. This Court, however, rejected the government’s argument because it saw “no evidence that Congress intended Article 134, UCMJ, to serve as a vehicle for the military to re prosecute Title 18 offenses tried in a federal civilian court simply by removing a jurisdictional element and charging it as a violation of clause 1 or 2.” *Id.* at 41. Accordingly, this Court disregarded the jurisdictional

element of the § 2252A offense for the purpose of applying the *Blockburger* test and concluded that the subsequent court-martial for the possession specifications in *Rice* violated the Double Jeopardy Clause. *Id.* at 44.

III. Discussion

Appellant argues in this appeal, as he argued before the military judge and the AFCCA, that the prohibitions against double jeopardy in the Fifth Amendment and Article 44(a), UCMJ, bar his second trial for the possession of obscene cartoons in violation of Article 134, UCMJ. We agree with Appellant. Our decision rests on two primary conclusions. The first conclusion is that jeopardy attached in the first court-martial because the Government introduced evidence in the case and because the court-martial had jurisdiction to try Appellant for the offense. The second conclusion is that the specifications in the first and second court-martial concerning obscene cartoons were “for the same offense” under the analysis that this Court used in *Rice*.

A. Attachment of Jeopardy in the First Court-Martial

Under R.C.M. 907(b)(2)(C)(i)(I) and this Court’s decision in *Easton*, jeopardy attaches to an offense when the Government introduces evidence on the general issue of guilt. The parties do not dispute that this happened in the first court-martial.⁵ The military

⁵ A complete record of trial was not prepared for the first court-martial because Appellant was not found guilty of any offense. But the military judge in the first court-martial issued a written ruling, included in the record in the present case, which

judge and the AFCCA, however, reasoned that jeopardy did not attach in this case because the first court-martial lacked jurisdiction to try Appellant for the specification concerning obscene cartoons. We agree with the general proposition that jeopardy cannot attach if the court-martial lacks jurisdiction because R.C.M. 907(b)(2)(C)(iv) provides that “[n]o courtmartial proceeding which lacked jurisdiction to try the accused for the offense is a trial in the sense of [the rule against double jeopardy].” But we cannot agree that the first court-martial lacked either personal or subject matter jurisdiction.

The first court-martial had personal jurisdiction over Appellant under Article 2(a)(1), UCMJ, 10 U.S.C. § 802(a)(1) (2012), because, according to a stipulation of fact in the record, he was a member of a “regular component of the armed forces.” The stipulation specifies that Appellant was an active duty Airman assigned to Aviano Air Base in Italy at the time of the offense. Appellant further testified to his military membership at his second trial when he confirmed that he enlisted in 2016 for a term of six years and had never been released from active duty.

The first court-martial also had subject matter jurisdiction to determine whether Appellant had violated Article 134, UCMJ. Article 134, UCMJ, provides that it applies to “persons subject to this chapter,” referring to Chapter 47 of Title 10 of the U.S. Code, which contains the UCMJ. Thus, alleging that the offense occurred in Italy did not deprive the court-martial of jurisdiction over either Appellant or the

described evidence that the Government presented at the first court-martial.

offense under Article 134, UCMJ, because Article 5, UCMJ, 10 U.S.C. § 805 (2012), provides that “[t]his chapter applies in all places.”

The military judge reached a different conclusion, reasoning that the court-martial lacked jurisdiction over the offenses because § 1466A did not apply to conduct outside of the “special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.” We cannot agree because the question of whether the court-martial had personal and subject matter jurisdiction is distinct from the merits question of whether the Government alleged and proved a fact necessary to show a violation of § 1466A, namely, that the alleged conduct occurred in a location to which the statute applies.⁶

On this point, this Court’s decision in *United States v. Williams*, 17 M.J. 207 (C.M.A. 1984), is instructive. In *Williams*, the accused was found guilty of violating clause 3 of Article 134, UCMJ, when he kidnapped someone on Fort Hood in violation of a federal statute, 18 U.S.C. § 1201(a)(2). *Id.* at 208-09. On appeal, however, this Court held that the evidence was legally insufficient to sustain the finding of guilt because the government had not proved that the offense occurred on a portion of Fort Hood that was within the “ ‘special maritime and territorial jurisdiction of the United States’ ” as § 1201(a)(2) required. *Id.* at 215. The Court emphasized that “all factual issues concerning guilt or innocence—

⁶ Appellant argues that § 1466A could apply in Italy if the Government could prove that the offending conduct occurred at an installation such as Aviano Air Base. This Court previously entertained a similar argument with respect to another federal

including any issue of territorial jurisdiction—must be submitted to the members for determination.” *Id.* The lesson of *Williams* is that the Government’s failure to prove a statutory element of this kind concerns the sufficiency of the evidence rather than the jurisdiction of the court-martial.

In this case, confusion may have arisen about whether the jurisdiction of the first court-martial depended on the location of the offense because federal statutory elements requiring that conduct occur in the territory of the United States, or affect interstate or foreign commerce, are typically called “jurisdictional elements.” This phrase, however, is a term of art. The phrase refers to elements that link a statute to a constitutional power of Congress to legislate, not to the jurisdiction of a court. As the United States Court of Appeals for the Tenth Circuit explained in *United States v. Tony*, 637 F.3d 1153, 1158-59 (10th Cir.

2011):

criminal statute that outlawed conduct only in the territory of the United States. *See United States v. Wilmot*, 11 C.M.A 698, 702, 29 C.M.R. 514, 518 (1960) (recognizing that “the question of whether Yokota Air Base Japan, an area located in a foreign country, is territory under the control of the United States” is a question subject to “proof of the facts”). Given our reasoning about the subject matter jurisdiction of this Court, we need not express an opinion on this issue in this case.

[A] “jurisdictional element” . . . is “‘jurisdictional’ only in the shorthand sense that without that nexus, there can be no federal crime.” The absence of a required element “is not jurisdictional in the sense that it affects a court’s subject matter jurisdiction, *i.e.*, a court’s constitutional or statutory power to adjudicate a case.”

Id. (citations omitted).

Confusion may also have arisen because of Appellant’s own arguments. Appellant incorrectly asserted in the filing submitted to the military judge that the court-martial lacked subject matter jurisdiction because § 1466A does not apply outside of the United States. While this argument may have contributed to the military judge’s ruling, it is not correct, and we do not believe that this incorrect argument precluded Appellant from subsequently making a double jeopardy argument in the second court-martial. Appellant had no double jeopardy argument to forfeit or waive until the second court-martial began. And Appellant specifically preserved his double jeopardy argument at his second court-martial by raising it before entering his pleas. *See United States v. Collins*, 41 M.J. 428, 429 (C.A.A.F. 1995) (holding that double jeopardy arguments are waived if the appellant does not raise them before entering a guilty plea).

The Government presents three arguments against our conclusion that jeopardy attached in this case. First, the Government contends that in the context of courts-martial, extraterritoriality is indeed

an issue of subject matter jurisdiction. The Government asserts that Article 18, UCMJ, 10 U.S.C. § 818 (2012), limits the subject matter jurisdiction of courts-martial to offenses “made punishable” under the UCMJ. Thus, according to the Government, the conduct alleged in the specification at issue in the first courtmartial was not “punishable” under the UCMJ because § 1466A cannot reach conduct in Italy. The Government therefore argues that the military judge correctly dismissed the specification for lack of subject matter jurisdiction. We cannot accept this argument because it implies that a court-martial’s subject matter jurisdiction over an offense depends on whether the Government can prove all of the elements necessary to establish that the accused is guilty of the offense. No precedent supports that view.⁷

Second, the Government argues that the military judge’s dismissal of the specification in the first court-martial was based on a legal judgment unrelated to factual guilt or innocence. The Government explains that the military judge was focused solely on a legal question, not an evidentiary question, and thus, the military judge never determined whether the Government’s evidence was inadequate. Although the military judge’s order to dismiss the third specification in the first court-martial focused on the lack of extraterritoriality, as the Government accurately emphasized here, we disagree with the military judge’s legal determination regarding jurisdiction. The point in time at which jeopardy

⁷ Additionally, this Court has previously stated that “[t]he question of the extraterritorial application of federal statutes has nothing to do with the jurisdiction of the federal courts.” *United States v. Martinelli*, 62 M.J. 52, 56 n.4 (C.A.A.F. 2005).

attaches is not when a military judge sitting as a court-martial makes a ruling based on the sufficiency of the evidence. Instead, as explained above, jeopardy attaches when the government introduces evidence on the general issue of guilt. *Easton*, 71 M.J. at 172; R.C.M. 907(b)(2)(C)(i)(I).

Third, the Government argues that the dismissal in the first court-martial was similar to a mistrial and should be treated like one. The Government reasons that “[i]f the military judge’s dismissal is akin to a mistrial, [a] reprosecution is not barred because Appellant brought the motion.” The Government explains that if Appellant had successfully moved for a mistrial at the first court-martial, then jeopardy would have terminated, and the Government could try him again for the same offenses. *See Easton*, 71 M.J. at 172 (explaining that the prohibition against double jeopardy does not “preclude subsequent proceedings, inter alia, where there is ‘manifest necessity’ for declaring a mistrial or otherwise discharging the jury” (quoting *United States v. Perez*, 22 U.S. 579, 580 (1824))). We disagree because we see no precedent for the analogy that the Government proposes.

B. Same Offense in First and Second Courts-Martial

Our second conclusion is that Appellant was tried twice for the same offense in the first and second courts-martial. In the first trial, as described above, Appellant was charged with violating clause 3 of Article 134, UCMJ, by possessing obscene cartoons in violation of § 1466A. In the second court-martial, he was charged with possessing the same obscene cartoons in violation of clause 2 of Article 134, UCMJ. It is true, and both parties agree, that a strict

application of the *Blockburger* test, unaffected by this Court's decision in *Rice*, would indicate that these are different offenses because each offense contains an element that the other does not. Specifically, at the first trial, the Government was required to prove that the cartoons at issue had traveled in or affected foreign commerce or that the offense occurred in the special maritime and territorial jurisdiction of the United States, but the Government did not have to prove that the offense was service discrediting. At the second trial, the Government had to prove that possessing the cartoons was service discrediting but did not have to prove that the cartoons had traveled in or affected foreign commerce or that the offense occurred in the special maritime and territorial jurisdiction of the United States.

In *Rice*, this Court held that the Double Jeopardy Clause precluded the government from exploiting the unique nature of Article 134, UCMJ, to try a servicemember by court-martial for conduct that the government had previously charged as violations of Title 18 offenses in federal civilian court "simply by removing a jurisdictional element" and refiling the charges under clause 1 or 2 of Article 134, UCMJ. *Rice*, 80 M.J. at 40-44. To determine whether the earlier Title 18 charges and the later military Article 134 specifications covered the same offenses, the Court disregarded the jurisdictional elements of the Title 18 offenses. And when the jurisdictional elements are disregarded, the § 1466A offense charged at the first trial no longer "requires proof of a fact which the [offense charged at the second trial] does not." *Blockburger*, 284 U.S. at 304. Accordingly, following *Rice*, we must conclude that trying Appellant for the offense under Article 134, UCMJ, at

the second court-martial violated the prohibition against double jeopardy.

The Government presents two arguments against our conclusion that the two courts-martial tried Appellant for the same offense. First, the Government attempts to limit *Rice* by emphasizing its narrow holding. The Court in *Rice* specifically cautioned that its holding “does not reach beyond the ‘unusual facts’ of this case, and thus ‘does not extend to those situations where additional substantive elements distinguish an offense charged under Article 134, UCMJ, from another criminal offense.’” 80 M.J. at 40 n.10 (citation omitted). We agree that the scope of *Rice* is narrow. But we see no meaningful difference between this case and *Rice*. In both cases, the accused were first charged with conduct violating a federal civilian criminal statute that included a jurisdictional element and were then later charged with the same conduct under clause 2 of Article 134, UCMJ. In both instances, if the jurisdictional elements of the federal civilian criminal statute are disregarded, the first offense does not require proof of any element the second offense does not.

The Government alternatively argues that this Court should reconsider *Rice* and apply the strict *Blockburger* test. Citing the dissent in *Rice*, the Government contends that there is no persuasive reason for disregarding elements when applying the *Blockburger* test. We do not believe that this argument is a sufficient reason to reconsider recent precedent. We have explained:

For purposes of our analysis under the doctrine of *stare decisis* . . . we do not limit our review to whether [a prior

decision] was wrongly decided, but rather we examine: whether the prior decision is unworkable or poorly reasoned; any intervening events; the reasonable expectations of servicemembers; and the risk of undermining public confidence in the law.

United States v. Quick, 74 M.J. 332, 336 (C.A.A.F. 2015) (footnote omitted). Because the Government has not addressed each of these factors in its brief, we decline to reconsider *Rice*.⁸

For these reasons, the finding of guilty for the Charge and its Specification must be set aside, and the AFCCA must conduct a new review under Article 66, UCMJ, 10 U.S.C. § 866 (2012). Appellant argues that the AFCCA on remand must consider how the admission of the obscene cartoons as evidence may have affected the findings of guilty for the other contested offenses.⁹ We agree. Accordingly, in conducting its new review under Article 66, UCMJ, the AFCCA shall evaluate the impact of this Court's

⁸ We also note that the Court in *Rice* rested its decision largely on the evident intentions of Congress in enacting Article 134, UCMJ. We express no opinion on whether Congress, by amending Article 134, UCMJ, could provide for a different result in future cases.

⁹ During the inquiry required by *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247 (1969), Appellant agreed that the stipulation of fact and his guilty plea could be used as evidence on the findings of the contested offenses (the Additional Charge and its Specifications). During the findings phase of the second court-martial, the stipulation of fact and the guilty plea were introduced into evidence in support of the contested offenses. In addition, trial counsel referred to this evidence in the opening statement and closing arguments.

dismissal of the Charge and its Specification on both (1) the findings of the Additional Charge and its Specifications and (2) the sentence. If the AFCCA sets aside the findings and sentence, a rehearing is authorized. If the AFCCA affirms the findings, it may reassess the sentence based on the affirmed findings of guilty or order a rehearing on the sentence.

IV. Conclusion

The granted question is answered in the affirmative. The decision of the United States Air Force Court of Criminal Appeals is set aside. The findings as to the Charge and its Specification are set aside and the Charge and its Specification are dismissed with prejudice. The record is returned to the Judge Advocate General of the Air Force for remand to the Court of Criminal Appeals for a new review under Article 66, UCMJ, 10 U.S.C. § 866 (2012), consistent with this opinion.

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

No. ACM 39889 (f rev)

UNITED STATES
Appellee

v.

Alexander L. DRISKILL
Airman (E-2), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial
Judiciary

Upon Further Review

Decided 23 August 2022

Military Judge: Willie J. Babor; Dayle P. Percle
(remand).

Sentence: Sentence adjudged on 4 November 2019 by GCM convened at Ramstein Air Base, Germany (20 May 2019), Aviano Air Base, Italy (20–27 June 2019), and Buckley Air Force Base, Colorado (28 October–4 November 2019). Sentence entered by military judge on 2 March 2020, and reentered on 20 January 2022: Dishonorable discharge, confinement for 40 years and 9 months, forfeiture of all pay and allowances, and reduction to E-1.

For Appellant: Major Kasey W. Hawkins, USAF;
Major Alexander A. Navarro, USAF.

For Appellee: Lieutenant Colonel Amanda L.K. Linares, USAF; Lieutenant Colonel Matthew J. Neil, USAF; Major Allison R. Barbo, USAF; Major Alex B. Coberly, USAF; Major Peter F. Kellett, USAF; Mary Ellen Payne, Esquire.

Before KEY, ANNEXSTAD, and MEGINLEY,
Appellate Military Judges.

Judge ANNEXSTAD delivered the opinion of the court, in which Senior Judge KEY joined. Judge MEGINLEY filed a separate dissenting opinion.

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

ANNEXSTAD, Judge:

At a general court-martial, in accordance with his pleas and pursuant to a pretrial agreement (PTA), a military judge found Appellant guilty of one specification of wrongful possession of obscene cartoons in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934.¹ Contrary to his pleas, a panel of officer members found

¹ The specifications covered the time period from 11 October 2016 to 27 March 2018. References to the punitive articles of the UCMJ are to the *Manual for Courts-Martial, United States* (2016 ed.). Unless otherwise noted all other references to the UCMJ and the Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.). Further, the Military Justice Act of 2016, National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 5001–5542 (23 Dec. 2016), as fully implemented by Exec. Order 13,825, 83 Fed. Reg. 9889 (8 Mar. 2018), applied to Appellant's court-martial and post-trial processing.

Appellant guilty of one specification of rape of a child and one specification of sexual abuse of a child, both in violation of Article 120b, UCMJ, 10 U.S.C. § 920b. The members sentenced Appellant to a dishonorable discharge, confinement for 40 years and 9 months, forfeiture of all pay and allowances, and reduction to the grade of E-1.^{2,3} The PTA did not place any limitations on punishment.⁴

Appellant's case is before this court a second time. Although not raised by Appellant, we determined the convening authority had erred by not taking action on Appellant's sentence as required by Executive Order 13,825, § 6(b), 83 Fed. Reg. 9889, 9890 (8 Mar. 2018), and Article 60, UCMJ, 10 U.S.C. § 860, *Manual for Courts-Martial, United States* (2016 ed.) (2016 MCM), and we remanded his case to the Chief Trial Judge, Air Force Trial Judiciary, for corrective action. *See United States v. Driskill*, No. ACM 39889, 2021 CCA LEXIS 672, at *11–12 (A.F. Ct. Crim. App. 14 Dec. 2021) (unpub. op.).⁵ The convening authority subsequently approved Appellant's sentence,

² The military judge merged the specifications of rape of a child and sexual abuse of a child for sentencing.

³ After trial, the convening authority suspended the adjudged forfeitures of all pay and allowances for six months, release from confinement, or expiration of term of service, whichever was sooner, with suspension commencing on 18 November 2019.

⁴ Appellant was credited with 278 days in pretrial confinement.

⁵ Our previous decision also addressed one additional issue not raised by Appellant in his initial appeal: whether Appellant was entitled to relief for a facially unreasonable post-trial delay. We found Appellant did not suffer prejudice and that no relief was warranted. *United States v. Driskill*, No. ACM 39889, 2021 CCA LEXIS 672, at *11 (A.F. Ct. Crim. App. 14 Dec. 2021) (unpub. op.).

resulting in a new entry of judgment. With this error corrected, we now turn to Appellant's remaining nine issues, along with three additional issues Appellant raised subsequent to our first opinion on this case.

Appellant initially raised nine issues which we have reworded: (1) whether the evidence was legally and factually sufficient to support Appellant's convictions for rape and sexual abuse of a child; (2) whether the military judge abused his discretion by allowing a Government expert to testify about future impact on the named victim; (3) whether the military judge erred when he denied Appellant's request to sever the charge for wrongful possession of obscene cartoons from the charge and specifications for rape and sexual abuse of a child; (4) whether Appellant's conviction for wrongful possession of obscene cartoons violated the prohibition against double jeopardy found in the Fifth Amendment to the United States Constitution⁶ and Article 44, UCMJ, 10 U.S.C. § 844; (5) whether the military judge erred by denying Appellant's motion for appropriate relief due to unequal access to the named victim; (6) whether the military judge erred by failing to compel an expert consultant for Appellant; (7) whether Appellant's guilty plea to wrongful possession of obscene cartoons was provident;⁷ (8) whether the confinement portion of the sentence was inappropriately severe; and (9) whether Appellant's convictions for rape and sexual

⁶ U.S. CONST. amend. V.

⁷ Although Appellant invites us to analyze this issue as one of legal and factual sufficiency, we decline to do so. Appellant pleaded guilty to this offense during his court-martial. In a guilty plea context, the issue is not legal or factual sufficiency, but whether the plea is provident. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996).

abuse of a child were factually and legally insufficient due to errors in the child forensic interview.

After Appellant's record was returned to this court, Appellant raised three additional issues which we have reworded: (10) whether his convictions for rape and sexual abuse of a child were factually and legally insufficient due to bias in the investigation; (11) whether trial counsel committed prosecutorial misconduct during his findings argument; and (12) whether the Government can prove beyond a reasonable doubt that the military judge's failure to instruct the panel that a guilty verdict must be unanimous was harmless.⁸

With respect to issues (3), (5), (6), and (12), we have carefully considered Appellant's contentions and find they do not require further discussion or warrant relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987). We consider issues (1), (9), and (10) together because they all concern Appellant's contention that his convictions for rape and sexual abuse of a child were legally and factual insufficient.

Finding no error that materially prejudiced a substantial right of Appellant, and following this court's Article 66(d), UCMJ, 10 U.S.C § 866(d), mandate to affirm only so much of the findings and sentence as we find, on the basis of the entire record, should be approved, we affirm the findings. Further, we affirm the sentence, as reassessed by this court, as a result of our ruling on sentence appropriateness.

⁸ Issues (6), (7), (8), (9), (10) and (11) were personally raised by Appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

I. BACKGROUND

Appellant joined the Air Force in May 2016. At the time of his trial, he was 26 years old. In October 2016, after finishing technical school, Appellant married HD. The couple had a daughter, WD, who had been born in December 2014. After the wedding, Appellant moved to Aviano Air Base, Italy, and was assigned to the 31st Operations Support Squadron. Approximately six months later, in March 2017, HD and WD joined him in Italy.

According to HD's trial testimony, about a year later, in February or March 2018, she and Appellant spent a "really good weekend" together visiting nearby towns in Italy. At the conclusion of the weekend, Appellant went to the couple's bedroom to "tuck [HD] in and say good night." HD testified that for the past couple of months Appellant had been staying up late using his computer on the couch so it had become rare for him to go to bed with her. HD explained that after Appellant hugged her goodnight he said he had "been hiding something from [her] for a while" and that he "couldn't stop looking at little girls." HD was unsure what he meant and asked him to show her what he was talking about. Appellant then walked into the living room with her, retrieved his laptop, and showed her images of child pornography. During the conversation that followed, Appellant admitted to HD that he found the images sexually arousing. In response, HD asked Appellant "if he would ever touch a child, a little girl." Appellant replied "I don't know, because I can't even stop looking" at the images. At this point, HD told Appellant that she would not report or divorce him if he immediately got rid of the images and promised her that he would never look at that type of content again. Appellant then took the

universal serial bus (USB) drives that contained the child pornography and destroyed them. HD testified she believed Appellant destroyed all the images of child pornography that he possessed.

Later in March 2018, the Air Force Office of Special Investigations (AFOSI) launched an investigation of Appellant. The investigation began when WD, who was almost 3 years old at the time, was diagnosed with herpes.⁹ Appellant was interviewed by AFOSI on 27 March 2018. Consistent with the purpose of the investigation and with Appellant's consent, AFOSI agents along with local Italian police officers searched Appellant's home and seized all of his electronic devices, including cell phones, computing devices, and electronic storage devices. These items were then sent to the Defense Cyber Crime Center Cyber Forensics Laboratory (DC3/CFL) for analysis. Ms. MH, a computer forensic examiner at DC3/CFL, discovered obscene cartoons on Appellant's devices. During the *Care*¹⁰ inquiry into the providence of his pleas, Appellant admitted that the images depicted "drawings of characters that are smaller and

⁹ In October 2017, WD was diagnosed with herpes, known to be a sexually transmitted disease. WD's diagnosis resulted in a referral to Family Advocacy, which eventually led to an investigation by the AFOSI. The court did not factor the issue of WD's herpes diagnosis into our decision. We articulate this information to establish appropriate timelines. No evidence was admitted on this matter and it did not factor into our legal and factual sufficiency determination of Appellant's convictions. We also note Appellant's crime of rape against a child under the age of 12 was charged to have occurred between on or about 11 October 2016 (approximately when Appellant arrived in Italy) and on or about 27 March 2018 (when AFOSI interviewed Appellant).

¹⁰ *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

childlike in nature engaging in sex acts.” One image Appellant possessed depicted a young girl on a tricycle, with a penis-shaped dildo in the place of the tricycle seat. Another image depicted a prepubescent girl wearing pigtails. The girl had an adult’s penis in her mouth with pubic hair near her face. Behind her, another larger male was holding her leg up, exposing her genitalia. Appellant admitted he did not know how many images he possessed, but agreed it was “well in excess of 100.”

In June 2018, while the AFOSI investigation was still ongoing, HD and WD moved to Texas to live with HD’s grandparents. During the investigation, HD did not want to talk to investigators or be involved with the investigation. She was satisfied that her husband had destroyed his USB drives containing the indecent images. HD testified that she wanted her “family together, and just have us be happy and not have to worry about it.” HD elaborated that although she had physically moved, she still loved Appellant, was trying to work through things with him, and spoke with him as frequently as she could. She also permitted WD to talk with him as much as she could. In December 2018, Appellant visited HD and WD for the holidays. HD recalled that they were “actually happy, like, things were great. We had a blast together. I thought everything was good.” She stated she was sad and crying when Appellant returned to Italy. HD said she still trusted Appellant with their young daughter at this time, despite having seen the child pornography on his computer. However, unbeknownst to HD at that time, the investigation revealed that Appellant had multiple other digital devices containing obscene images of children engaged in sexually explicit conduct.

HD testified things changed on 28 January 2019, shortly after WD's fourth birthday. WD made an unprompted utterance of what Appellant did to her when they were living in Italy. As HD described, HD and WD were residing with HD's grandparents. The allegation came to light while she and WD were going through their normal bedtime routine. They were playing a game on her phone called Radial, which created tapestry-type signs. WD started to giggle at one point and said that one of the shapes looked "like Daddy's pee-pee." When trial counsel asked HD what happened next, HD responded:

I asked her what - - how did she know what Daddy's pee-pee looks like. And she said "Daddy put his pee-pee in my mouth the last time we were in Italy." And then I asked her what - - "Well what do you mean?" And she said, "Well, the last time we were in Italy, Daddy put his pee-pee in my mouth, and I spit into a towel." And I asked her where I was and she said I was in the shower. And [I asked her] where it happened, she said "In yours and Daddy's room."

HD further testified that she was in shock and was having a difficult time with what she heard. HD then took WD to her grandparent's bedroom where WD repeated to her great-grandparents what she had told HD. JC, HD's grandfather, testified that at first, he only heard a portion of what WD said, including, "Daddy pee-pee in my mouth, and something about balls." JC then asked WD to repeat herself, and WD responded "when we were [in Italy], [HD was] taking a shower, Daddy put his pee-pee in my mouth. He

pushed his balls against my face, and I threw up on a towel.” HD testified that WD did not seem confused about whose penis was in her mouth, or when, or where it happened. According to HD, the only thing WD was confused about “was whether she did something wrong or not.” HD stated she did not report Appellant that night because she “wanted to sleep on it” because “[t]here was a lot to consider.” HD reported the allegation the next day.

After HD reported the incident, WD met with BL, a forensic interviewer with the Children’s Advocacy Center located in the county where HD’s grandparents resided. WD explained to BL what Appellant did to her in Italy during a video-recorded interview. BL stated that WD was able to discern what constituted a truth and what constituted a lie when prompted with hypothetical scenarios. BL testified that WD was also able to discern the differences in the questions that she asked her, which is evidenced by the fact that WD denied that anyone ever touched her chest. BL further testified that when she asked WD if anyone made her touch their private parts, WD did not respond at first and tried to change the subject, but went on to state that she did not want to talk about the bad stuff. BL recalled WD eventually told her that “daddy put his pee-pee in my mouth, and I threw up in a towel.” WD described her “throw up” as white in color.

Significantly, WD also physically demonstrated what happened to her during the interview and on her own accord. WD used her hands and body to demonstrate Appellant’s actions. When BL asked WD, “[W]here were daddy’s hands when he put his pee-pee in your mouth?” WD replied by saying, “[H]e didn’t put his own hands on it,” then she indicated towards her

own groin area and put her hand under her own chin, demonstrating that Appellant had lifted her chin to put his penis in her mouth. The entire recorded interview was played for the members during trial.¹¹

Under oath at trial, WD also detailed Appellant's actions. Specifically, trial counsel asked WD, "Tell me what daddy did with his pee-pee." WD testified, "[Appellant] put it in my mouth . . . [a]nd then I - - and then I throwed up it, the white stuff in a white towel." When asked what "daddy's pee-pee" looked like, WD demonstrated with her hands, then responded, "[H]e wanted me to put it in my mouth." She described the stuff that came out of "daddy's pee-pee" as white and tasting like "throw up" and stated it went in her mouth and she spit it in a towel. She continued by stating the white stuff that went in her mouth did not taste good and that "[i]t came out of this hole," while also demonstrating her response. She also described this event as occurring "next to daddy's and my mom's bed." Following trial defense counsel's cross-examination of WD, and pursuant to a member's question, the military judge asked, "[WD], one more question. Did you ever see Daddy do anything to Mommy with his pee-pee?" To which WD responded, "Nope."

At trial the Defense called Special Agent (SA) IP, the case agent in Appellant's case. Trial defense counsel, *inter alia*, explored the possibility that HD had coached WD to say that she was sexually assaulted. SA IP testified the investigation did not reveal that HD provided WD with information to support her allegation. SA IP also testified that WD "didn't look like she was coached" and "wasn't

¹¹ The recorded interview was approximately 20 minutes long.

behaving like she had been coached.” SA IP also stated on cross-examination that the AFOSI investigation did not reveal WD had been exposed to any pornography or obscene cartoons. She also confirmed that the investigation did not reveal WD had been exposed to the secretion of semen from any other source. Finally, she confirmed that HD was unwilling to participate in the investigation and there was no reason to believe that anyone told WD what to say during the investigation or Appellant’s court-martial.

The Defense also called Dr. JY, who was recognized as an expert in the field of forensic psychology. Dr. JY testified concerning possible memory contamination, and the typical protocol for a child forensic interview—such as developing rapport, asking open-ended questions, and assessing cognitive ability. Dr. JY concluded, after reviewing DL’s interview of WD, that WD was difficult to interview. He stated that DL had taken some “shortcuts” with rapport building due to WD’s age which made accuracy of WD’s disclosure a “toss-up.” On cross-examination, Dr. JY agreed all the questions that DL posed to WD were open-ended questions that did not suggest an answer or conclusion. He further agreed that WD did not hesitate to challenge false information and that she made “on-the-spot corrections to information given to her” by DL. Dr. JY testified WD also gave an unprompted physical demonstration during the interview of how Appellant moved his penis in her mouth and further agreed that the question did not require WD to demonstrate a response. Finally, Dr. JY agreed that there was no evidence that WD was confused about who sexually assaulted her, what was done to her, where the

assault occurred, or how Appellant committed the assault.

The panel of officer members found Appellant guilty of one specification each of rape and sexual abuse of a child.

II. DISCUSSION

A. Legal and Factual Sufficiency

Appellant contends his convictions of rape and sexual abuse of a child are both legally and factually insufficient. Specifically, Appellant takes issue with WD's testimony, the manner in which the pretrial interviews were conducted, and whether WD was coached or influenced by adults. He also generally claims that the investigators were biased. Appellant asks us to set aside the findings and sentence. We disagree with Appellant's contentions and find no relief is warranted.

1. Law

Issues of legal and factual sufficiency are reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "Our assessment of legal and factual sufficiency is limited to evidence produced at trial." *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citing *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993)), *rev. denied*, No. 22-0111, 2022 CAAF LEXIS 278 (C.A.A.F. 12 Apr. 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) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). “The term reasonable doubt, however, does not mean that the evidence must be free from conflict.” *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)), *aff’d*, 77 M.J. 289 (C.A.A.F. 2018). “[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution.” *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). As a result, “[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction.” *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (alteration in original) (citation omitted). The test for legal sufficiency “gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1973)).

“The test for factual sufficiency is ‘whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses,’ [this] court is ‘convinced of the [appellant]’s guilt beyond a reasonable doubt.’” *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). “In conducting this unique appellate role, we take ‘a fresh, impartial look at the evidence,’ applying ‘neither a presumption of innocence nor a presumption of guilt’ to ‘make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable

doubt.” *Wheeler*, 76 M.J. at 568 (alteration in original) (quoting *Washington*, 57 M.J. at 399). The term “reasonable doubt” does not mean evidence free from conflict. *See Lips*, 22 M.J. at 684. This court’s review of the factual sufficiency of evidence for findings is limited to the evidence admitted at trial. *See Article 66(d)*, UCMJ; *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007) (citations omitted).

Appellant was convicted of rape of a child in violation of Article 120b(a), UCMJ, 10 U.S.C. § 920b(a), which required the Government to prove two elements beyond a reasonable doubt: (1) Appellant committed a sexual act upon WD by penetrating her mouth with his penis; and (2) that WD had not attained the age of 12 years at the time of the sexual act. *See 2016 MCM*, pt. IV, ¶ 45b.b.(1)(a).

Appellant was also convicted of sexual abuse of a child in violation of Article 120b(c), UCMJ, 10 U.S.C. § 920b(c), which required the Government to prove the following elements beyond a reasonable doubt: (1) Appellant committed a sexual contact upon WD by causing her to touch his genitalia; and (2) Appellant did so with the intent to gratify his sexual desire. *See 2016 MCM*, pt. IV, ¶ 45b.b.(4)(a). As charged in this case, the Government also had to prove that WD had not attained the age of 12 years.

2. Analysis

a. The Government’s Case

The Government introduced convincing evidence of Appellant’s guilt. Most significantly, the evidence demonstrated that WD consistently described and demonstrated, from her initial unprompted utterance to her in-court testimony, how Appellant committed the act of rape of a child by penetrating her mouth

with his penis, and committed the act of sexual abuse of a child by causing her to touch his genitalia. She clearly stated these offenses took place in her parents' bedroom while the family was living in Italy. The evidence also demonstrated that the offenses occurred between October 2016 and March 2018, when WD was approximately 3 years old.

Specifically, during direct examination, WD clearly and in detail described when, where, and how Appellant performed a sexual act on her. The Government powerfully reinforced her testimony with the testimony of HD, who described in detail WD's spontaneous outcry when they were playing with a phone application before bed. HD clearly described that WD told her "the last time we were in Italy, Daddy put his pee-pee in my mouth, and I spit in a towel." WD's description of the offenses was also reinforced by testimony from WD's great-grandfather, JC, and testimony from the forensic interviewer, BL. JC testified WD told him "when we were [in Italy] . . . Daddy put his pee-pee in my mouth. He pushed his balls against my face, and I threw up on a towel." BL testified WD told her that "Daddy put his pee-pee in my mouth, and I threw up in a towel." WD also described to BL that the color of her "throw up" was white and it tasted bad.

In addition, HD provided testimony concerning Appellant's possession of child pornography and that Appellant had stated to her that he found the images arousing, refused to confirm that he would not touch a child or a little girl, and admitted he "couldn't stop looking at little girls." HD also described how she refused to be involved with the AFOSI investigation concerning the child pornography, and how WD's unprompted utterance came at a time when HD was

excited about keeping her family together and moving on.

b. Appellant's Claims of Reasonable Doubt

Appellant raises a number of arguments as to why we should not be convinced of his guilt beyond a reasonable doubt. We address the three most significant of them below.

Appellant first contends there were inconsistencies in WD's testimony. Specifically, Appellant argues that WD provided different descriptions of the bedroom where she was sexually assaulted. Appellant points us to WD's statement during the forensic interview, where she described pictures of "flower, pink butterflies" on the wall. This description was contradicted by other evidence. Appellant also asks that we compare the above statement with WD's testimony during cross-examination, where she generally described the room as "[j]ust normal. Just like plain . . . It was just the same. Just plain." Appellant argues that these discrepancies alone are enough to support reasonable doubt. We are unpersuaded by Appellant's argument. Even if we were to assume that there were inconsistencies in her description of the bedroom where the rape and sexual abuse occurred, "[i]nconsistencies . . . are not uncommon when child abuse victims testify." *United States v. Cano*, 61 M.J. 74, 77 (C.A.A.F. 2005). We also note that "reasonable doubt" does not mean that the evidence must be free from conflict. *See Lips*, 22 M.J. at 684. Here, any inability to accurately describe her parents' bedroom where the rape and sexual abuse occurred does little to contradict WD's vivid description and consistent recollection of where and

how the acts occurred, and in this court's opinion does not, in and of itself, equate to reasonable doubt.

Appellant next contends WD's forensic interview was tainted when the interviewer "coaxed information" from WD to support the charged offenses. However, this is contrary to the record that demonstrates BL asked open-ended questions allowing WD to explain in her own words what Appellant did to her during the recorded forensic interview. BL testified during trial and Appellant's trial defense counsel extensively cross-examined her on her interview techniques. Trial defense counsel specifically questioned BL regarding her use of leading questions, to which BL testified that she was careful in her questioning as to not suggest any information or preferred responses. The strongest evidence against Appellant's argument comes from the Defense's own expert witness, Dr. JY. Dr. JY agreed during his testimony that all of the questions asked of WD during the forensic interview were open-ended questions. Additionally, he agreed there was no evidence that WD was confused regarding the details of the sexual assault. We are not persuaded that this evidence leads to reasonable doubt.

Appellant also contends WD was coached and influenced by exposure to age-inappropriate information prior to trial. Appellant alleges that WD could have made up the sexual assault because she could have seen Appellant having sex with HD. This argument is not supported by the record. First, WD clearly stated on the record that she had not witnessed Appellant doing anything to HD with his "pee-pee." Additionally, in response to questions posed by trial defense counsel, SA IP testified that she had no reason to believe that WD had been exposed to any child

pornography or obscene cartoons, and that “[WD] didn’t look like she was coached.” On this point, we note that there is also no evidence in the record that HD had a motive to coach her daughter. Rather, the evidence adduced at trial indicated that HD stayed with her husband even after he disclosed his habit of viewing child pornography. HD further testified she loved Appellant and was looking forward to putting the investigation behind them and being a family. Most compelling is HD’s reluctance to participate with the law enforcement investigation. In sum, there was no evidence that WD was coached in preparation for her forensic interview.

Finally, Appellant contends his convictions were the product of a biased investigation. Specifically, Appellant contends that both HD and an investigator from Child Protective Services, ME, were biased against him. Having already discussed HD’s potential bias or lack thereof above, we focus our attention on ME’s involvement. ME interviewed WD shortly after WD was diagnosed with herpes. Generally, ME was investigating the possibility that WD had been sexually abused. Appellant now argues that ME was biased because she referenced WD’s herpes infection in her investigative report. We find the discussion regarding herpes irrelevant, as there was no evidence of herpes put into evidence, nor was it even remotely discussed in front of the members at trial. Interestingly, Appellant called ME as a Defense witness at trial. ME testified that when she interviewed WD, prior to WD’s outcry, that WD denied any sexual abuse. This information is very favorable to Appellant. If ME was harboring any bias towards Appellant, no evidence of such was brought to light during the trial. We find Appellant’s contention that

the investigation was biased is not supported by the record.

c. Conclusion

Viewing the evidence in the light most favorable to the Prosecution, a rational trier of fact could have found the essential elements of rape and sexual abuse of a child 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 are ourselves convinced of Appellant’s guilt beyond a reasonable doubt. *See Reed*, 54 M.J. at 41 (quoting *Turner*, 25 M.J. at 325).

B. Expert Testimony on Future Impact to Victim

Appellant argues the military judge erred in permitting expert testimony during presentencing proceedings concerning the future impact the offenses would have on WD. Specifically, Appellant contends that the testimony did not qualify as evidence in aggravation under Rule for Courts-Martial (R.C.M.) 1001(b)(4). Additionally, Appellant takes issue with the military judge’s finding that the probative value of this evidence was not substantially outweighed by the risk of unfair prejudice. Appellant asks us to set aside the sentence. We find no error and no relief warranted.

1. Additional Background

During an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session outside the presence of members, trial counsel informed the court that the Government would call Dr. EB to adduce expert testimony during presentencing that would demonstrate WD was at

risk for significant psychological trauma due to Appellant's offenses. Trial defense counsel objected, arguing that Dr. EB's testimony would rely on research with subjects who were not similarly situated with WD. Specifically, trial defense counsel noted that the research subjects' "median age at the onset of abuse was between seven and eight years," more than double WD's age at the time of the assault, and that the subjects suffered a median duration of two years of abuse, which was longer than the single incident encompassing the charged offenses. Trial defense counsel also argued that 70 percent of the abuse in those cases involved vaginal or anal penetration, whereas WD's case involved oral penetration.

During the Article 39(a), UCMJ, session, the military judge questioned Dr. EB in order to resolve the objections. Dr. EB generally stated her testimony would be related to Appellant's convictions based on the research trial defense counsel referenced. Dr. EB testified three factors cited by the research were present in WD's case and indicated WD was at a greater risk for future psychological harm: (1) the abuser was a father or father figure; (2) oral, anal, or vaginal penetration occurred; and (3) WD was under 8 years old at the time of abuse. Dr. EB confirmed for the military judge that she concluded the three factors applied to Appellant's case based on evidence adduced during the court-martial, which she observed. She did not quantify how much of a greater risk she believed WD faced. On cross-examination, trial defense counsel pointed out how the victims in the underlying research studies differed from WD. Dr. EB responded that the articles used to inform her opinions in this case discussed 20 to 30 different studies, and that she

would only “rely on parts of the articles that are relevant to [Appellant’s] case.”

After the questioning of Dr. EB, the military judge ruled that Dr. EB would be allowed to testify about “any aggravating circumstances . . . directly relating to or resulting from the offenses for which [Appellant] has been found guilty. This rule extends to the potential future impacts on this victim.” He further found that trial defense counsel had shown the ability “to extract equally probative testimony from [Dr. EB].” The military judge also conducted a Mil. R. Evid. 403 balancing test and found

the potential testimony of [Dr. EB] to substantially outweigh the risk of prejudice to the accused, undue delay, and confusing the issues for the members. Especially, in light of [trial] defense counsel’s abilities and knowledge in this field, as well as, the [D]efense’s own access to a forensic psychologist.

The military judge later restated his ruling on the record:

With regards to Dr. [EB]’s proposed testimony at the time in my last decision: trial counsel may present evidence to any aggravating circumstances directly relating to or resulting from the offenses of which [Appellant] has been found guilty. “Directly relating or resulting from” not only refers to past events, but potential future impact as a result of the crime on the victim.

The question here is whether [Appellant]’s misconduct could lead to future impact on [WD], as described in Dr. [EB]’s testimony. And this court finds it can. This court finds a direct link between [Appellant]’s offenses and [WD], specifically, in Dr. [EB]’s testimony regarding potential future impact of those acts on [WD]. This evidence is clearly relevant, directly related to, and resulted from [Appellant]’s acts.

Furthermore, the probative value is not substantially outweighed by undue prejudice. The relevance of Dr. [EB]’s testimony, specifically, that of the impact of the father being the perpetrator of sexual abuse, the penetrative nature of the offense, and the young age [of the victim], that is, under the age of eight, is significant, given Dr. [EB]’s knowledge, skills and experience, and the facts and circumstances before this court-martial.

When presentencing resumed, the Government called Dr. EB as a witness. During her testimony Dr. EB was recognized as an expert in the fields of clinical and forensic psychology. At this point, the military judge instructed the members that they were “not required to accept the testimony of an expert witness or give it more weight than the testimony of an ordinary witness.” Dr. EB then gave examples of short-term effects that a child sexual abuse victim may experience such as “depression symptoms, anxiety symptoms, PTSD [post-traumatic stress disorder], low self-esteem, self-harm . . . substance abuse, sexual promiscuity, academic difficulties, as

well as behavior and conduct problems.” She also testified about family problems that may arise from child sexual abuse and the specific effects upon preschool-aged victims.

Dr. EB further testified child sexual abuse victims were at risk of suffering various long-term effects. These included depression, PTSD, suicide attempts, marital problems stemming from less marital and sexual satisfaction, higher rates of re-victimization, substance abuse, and medical disorders like cardiopulmonary disorders, and gastro-intestinal disorders. Dr. EB explained the risk of negative effects is greater where the father is the abuser, the abuse involves penetration, or when the victim is under 8 years old. She also noted that the duration of abuse can increase the likelihood of the negative outcomes, however, she also acknowledged that there was no evidence that there was a “longer duration of abuse” in WD’s case. She concluded WD was at “higher risk” of exhibiting long-term effects later in her life as a result of the assault.

On cross-examination, trial defense counsel adduced testimony that not every child would be affected in the same way and that there were several factors associated with “greater negative outcomes” that were not present in WD’s case. Dr. EB admitted that she had not personally evaluated WD and could not say that WD would, in fact, experience any of the aforementioned negative outcomes.

2. Law

We review a military judge’s decision to admit or exclude evidence, including expert testimony, for an abuse of discretion. *See United States v. Hutchins*, 78

M.J. 437, 444 (C.A.A.F. 2019); *United States v. Billings*, 61 M.J. 163, 166 (C.A.A.F. 2005).

Military judges abuse their discretion when their “factual findings are clearly erroneous, view of law is erroneous, or decision is outside the range of reasonable choices.” *Hutchins*, 78 M.J. at 444 (citations omitted). To prevail under this claim of error, an appellant must show “more than a mere difference of opinion,” he must show the military judge’s decision was “arbitrary, fanciful, clearly unreasonable, or clearly erroneous.” *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (citation omitted).

Mil. R. Evid. 702 prescribes:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Pursuant to Mil. R. Evid. 702, an expert may “testify in the form of an opinion or otherwise.” The expert’s opinion may be based on facts or data the

expert has either personally observed or has been made aware of. Mil. R. Evid 703.

In the Government's sentencing case in aggravation, trial counsel may introduce evidence of "aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." R.C.M. 1001(b)(4). Such evidence in aggravation may include "evidence of financial, social, psychological, and medical impact on or cost to any person . . . who was the victim of an offense committed by the accused" *Id.*

As this court has previously stated: "[t]he purpose of R.C.M. 1001(b)(4) is to provide the sentencing authority with information about the consequences and repercussions of an accused's offenses in order that a proper sentence can be discerned." *United States v. Anderson*, 60 M.J. 548, 556 (A.F. Ct. Crim. App. 2004). This evidence naturally includes evidence that a victim "may develop psychological or behavioral problems" in the future as a direct result of an accused's offenses. *Id.*

In determining whether evidence admitted in aggravation is "directly related" to the offenses of which an appellant was convicted, we assess whether the evidence is both direct and "closely related in time, type, and/or often outcome, to the convicted crime." *United States v. Hardison*, 64 M.J. 279, 281–82 (C.A.A.F. 2007). "Although the relationship to the appellant's offenses must be 'direct,' there is no requirement that the impact be limited to matters that have already occurred." *Anderson*, 60 M.J. at 556. It is well "accepted that impact evidence can include well-established prospective impact as well." *Id.*

Even when evidence qualifies for admission under R.C.M. 1001(b)(4), its probative value must still be weighed against its prejudicial impact under Mil. R. Evid. 403. *Hardison*, 64 M.J. at 281. Mil. R. Evid. 403 states: “The military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence.” In applying the Mil. R. Evid. 403 balancing test, military judges enjoy “wide discretion.” *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) (citations omitted). However, we give less deference to military judges’ decisions if they do not explain their analysis on the record, and we give military judges no deference when they fail to conduct the analysis at all. *Id.*

“When there is error in the admission of sentencing evidence, the test for prejudice is whether the error substantially influenced the adjudged sentence.” *United States v. Barker*, 77 M.J. 377, 384 (C.A.A.F. 2018) (internal quotation marks omitted) (quoting *United States v. Sanders*, 67 M.J. 344, 346 (C.A.A.F. 2009)). We consider four factors to determine whether an error had a substantial influence on the sentence. Those factors include “(1) the strength of the Government’s case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question.” *Id.* (internal quotation marks omitted and citations omitted). “An error is more likely to be prejudicial if the fact was not already obvious from the other evidence presented at trial and would have provided new ammunition against an appellant.” *Id.* (citing

United States v. Harrow, 65 M.J. 190, 200 (C.A.A.F. 2007)).

3. Analysis

Here, the military judge did not abuse his discretion when he determined that Dr. EB's testimony would assist the trier of fact to understand the potential future harm WD could suffer as a child-victim of sexual abuse, and that such testimony was proper evidence in aggravation. *See United States v. Stark*, 30 M.J. 328, 329–30 (C.M.A. 1990) (expert testimony that child victims of sexual abuse were “at a higher risk” of suffering from long-term effects of the abuse); *United States v. Hammond*, 17 M.J. 218, 219–21 (C.M.A. 1984) (expert testimony was admissible regarding evidence of the general effects of rape trauma even though the witness had neither interviewed nor counseled the victim).

In this case, Dr. EB, an expert in the fields of clinical and forensic psychology, testified that WD was at a greater risk of experiencing psychological harm in the future. She based her opinion on three factors that she found applicable to Appellant's court-martial which she personally observed. Consistent with her statements in the Article 39(a), UCMJ, hearing, Dr. EB based her testimony on research applicable to the evidence presented during findings, and her opinions were limited to the possible negative outcomes that WD could later face.

We find that there was a sufficient basis in this case for the military judge to allow Dr. EB's expert testimony because Dr. EB had observed the entire court-martial, which included watching WD's testimony, and viewing WD's recorded forensic interview. Also, as in *Stark*, trial defense counsel in

this case conducted a vigorous cross-examination of Dr. EB, during which Dr. EB agreed that not all children would react the same way, and that there were several factors not present in WD's case that could "predict greater negative outcomes." Dr. EB also acknowledged on cross-examination that she had not personally evaluated WD and could not say that WD would, in fact, experience any negative outcomes as a result of the sexual abuse she suffered.

We also find that the military judge conducted sufficient analysis under Mil. R. Evid. 403 to make his determination. The military judge found Dr. EB's testimony to be relevant, and that the probative value was significant given "Dr. [EB]'s knowledge skills and experience, and the facts and circumstances before this court-martial" that were present in the research. In contrast, the military judge found the risk of unfair prejudice to be low due to trial defense counsel's ability to effectively cross-examine Dr. EB and adduce probative evidence to challenge her testimony. Based on these findings the military judge determined that the probative value of Dr. EB's testimony substantially outweighed the risk of prejudice.

In this case, Appellant has not demonstrated that the military judge's decision was "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *McElhaney*, 54 M.J. at 130. Rather, the record demonstrates that the military judge correctly applied the facts to the law, conducted the required Mil. R. Evid. 403 balancing test, and properly instructed the members, prior to receiving the evidence, on how to consider Dr. EB's testimony. *See Stark*, 30 M.J. at 330. We therefore conclude that Dr. EB's testimony on the possible psychological impact of Appellant's crime on

WD was properly admitted as expert testimony in aggravation.

Assuming *arguendo* that the military judge erred in admitting the testimony of Dr. EB, we find Appellant suffered no prejudice. Applying the *Barker* factors, we find the Government's case was strong. We also find that Dr. EB's testimony was insubstantial as compared to the far more aggravating evidence already before the members concerning the circumstances and details of Appellant's criminal behavior. Additionally, we find that trial defense counsel's effective cross-examination of Dr. EB sufficiently negated the risk that Dr. EB's testimony had a substantial influence on the adjudged sentence. Finally, the military judge instructed the panel that they did not have to accept Dr. EB's testimony or give it greater weight than any other evidence. We presume the members followed the military judge's instructions. *United States v. Custis*, 65 M.J. 366, 372 (C.A.A.F. 2007). Therefore, we conclude Dr. EB's testimony did not "substantially influence the adjudged sentence." *Barker*, 77 M.J. at 384.

C. Double Jeopardy

Appellant contends that the military judge erred by not dismissing the specification alleging possession of obscene cartoons on the grounds that Appellant's prosecution for this offense was in violation of the Fifth Amendment and the prohibition against double jeopardy contained in Article 44, UCMJ. Appellant asks this court to set aside the findings and sentence. We are not persuaded by Appellant's contention and find no relief is warranted.

1. Additional Background

a. Appellant's First Court-Martial

Between 29 October and 2 November 2018, Appellant was tried by a military judge at a general court-martial for three specifications alleging that Appellant (1) knowingly and wrongfully possessed child pornography, (2) knowingly and wrongfully viewed child pornography, and (3) knowingly and wrongfully possessed obscene cartoons under 18 U.S.C. § 1466A(b)(1), all in violation of Article 134, UCMJ.

During closing argument at Appellant's first court-martial, trial defense counsel argued that the specification related to the obscene cartoons was erroneously drafted. The military judge, *sua sponte*, stated that she considered the argument to be a motion to dismiss, even though trial defense counsel did not characterize it as such. The military judge requested the parties draft written briefs on the issue. After receiving the written briefs and hearing argument but before entering any findings, the military judge dismissed the specification alleging possession of obscene cartoons for lack of jurisdiction. Subsequently, the military judge acquitted Appellant of the remaining two specifications.

b. Appellant's Second Court-Martial

At Appellant's second court-martial, which we now review, the Government charged Appellant with wrongful possession of obscene cartoons in violation of Article 134, UCMJ. On 8 May 2019, the Defense moved to dismiss the specification, arguing that Appellant was now charged in violation of the Fifth

Amendment's prohibition against double jeopardy.¹² On 15 May 2019, the Government filed a response, and on 20 May 2019, a hearing was held pursuant to Article 39(a), UCMJ, at which time the motion was litigated. On 13 June 2019, the military judge issued his ruling and denied the defense motion to dismiss.

In his written ruling, the military judge found Appellant was currently charged with one specification that alleged he wrongfully possessed obscene cartoons in violation of Article 134, UCMJ. The specification alleged that Appellant:

did, at or near Italy, between on or about 11 October 2016 and on or about 27 March 2018, knowingly and wrongfully possess obscene cartoons, such conduct being of a nature to bring discredit upon the armed forces.

The military judge also found Appellant was previously tried by court-martial for knowing and wrongful possession of obscene cartoons in violation Article 134, UCMJ. Specifically, the judge found the specification from Appellant's first court-martial alleged that he:

did, at or near Italy, between on or about 11 October 2016 and on or about 27 March 2018, knowingly and wrongfully possess obscene cartoons, to wit: visual depictions of minors engaging in sexually explicit conduct, and that said visual depictions were transported in foreign

¹² Trial defense counsel explicitly stated that he did not believe the double jeopardy issue was waived for appellate review despite Appellant's plea of guilty to the specification.

commerce by computer, in violation of 18 U.S. Code Section 1466A(b)(1), an offense not capital.

During the motions hearing, the military judge asked trial defense counsel to clarify the trial judge's ruling at the first court-martial. The following discussion ensued:

Q [Military Judge]: What was the finding, though?

A [Trial Defense Counsel]: The finding was lack of jurisdiction.

Q: Okay. So, there was no finding entered as to the - -

A: Yes, sir. It was dismissed before findings.

The military judge then concluded that both specifications captured the same course of conduct, although they were charged under different provisions of Article 134, UCMJ. The military judge also found the trial judge in Appellant's first court-martial did not enter a finding for the possession of obscene cartoons and that the specification was dismissed for lack of jurisdiction. The military judge also stated the evidence was "uncontroverted" that the trial judge for the first court-martial did not consider any of the evidence supporting the dismissed specification in reaching the findings on the other specifications. The military judge explained his conclusion was supported by the fact that the images alleged in the other specifications were contained on Appellant's cell phone and the obscene cartoons in the dismissed specification were contained on Appellant's laptops and USB drive.

Ultimately, the military judge concluded that while jeopardy had attached in Appellant's first court-martial when evidence on the merits was admitted, that jeopardy was later severed when the military judge dismissed the specification on jurisdictional grounds prior to any final judgment on the specification. The military judge then denied the Defense motion to dismiss. Subsequently, Appellant filed a petition with this court requesting a writ of mandamus to set aside the military judge's denial of the defense motion and to order the obscene-cartoon specification dismissed with prejudice. This court denied the petition. *See In re Driskill*, Misc. Dkt. No. 2019-03, 2019 CCA LEXIS 281, at *3–4 (A.F. Ct. Crim. App. 2 Jul. 2019).

2. Law

“Whether a prosecution violates double jeopardy is a question of law” that we review de novo. *United States v. Rice*, 80 M.J. 36, 40 (C.A.A.F. 2020). Questions of jurisdiction are reviewed de novo. *See United States v. Kuemmerle*, 67 M.J. 141, 143 (C.A.A.F. 2009).

The Fifth Amendment provides that no person shall “be subject, for the same offence, to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V. The prohibition against double jeopardy provides protection against multiple punishments and successive prosecutions for the same misconduct. *See Brown v. Ohio*, 432 U.S. 161, 165 (1977). One of the purposes underlying the prohibition on double jeopardy is “to protect the integrity of a final judgment.” *United States v. Scott*, 437 U.S. 82, 92 (1978). Another purpose is to ensure that the Government, “with all its resources and power,” is not

“allowed to make repeated attempts to convict an individual” for an offense, “thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.” *Green v. United States*, 355 U.S. 184, 187–88 (1957).

The double jeopardy clause applies to military personnel through Article 44(a), UCMJ, 10 U.S.C. § 844(a), which provides that “[n]o person may, without his consent, be tried a second time for the same offense.” “Article 44, UCMJ, does not, however, offer broader protections than granted by the Constitution.” *United States v. McClain*, 65 M.J. 894, 899 (A. Ct. Crim. App. 2008) (citations omitted).

The analysis of whether a prosecution is barred by double jeopardy includes two temporal components, “first, that jeopardy attaches, and second, that it terminates.” *United States v. McMurrin*, 72 M.J. 697, 704 (N.M. Ct. Crim. App. 2013). “In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn. In a nonjury trial, jeopardy attaches when the court begins to hear evidence.” *Serfass v. United States*, 420 U.S. 377, 388 (1975). “[T]he conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial.” *Id.* at 390 (quoting *Illinois v. Somerville*, 410 U.S. 458, 467 (1973)). Jeopardy can terminate when there is no final judgment on the matter, when a charge is withdrawn and dismissed without prejudice upon a defense motion, even after the presentation of evidence. *See, e.g., Lee v. United States*, 432 U.S. 23 (1977); *United States v. Dinitz*, 424 U.S. 600 (1976).

“No court-martial proceeding which lacked jurisdiction to try the accused for the offense is a trial in the sense of the rule.” R.C.M. 907(b)(2)(C)(iv). “[B]efore a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged.” *Grafton v. United States*, 206 U.S. 333, 345 (1907).

3. Analysis

At the first court-martial, a military judge-alone trial, Appellant was arraigned and entered pleas, and evidence on the merits was admitted. Therefore, we agree with the military judge that jeopardy had clearly attached. We also agree with the military judge that jeopardy terminated when the specification alleging that Appellant possessed obscene cartoons was dismissed without prejudice. We see no evidence of bad faith on behalf of the judge or trial counsel in this case. *See Lee*, 432 U.S. at 33 (the Double Jeopardy Clause will not bar reprosecution absent bad faith on behalf of judge or prosecutor). In fact, it was Appellant’s counsel who raised the issue during argument which eventually led to dismissal of the specification. It is also clear the specification was dismissed for lack of jurisdiction—grounds wholly unrelated to Appellant’s guilt or innocence—and that the dismissal came before Appellant was acquitted of the remaining specifications. Therefore, we conclude that there was no final judgment on whether Appellant wrongfully possessed obscene cartoons, and that no constitutional or Article 44(a), UCMJ, violation occurred in this case.

D. Providence of Guilty Plea

Appellant claims his guilty plea for possessing obscene cartoons was improvident because the cartoons were not obscene. Specifically, Appellant argues that “some of the characters [in the cartoons] are actually hundreds of years old even though they appear young” and thus do not depict adults and children engaged in sexually explicit behavior. We disagree, and find no relief is warranted.

1. Additional Background

As part of his guilty plea, Appellant entered into a PTA in which he waived all waivable motions as pertaining to the obscene-cartoons specification. Appellant also voluntarily entered into a stipulation of fact, where he agreed to the admissibility of 150 cartoon images that depicted adult figures engaged in sexually explicit conduct with what appear to be young children. Specifically, in the stipulation of fact, Appellant agreed that “[t]he cartoons were obscene in that their sexual content was patently offensive in light of community standards,” and that the cartoons lacked any “serious literary, artistic, political, or scientific value.”

The military judge asked Appellant during the guilty plea inquiry if “there [was] anything in the stipulation [of fact] that [he did] not wish to admit [was] true?” Appellant responded “No, Your Honor.”

When describing this offense, Appellant stated, “I wrongfully possessed obscene cartoons. . . . I reviewed the cartoons on Prosecution Exhibit 1 [stipulation of fact] and agree that they meet the legal definition of obscenity because of what they depict.” The military judge then asked Appellant to describe why the cartoons were obscene. Appellant responded,

“[B]ecause they depict drawings of characters that are smaller and childlike in nature engaging in sex acts” Appellant further agreed the cartoons were “patently offensive.”

2. Law

“A military judge’s decision to accept a guilty plea is reviewed for an abuse of discretion.” *United States v. Forbes*, 78 M.J. 279, 281 (C.A.A.F. 2019) (quoting *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996)). In reviewing the providency of a plea, a military judge abuses his discretion only when there is “a substantial basis in law or fact for questioning the plea.” *United States v. Inabinette*, 66 M.J. 320, 321–22 (C.A.A.F. 2008) (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). The military judge’s legal conclusion about the providency of the plea is reviewed de novo. *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005).

“Once the military judge has accepted a plea as provident and has entered findings based on it, an appellate court will not reverse that finding and reject the plea unless it finds a substantial conflict between the plea and the accused’s statements or other evidence of record.” *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996).

An appellant bears the burden of establishing that the record shows “a substantial basis in law or fact to question the plea.” *United States v. Phillips*, 74 M.J. 20, 21–22 (C.A.A.F. 2015). “A ‘mere possibility’ of such a conflict is not a sufficient basis to overturn the trial results.” *Garcia*, 44 M.J. at 498 (quoting *Prater*, 32 M.J. at 436).

Appellate courts will not speculate on the existence of facts that might invalidate a plea especially where the matter raised post-trial contradicts an appellant's express admission on the record. *See United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995).

"A guilty plea is provident if the facts elicited make out each element of the charged offense." *Harrow*, 65 M.J. at 205.

"'Indecent' is synonymous with 'obscene,' and such language is not afforded constitutional protection." *United States v. Moore*, 38 M.J. 490, 492 (C.M.A. 1994) (citing *United States v. French*, 31 M.J. 57, 59 (C.M.A. 1990)); *see also United States v. Meakin*, 78 M.J. 396, 401 (C.A.A.F. 2019).

"Indecent language" is defined as "that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought." 2016 *MCM*, pt. IV, ¶ 89.c.

The United States Supreme Court outlined "basic guidelines" for determining whether forms of expression amount to obscenity in *Miller v. California*. 413 U.S. 15, 24 (1973). These guidelines are: (a) whether "the work, taken as a whole, appeals to the prurient interest" when viewed through the lens of "the average person, applying contemporary community standards;" (b) "whether the work depicts or describes, in a patently offensive way, sexual conduct;" and (c) "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

United States v. White, No. ACM 39917 (f rev), 2022 CCA LEXIS 344, at *22–23 (A.F. Ct. Crim. App. 10 Jun. 2022) (unpub. op.) (citations omitted).

3. Analysis

At trial, the military judge conducted a comprehensive inquiry not just of Appellant's plea, but, *inter alia*, also of his right to counsel and the PTA and stipulation of fact that Appellant signed. After the military judge read the elements and definitions for wrongful possession of obscene cartoons, Appellant acknowledged that he understood the elements and definitions and that, when taken together, they accurately described his conduct. Appellant described the cartoons and why they were obscene in his own words. The military judge reviewed the stipulation of fact, including 150 cartoon images where a significant number of the images depicted adult figures engaged in sexually explicit conduct with what appear to be young children which Appellant averred was accurate. We conclude that the military judge did not abuse his discretion in accepting Appellant's plea and had no evident basis for rejecting it. Accordingly, we find Appellant's guilty plea was voluntary and provident.

E. Trial Counsel's Closing Argument

Appellant claims that trial counsel committed prosecutorial misconduct during his findings argument by using evidence that was admitted under Mil. R. Evid. 404(b) for the purpose of showing that Appellant had the propensity to commit the charged crimes. Specifically, Appellant alleges trial counsel used evidence that Appellant possessed child pornography to show that he had the propensity to rape and sexually abuse his daughter. Appellant asks

this court to set aside the findings and sentence. We disagree with Appellant's claims and find no relief is warranted.

1. Additional Background

As we noted above in section C, Appellant was previously acquitted of wrongfully possessing and viewing child pornography. During Appellant's current trial, trial defense counsel filed a motion to exclude any evidence of Appellant's alleged prior child pornography offenses. The military judge ruled HD could testify that Appellant had shown her child pornography, but that she could not detail the number of images or the images' content. At trial, the senior trial counsel asked HD if Appellant had shown her images of child pornography which she answered affirmatively. HD then testified about a conversation she had with Appellant regarding child pornography. She asked Appellant if he "got off on [child pornography]," and Appellant confirmed by stating, "Why does anybody look at pornography, [HD]?" HD also testified Appellant confessed to her that he started looking at child pornography to "help these children," but later "started getting turned on by it." HD asked Appellant if he would ever touch a child, and he responded, "I don't know, because I can't even stop looking at a picture."

At the conclusion of HD's testimony, the military judge issued the following instruction to the members:

You've heard evidence that [Appellant] may have shown [HD] images of child pornography, and commented on his willingness to commit crimes similar to those in the images. You may consider

this for the limited purpose of its tendency, if any, to determine whether [Appellant] had a motive to commit any of the charged offenses, as well as to prove that [Appellant] intended to commit the offense alleged in Specification 2 of the Additional Charge [sexual abuse of a child]. You may not consider this evidence for any other purpose. And you may not conclude from this evidence that [Appellant] is a bad person, or has general criminal tendencies and that he, therefore, committed the offenses charged.

During findings argument, trial counsel argued:

[HD] described it as child pornography. And you know it is, because what was his response when she first found out about it, how did he describe why he started looking at these images? He said, "I just wanted to help these kids," or words to that effect. He wanted to help them? Well, the one thing we know from that is that they were real kids, because there's no helping cartoons. And so ultimately, members, you have to know exactly what this guy was into.

Trial counsel continued:

W]hen he tells [HD]: I don't know [HD], I just can't stop looking at them or I can't even stop looking at them. You know what he was bound to do. You know if that's the line that he would draw, I will look at them but I will not offend, his

answer is much different to his wife. And the cross-examination was he had been drinking. Yeah, some truth serum got it out. For sure. For sure. Some truth serum got us to understand exactly what his intent was, and what his motive has been all along. Absolutely he said that to her.

Trial counsel went on to argue that when Appellant sobered up the next day, he “change[d] the degree and timeline of his guilt.” Trial counsel argued that Appellant’s culpability changed “[b]ecause he has to hide from the very fact that every time he looks at these images he has the same arousal. And he has to hide from the very fact that he is motivated to do it himself.”

Trial defense counsel did make objections to other statements in trial counsel’s argument, but none pertaining to either the Mil R. Evid. 404(b) evidence or to any of the above-quoted arguments.

2. Law

“We review prosecutorial misconduct and improper argument de novo and where . . . no objection is made, we review for plain error.” *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (citing *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018)). “Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused.” *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (citation omitted). The burden of proof under a plain error review is on the appellant. See *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006).

“Improper argument is one facet of prosecutorial misconduct.” *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017). Prosecutorial misconduct occurs when trial counsel “oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.” *Fletcher*, 62 M.J. at 178 (quoting *Berger v. United States*, 295 U.S. 78, 84 (1935)). Such conduct “can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, *e.g.*, a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon.” *United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014) (quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)).

“A prosecutorial comment must be examined in light of its context within the entire court-martial.” *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005) (citation omitted). “When a trial counsel makes an improper argument during findings, ‘reversal is warranted only when the trial counsel’s comments taken as a whole were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone.’” *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021) (quoting *Andrews*, 77 M.J. at 401–02). “We weigh three factors to determine whether trial counsel’s improper arguments were prejudicial: ‘(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction.’” *Andrews*, 77 M.J. at 402 (quoting *Fletcher*, 62 M.J. at 184).

“[T]he lack of a defense objection is ‘some measure of the minimal impact of a prosecutor’s improper comment.’” *United States v. Gilley*, 56 M.J. 113, 123

(C.A.A.F. 2001) (quoting *United States v. Carpenter*, 51 M.J. 393, 397 (C.A.A.F. 1999)).

3. Analysis

Because trial defense counsel did not object, we review for plain error. We are not persuaded by Appellant's argument that trial counsel used evidence admitted under Mil. R. Evid. 404(b) for the improper purpose of arguing Appellant had the propensity to commit the charged offenses. We find that trial counsel argued admitted evidence for the express purpose of showing Appellant's motive and intent. In support of his position that trial counsel misused the evidence, Appellant asks that we focus our attention on eight words spoken by trial counsel, "You know what he was bound to do." However, after review of trial counsel's entire argument, it is evident that trial counsel was not linking Appellant's alleged possession of child pornography to a propensity to commit rape or sexual abuse of a child. Rather, trial counsel reasoned that Appellant was discretely revealing his motive and intent to sexually assault a child because he could not reassure his wife that he would never touch a child sexually. We note the military judge had previously instructed the members that they could consider Appellant's comments to HD "for the limited purpose of its tendency, if any, to determine whether [Appellant] had a motive to commit any of the charged offenses." Therefore, we conclude that trial counsel properly argued evidence admitted for its limited permitted purpose and that there was no error plain or otherwise.

Even if we were to assume that TC's argument constituted plain or obvious error, Appellant would

not be entitled to relief because he has failed to demonstrate prejudice. After considering the three factors set forth by the United States Court of Appeals for the Armed Forces in *Fletcher*, we conclude such an error did not materially prejudice Appellant's substantial rights. As to the first factor, we find the severity of the error to be slight. The fact that trial defense counsel did not object to any of these instances is some indication of their immateriality. *See Gilley*, 56 M.J. at 123. In addition, Appellant only points to eight words in an otherwise lengthy findings argument. We find the first factor weighs in the Government's favor.

With regard to the second *Fletcher* factor, our review of the record finds that the military judge reiterated his instruction regarding the limited purpose for which the members could consider Appellant's alleged possession of child pornography at least three times. We note again that the military judge provided a limiting instruction once after the testimony was heard, once immediately before trial counsel argued, and once directly after the conclusion of trial counsel's argument. "Absent evidence to the contrary, this [c]ourt may presume that members follow a military judge's instructions." *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000) (citations omitted); *see also Custis*, 65 M.J. at 372. Therefore, we find the second factor also weighs in the Government's favor.

Finally, as we noted above, we find the strength of the evidence significantly favors the Government. The Government presented a compelling case, including the testimony of WD, HD, and JC. In sum, we find no prospect that the allegedly erroneous argument—eight words—played any substantial role in the court

members' findings. Therefore, the third factor also weighs in the Government's favor. After weighing the *Fletcher* factors together and considering trial counsel's arguments in context, we are confident the court members properly convicted Appellant on the basis of the evidence alone.

F. Sentence Appropriateness

Appellant contends his sentence to 40 years and 9 months of confinement is inappropriately severe. We agree.

This court “may affirm only . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.” Article 66(d), UCMJ. We review sentence appropriateness de novo, employing “a sweeping Congressional mandate to ensure ‘a fair and just punishment for every accused.’” *United States v. Baier*, 60 M.J. 382, 383–84 (C.A.A.F. 2005) (quoting *United States v. Bauerback*, 55 M.J. 501, 504 (A. Ct. Crim. App. 2001)). In determining whether a sentence should be approved, our authority is “not legality alone, but legality limited by appropriateness.” *United States v. Nerad*, 69 M.J. 138, 141 (C.A.A.F. 2010) (citing *United States v. Atkins*, 23 C.M.R. 301, 303 (C.M.A. 1957)).

“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. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009) (per curiam) (citations omitted). While we have great discretion in determining whether a sentence is appropriate, we

are not authorized to engage in exercises of clemency. *See Nerad*, 69 M.J. at 146.

In conducting this review, we must also be sensitive to considerations of uniformity and even-handedness. *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (citing *United States v. Lacy*, 50 M.J. 286, 287–88 (C.A.A.F. 1999)).

We have conducted a thorough review of Appellant's entire court-martial record, including his record of service. Our review of the trial record shows Appellant did not make an unsworn statement, and presented no evidence for the members' consideration before they determined his sentence. Additionally, our review of Appellant's service record shows that he joined the Air Force on 3 May 2016, served no deployments, served no remote tours, and did not have an enlisted performance report.

Here, we note that Appellant's misconduct is severe and that the maximum sentence Appellant faced included a term of confinement for life without parole and a dishonorable discharge.

Nonetheless, based on our collective experiences as judge advocates and appellate judges, and taking into account the principles of sentencing and the matters in aggravation, as balanced by the matters in mitigation, we conclude that Appellant's sentence to confinement for 40 years and 9 months is inappropriately severe. In making this determination, we are not engaging in an act of clemency; rather, we are fulfilling our duty under Article 66(d), UCMJ, to maintain uniformity and even-handedness of court-martial sentencing decisions. *See Sothen*, 54 M.J. at 296. Our decision is not made lightly and was the product of considerable reflection, deliberation, and

debate. See *Lacy*, 50 M.J. at 288 (citing *United States v. Olinger*, 12 M.J. 458, 461 (C.M.A. 1982) (“Under Article 66(c), [UCMJ,] Congress has furthered the goal of uniformity in sentencing in a system that values individualized punishment by relying on the judges of the Courts of Criminal Appeals to utilize the experience distilled from years of practice in military law to determine whether, in light of the facts surrounding [the] accused’s delict, his sentence was appropriate.” (Alteration in original)); see also *United States v. Wacha*, 55 M.J. 266, 267 (C.A.A.F. 2001) (citing *United States v. Ballard*, 20 M.J. 282, 286 (C.M.A. 1985)) (affirming the importance of the “accumulated knowledge” of “experienced Court of Criminal Appeal judges” in assessing for sentence appropriateness). We conclude that a sentence of a dishonorable discharge, confinement for 30 years, forfeiture of all pay and allowances, and reduction to the grade of E-1 should be affirmed.

III. CONCLUSION

We affirm only so much of the sentence that includes a dishonorable discharge, confinement for 30 years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The findings as entered and sentence as reassessed 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 of guilty as entered, and the sentence as reassessed, are **AFFIRMED**.

MEGINLEY, Judge (dissenting):

Although Appellant did not specifically ask the military judge to instruct the members that a finding of guilty must be unanimous, and while it is unknown whether Appellant was convicted by a unanimous verdict, Appellant argues the Government could not prove beyond a reasonable doubt that the military judge's failure to instruct the panel that a guilty verdict must be unanimous was harmless. In *United States v. Westcott*, I found the appellant was denied equal protection under the law and would have set aside the findings without prejudice; our superior court has since denied review in that case. No. ACM 39936, 2022 CCA LEXIS 156, at *108 (A.F. Ct. Crim. App. 17 Mar. 2022) (Meginley, J., dissenting in part and in the result) (unpub. op.), *rev. denied*, No. 22-0206, 2022 CAAF LEXIS 522 (C.A.A.F. 21 Jul. 2022).

Nonetheless, in *United States v. Anderson*, the United States Court of Appeals for the Armed Forces (CAAF) granted the appellant's petition on the following issue:

WHETHER APPELLANT WAS DEPRIVED
OF HIS RIGHT TO A UNANIMOUS VERDICT
AS GUARANTEED BY THE SIXTH
AMENDMENT, THE FIFTH AMENDMENT'S
DUE PROCESS CLAUSE, AND THE FIFTH
AMENDMENT'S RIGHT TO EQUAL
PROTECTION.

No. 22-0193, 2022 CAAF LEXIS 529 (C.A.A.F. 25 Jul. 2022). That same day, the CAAF also granted review in *United States v. Veerathanongdech* on the following issue:

WHETHER THE MILITARY JUDGE'S
FAILURE TO INSTRUCT THE PANEL THAT

161a

A GUILTY VERDICT MUST BE
UNANIMOUS WAS HARMLESS BEYOND A
REASONABLE DOUBT.

No. 22-0205, 2022 CAAF LEXIS 533 (C.A.A.F. 25 Jul.
2022).

I believe these two issues are encompassed within
my dissent in *Westcott*. Therefore, although the CAAF
denied review in *Westcott*, in light of these two grants
by the CAAF, I maintain my position as articulated in
Westcott, and find Appellant was denied equal
protection under the law and would set aside the
findings without prejudice.



FOR THE COURT

A handwritten signature in black ink, appearing to read "Anthony F. Rock".

ANTHONY F. ROCK, Maj, USAF
Acting Clerk of the Court

162a

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

No. ACM 39889

UNITED STATES
Appellee

v.

Alexander L. DRISKILL
Airman (E-2), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial
Judiciary

Decided 14 December 2021

Military Judge: Willie J. Babor.

Sentence: Sentence adjudged on 4 November 2019 by GCM convened at Ramstein Air Base, Germany, Aviano Air Base, Italy, and Buckley Air Force Base, Colorado. Sentence entered by military judge on 2 March 2020: Dishonorable discharge, confinement for 40 years and 9 months, and reduction to E-1.

For Appellant: Major Alexander A. Navarro, USAF.

For Appellee: Lieutenant Colonel Matthew J. Neil, USAF; Major Allison R. Barbo, USAF; Major Alex B. Coberly, USAF; Major Peter F. Kellett, USAF; Mary Ellen Payne, Esquire.

Before LEWIS, ANNEXSTAD, and OWEN, *Appellate Military Judges*.

Judge ANNEXSTAD delivered the opinion of the court, in which Senior Judge LEWIS and Judge OWEN joined.

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

ANNEXSTAD, Judge:

At a general court-martial, in accordance with his pleas, a military judge found Appellant guilty of one specification of wrongful possession of obscene cartoons in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. Contrary to his pleas, a panel of officer members found Appellant guilty of one specification of rape of a child and one specification of sexual abuse of a child, both in violation of Article 120b, UCMJ, 10 U.S.C. § 920b.¹ The members sentenced Appellant to a dishonorable discharge, confinement for 40 years and nine months,

¹ The specifications covered the time period from 11 October 2016 to 27 March 2018. References to the punitive articles of the UCMJ are to the *Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*). Unless otherwise noted all other references to the UCMJ and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.). Further, the Military Justice Act of 2016, National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 5001–5542 (23 Dec. 2016), as fully implemented by Exec. Order 13,825, 83 Fed. Reg. 9889 (8 Mar. 2018), applied to Appellant’s court-martial and post-trial processing.

forfeiture of all pay and allowances, and reduction to the grade of E-1.² The pretrial agreement did not place any limitations on punishment.

Appellant raises nine assignments of error which we have reworded: (1) whether the evidence was legally and factually sufficient to support Appellant's convictions for rape and sexual abuse of a child; (2) whether the military judge abused his discretion by allowing a Government expert to testify about future impact on the named victim; (3) whether the military judge erred when he denied Appellant's request to sever the charge for wrongful possession of obscene cartoons from the charge and specifications for rape and sexual abuse of a child; (4) whether Appellant's conviction for wrongful possession of obscene cartoons violated the prohibition against double jeopardy found in the Fifth Amendment³ and Article 44, UCMJ, 10 U.S.C. § 844; (5) whether the military judge erred by denying Appellant's motion for appropriate relief due to unequal access to the named victim; (6) whether the military judge erred by failing to compel an expert consultant for Appellant; (7) whether the evidence was legally insufficient to support Appellant's conviction for wrongful possession of obscene cartoons; (8) whether the sentence of confinement of 40 years and 9 months was inappropriately severe; and (9) whether Appellant's conviction for rape and sexual abuse of a child was factually and legally insufficient due to errors in the child forensic

² After trial, the convening authority suspended the adjudged forfeitures of all pay and allowances for six months, release from confinement or expiration of term of service, whichever was sooner, with suspension commencing on 18 November 2019.

³ U.S. CONST. amend. V.

interview.⁴ After careful review, we also consider two additional issues not raised by Appellant: (10) whether Appellant is entitled to appropriate relief due to the convening authority's failure to take action on the sentence as required by law; and (11) whether Appellant is entitled to relief for a facially unreasonable post-trial delay.

We find the convening authority failed to take action on the entire sentence as he was required to do, and that remand to the Chief Trial Judge, Air Force Trial Judiciary, is appropriate. We find no relief warranted for a facially unreasonable post-trial delay. We defer addressing Appellant's other assignments of error until the record is returned to this court for completion of our Article 66(d), UCMJ, 10 U.S.C. § 866(d), review.

I. BACKGROUND

Appellant's trial concluded on 4 November 2019. Eight days later, on 12 November 2019, Appellant's spouse, on behalf of the couple's daughter and named victim, submitted a request to the convening authority asking that he waive or defer forfeitures for the benefit of the victim and herself. Subsequently, on 25 November 2019, Appellant submitted a clemency request to the convening authority. In his request, Appellant highlighted three issues of interest for the convening authority but did not request any specific relief. Appellant's counsel contended that Appellant's sentence to confinement was inappropriately severe,

⁴ Issues (6), (7), (8) and (9) were personally raised by Appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

and specifically stated that the convening authority's options at clemency were "limited, if not outright non-existent" and further described the clemency process as an "exercise in futility."

On 28 January 2020, the convening authority issued his Decision on Action memorandum. In the memorandum, the convening authority memorialized the following action on the sentence: (1) he suspended the adjudged forfeitures of all pay and allowances for six months, release from confinement or expiration of term of service, whichever was sooner, with suspension commencing on 18 November 2019; and (2) he waived all of the automatic forfeitures for a period of six months, release from confinement or expiration of term of service, whichever was sooner, with the waiver also commencing on 18 November 2019. He then directed that the total pay and allowances be paid to Appellant's spouse for the benefit of herself and the named victim. The Decision on Action memorandum also indicated Appellant would be required to take appellate leave under Article 76a, UCMJ, 10 U.S.C. § 876a. However, there was no explicit statement as to whether any of the other elements of the Appellant's sentence were approved, disapproved, commuted, or suspended.

On 2 March 2020, the military judge signed the entry of judgment (EoJ), noting both the convening authority's suspension of the adjudged forfeitures and waiver of the automatic forfeitures. He entered the rest of the sentence as adjudged.

II. DISCUSSION

A. Convening Authority Action

Proper completion of post-trial processing is a question of law this court reviews de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citation omitted). Interpretation of a statute and a Rule for Courts-Martial are also questions of law we review de novo. *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008) (citation omitted); *United States v. Martinelli*, 62 M.J. 52, 56 (C.A.A.F. 2005) (citation omitted).

Executive Order 13,825, § 6(b), requires that the version of Article 60, UCMJ, 10 U.S.C. § 860,

in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority . . . to the extent that Article 60: (1) requires action by the convening authority on the sentence; . . . or (5) authorizes the convening authority to approve, disapprove, commute, or suspend a sentence in whole or in part.

See 2018 Amendments to the *Manual for Courts-Martial, United States*, 83 Fed. Reg. 9889, 9890 (1 Mar. 2018).

The date of the earliest charged offense of which Appellant was found guilty was on or about 11 October 2016. The version of Article 60, UCMJ, in effect on that date stated “[a]ction on the sentence of a court-martial *shall* be taken by the convening authority or by another person authorized to act under this section.” 10 U.S.C. § 860(c)(2)(A) (*Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*))

(emphasis added); *see also United States v. Perez*, 66 M.J. 164, 165 (C.A.A.F. 2008) (per curiam) (“[T]he convening authority is required to take action on the sentence”). Article 60, UCMJ, further stated: “Except as [otherwise] provided . . . the convening authority . . . may approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part.” 10 U.S.C. § 860(c)(2)(B) (2016 *MCM*).

The United States Court of Appeals for the Armed Forces (CAAF) recently held that:

In any case where an accused is found guilty of at least one specification where the offense was committed before January 1, 2019, a convening authority errs if he fails to take one of the following mandated post-trial actions in a case: approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part.

United States v. Brubaker-Escobar, __ M.J. __, No. 20-0345, 2021 CAAF LEXIS 818, at *6 (C.A.A.F. 7 Sep. 2021) (per curiam). In that case, the convening authority had signed a form stating he was taking “No Action” in the case. *Id.* at *3.

In this case the convening authority stated in his Decision on Action memorandum that he suspended the adjudged forfeitures and waived the automatic forfeitures for the benefit of Appellant’s spouse and child. That said, the convening authority failed to state whether he approved, disapproved, commuted, or suspended the other portions of Appellant’s sentence of the court-martial in whole or in part, to

include Appellant's adjudged reduction in grade.⁵ Considering *Brubaker-Escobar*, we find error.

Under *Brubaker-Escobar*, the convening authority's error was procedural, not jurisdictional. See *id.* at *7–8. “[P]rocedural errors are ‘test[ed] for material prejudice to a substantial right to determine whether relief is warranted.’” *Id.* at *8 (second alteration in original) (quoting *United States v. Alexander*, 61 M.J. 266, 269 (C.A.A.F. 2005)).

In *Brubaker-Escobar*, our superior court held the convening authority's error in taking “no action” was harmless because the appellant did not request clemency, and the convening authority could not have granted meaningful clemency regarding any portion of the adjudged sentence.⁶ *Id.* at *8. In contrast, in this

⁵ We note the Government has not offered any clarification of the convening authority's intent. Cf. *United States v. Harrington*, No. ACM 39825, 2021 CCA LEXIS 524 (A.F. Ct. Crim. App. 14 Oct. 2021) (unpub. op.) (convening authority's declaration regarding intent in taking “no action” on sentence demonstrated no material prejudice to a substantial right of appellant).

⁶ In *Brubaker-Escobar*, the adjudged sentence included a punitive discharge and a reduction to E-1. 2021 CAAF LEXIS 818, at *2. Under Article 60(c)(4)(A), UCMJ, 10 U.S.C. § 860(c)(4)(A) (2016 *MCM*), the convening authority lacked the power to affect the punitive discharge. *Id.* at *8. Further, though the convening authority in *Brubaker-Escobar* had the authority to grant clemency regarding the rank reduction, the CAAF found this power effectively “meaningless because [a]ppellant's punitive discharge would have resulted in an automatic reduction to E-1” under Article 58a, UCMJ, 10 U.S.C. § 858a (2016 *MCM*), and a related Army regulation. *Id.* No such automatic reduction would apply to Appellant in this case. See Department of the Air Force Instruction 51-201, *Administration of Military Justice*, ¶ A11.26.3 (18 Jan. 2019) (“The provisions of Article 58a do not apply to the Air Force. All reductions in grade are based upon adjudged and approved sentences.”).

case Appellant expressed his belief that his sentence was inappropriately severe with requesting any specific relief. The one remaining component of the sentence that the convening authority could meaningfully affect was the reduction in grade from E-2 to E-1, and yet Appellant did not ask for relief. In that regard, we cannot determine from the record if Appellant erroneously believed the convening authority's options were "limited" to "outright non-existent," on one hand, or if Appellant was not interested in seeking to minimize his reduction in grade, on the other.⁷

We also note that under the new post-trial processing procedures, no written legal advice on Appellant's clemency request was required and none was included in the record of trial. Therefore we cannot be sure that the convening authority knew he could grant relief in regards to Appellant's reduction in rank. Under the facts presented here, we are unable to conclude that the convening authority's error did not materially prejudice a substantial right of Appellant. Accordingly, remand is appropriate before we complete our Article 66(d), UCMJ, review.

B. Post Trial Delay

Appellant was sentenced on 4 November 2019 and the military judge signed the entry of judgment on 2 March 2020. On 22 April 2020 Appellant's case was docketed with this court. Appellant filed his initial assignments of error 450 days later on 16 July 2021, after requesting and receiving 12 enlargements of time over the Government's objection. A month later,

⁷ The convening authority lacked authority to affect the punitive discharge and sentence to confinement. R.C.M. 1107(d)(1)(B) (2016 *MCM*).

on 15 August 2021, Appellant filed a supplemental brief with this court. We accepted the Government's answer on 24 September 2021, after granting a motion to exceed page limits. On 15 October 2021, 541 days after his case was docketed with this court, Appellant filed a reply brief, after receiving one enlargement of time from this court. We note that Appellant was aware of the progress on his appeal and of his options with assigned counsel, and that he consented to the motions for enlargement of time in the interest of having his case thoroughly briefed.

“We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal.” *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citing *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004); *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003)). In *Moreno*, the CAAF established a presumption of facially unreasonable delay when the Court of Criminal Appeals does not render a decision within 18 months of docketing. 63 M.J. at 142. Where there is such a delay, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of his right to a timely review; and (4) prejudice to the appellant. *Moreno*, 63 M.J. at 135 (citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004) (per curiam)). “No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding.” *Id.* at 136 (citing *Barker*, 407 U.S. at 533).

Appellant's case was docketed with our court on 22 April 2020. The overall delay in failing to render this decision by 22 October 2021 is facially unreasonable.

See Moreno, 63 M.J. at 142. However, we determine there has been no violation of Appellant's right to due process and a speedy appellate review.

This case has exceeded the 18-month standard between docketing and appellate decision by approximately seven weeks. The primary reason for the delay is the fact Appellant took some 15 months to file his assignments of error after requesting and receiving 12 extensions. Once we received Appellant's reply brief, we began our Article 66(d), UCMJ, review and identified the two issues we address today. We find the length of the delay generally weighs in Appellant's favor. We find the reasons for the delay weigh in the Government's favor, especially in light of the fact that most of the delay was at Appellant's behest. Appellant has not asserted a right to speedy appellate review. He has also not pointed to any particular prejudice resulting from the presumptively unreasonable delay, and we find none.

Finding no *Barker* prejudice, we also find the delay is not so egregious that it adversely affects the public's perception of fairness and integrity of the military justice system. *See United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). As a result, there is no due process violation. *See id.*

Recognizing our authority under Article 66(d), UCMJ, we have also considered whether relief for excessive post-trial delay is appropriate even in the absence of a due process violation. *See United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). After considering the factors enumerated in *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016), we conclude it is not.

III. CONCLUSION

This case is **REMANDED** to the Chief Trial Judge, Air Force Trial Judiciary, to resolve a substantial issue with the convening authority's decision memorandum, as the convening authority failed to take action on the sentence as required by Article 60, UCMJ (2016 *MCM*), and *Brubaker-Escobar*.

Our remand returns jurisdiction over the case to a detailed military judge and dismisses this appellate proceeding consistent with Rule 29(b)(2) of the Joint Rules for Appellate Procedure for Courts of Criminal Appeals. JT. CT. CRIM. APP. R. 29(b)(2). A detailed military judge may:

(1) Return the record of trial to the convening authority or his successor to take action on the sentence;

(2) Conduct one or more Article 66(f)(3), UCMJ, proceedings using the procedural rules for post-trial Article 39(a), UCMJ, 10 U.S.C. § 839, sessions; and/or

(3) Correct or modify the entry of judgment.

Thereafter, the record of trial will be returned to the court for completion of appellate review under Article 66(d), UCMJ.



FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

174a

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

United States, USCA Dkt. No. 26-0073/AF
 Appellee Crim.App. No. 39903

v.

ORDER DENYING PETITION

Jesus
Martinez,
 Appellant

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is by the Court, this 25th day of March, 2026,

ORDERED:

That the petition is hereby denied.

For the Court,

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

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

175a

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

No. ACM 39903 (reh) (f rev)

UNITED STATES
Appellee

v.

Jesus MARTINEZ
Airman First Class (E-3), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial
Judiciary

Upon Further Review

Decided 31 October 2025

Military Judge: Matthew P. Stoffel.

Sentence: Sentence adjudged 22 November 2022 by GCM convened at Fairchild Air Force Base, Washington. Sentence entered by military judge on 31 May 2023: Dishonorable discharge, confinement for 46 months, forfeiture of all pay and allowances, and reduction to E-1.

For Appellant: Captain Michael J. Bruzik, USAF.

For Appellee: Colonel Steven R. Kaufman, USAF; Colonel Matthew D. Talcott, USAF; Lieutenant Colonel Jenny A. Liabenow, USAF; Lieutenant Colonel J. Pete Ferrell, USAF; Major Vanessa

Bairos, USAF; Major Jocelyn Q. Wright, USAF; Jack C. Korologos, Legal Intern;¹ Mary Ellen Payne, Esquire.

Before JOHNSON, KEARLEY, and MCCALL,
Appellate Military Judges.

Chief Judge JOHNSON delivered the opinion of the court, in which Judge KEARLEY and Judge MCCALL joined.

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

JOHNSON, Chief Judge:

In August 2019, a general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of sexual assault and one specification of attempted sexual assault, in violation of Articles 120 and 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920, 880.² The court-martial sentenced Appellant to a dishonorable discharge, confinement for six years, forfeiture of all pay and allowances, and reduction to the grade of E-1.

¹ Mr. Korologos is a legal intern who was at all times supervised by an attorney admitted to practice before this court.

² Unless otherwise indicated, all references to the UCMJ and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

In his initial appeal to this court, Appellant raised 11 assignments of error. *United States v. Martinez*, No. ACM 39903, 2021 CCA LEXIS 250 (A.F. Ct. Crim. App. 21 May 2021) (unpub. op.) (*Martinez I*). In its initial opinion, this court found the convening authority failed to take action on Appellant's entire sentence as required by Executive Order 13,825, § 6(b), 83 Fed. Reg. 9889, 9890 (8 Mar. 2018), and Article 60, UCMJ, 10 U.S.C. § 860. *Martinez I*, unpub. op. at *2. As a result, this court remanded the record of trial to the Chief Trial Judge, Air Force Trial Judiciary, to resolve the ambiguous and incomplete convening authority action, and deferred consideration of the remaining issues. *Id.* at *7–8. We deferred addressing the remainder of Appellant's assignments of error until the record was returned. *Id.* at *2.

On remand, the convening authority approved the adjudged sentence and the case was re-docketed with this court. On further review, this court found prejudicial error in the military judge's findings instructions regarding attempted sexual assault. *United States v. Martinez*, No. ACM 39903 (f rev), 2022 CCA LEXIS 324, at *106–12 (A.F. Ct. Crim. App. 31 May 2022) (unpub. op.) (*Martinez II*). Consequently, this court set aside the findings of guilty as to that charge and specification and the sentence; dismissed that charge and specification; authorized a rehearing as to the dismissed charge and specification and the sentence; and affirmed the findings of guilty as to sexual assault. *Id.* at *136.

On 22 November 2022, a rehearing was held as to the sentence only. For the previously affirmed sexual assault conviction, a general court-martial composed of a military judge alone sentenced Appellant to a

dishonorable discharge, confinement for 46 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The military judge awarded Appellant 1,055 days of confinement credit for confinement served pursuant to the original sentence, 121 days of pretrial confinement credit, and 242 days of judicially ordered credit for illegal pretrial confinement. The military judge further ordered that 182 days of the confinement credit be applied against the adjudged total forfeiture of pay and allowances.

After the sentencing rehearing, Appellant raised three issues to this court: (1) whether Appellant is entitled to greater relief than that ordered by the military judge for illegal pretrial confinement; (2) whether the delay before Appellant's sentencing rehearing violated his speedy trial rights under Article 10, UCMJ, 10 U.S.C. § 810, and Rule for Courts-Martial (R.C.M.) 707; and (3) whether Appellant is entitled to relief for post-trial delay. However, this court remanded the record to the Chief Trial Judge, Air Force Trial Judiciary, for correction with respect to several missing appellate exhibits. *See United States v. Martinez*, No. ACM 39903 (reh), 2024 CCA LEXIS 551 (A.F. Ct. Crim. App. 16 Dec. 2024) (order). After correction, upon re-docketing, Appellant filed a brief with this court providing additional argument with respect to issue (3), but raised no additional issues.

We find no error materially prejudicial to Appellant's substantial rights with respect to issues (1) and (2), but we find relief for excessive post-trial delay appropriate, and take corrective action in our decretal paragraph.

I. BACKGROUND

This court's 2022 opinion provides a concise summary of the evidence underlying Appellant's affirmed conviction for sexual assault. *Martinez II*, unpub. op. at *4–5. For purposes of the current appeal, we begin the relevant background with the issuance of this court's opinion in *Martinez II* affirming the Article 120, UCMJ, conviction, and setting aside the findings of guilty as to Article 80, UCMJ, and the sentence, and authorizing a rehearing. Following the issuance of the opinion, Appellant continued to be held in confinement at the Naval Consolidated Brig at Marine Corps Air Station Miramar, California (Miramar).³

This court issued *Martinez II* on 31 May 2022. On 19 July 2022, the Air Force Military Justice Law and Policy Division (AF/JAJM) sent a copy of *Martinez II* and accompanying memorandum to the Office of the Staff Judge Advocate (SJA) of the general court-martial convening authority (GCMCA). The memorandum provided instructions regarding a potential rehearing. In part, the memorandum advised, "Pursuant to R.C.M. 707(b)(3)(D), a new 120-day time period begins on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing." The military judge for the rehearing subsequently determined the convening authority received the opinion on 20 July 2022.

³ The following background is drawn primarily from the rehearing military judge's findings of fact which, to the extent we refer to them here, we find to be supported by the record and not clearly erroneous.

On 28 July 2022, Appellant petitioned the United States Court of Appeals for the Armed Forces (CAAF) for review of *Martinez II*. On 16 August 2022, the CAAF denied the petition “without prejudice to Appellant’s right to raise the matters asserted during the normal course of appellate review,” explaining that “given the possibility of a rehearing, the petition is not ripe for review at this time.” *United States v. Martinez*, 83 M.J. 19 (C.A.A.F. 2022) (mem.).

On or about 9 September 2022, the Fairchild Air Force Base (AFB) Victim Witness Assistance Program (VWAP) coordinator began contacting counsel for ES, the named victim of the Article 80, UCMJ, attempted sexual assault charge, to inquire whether ES was willing to participate in a rehearing. ES’s counsel stated she would attempt to obtain a written decision from ES. The VWAP coordinator followed up repeatedly with ES’s counsel between 14 September 2022 and 3 October 2022. On 4 October 2022, ES’s counsel sent the VWAP coordinator an email from ES declining participation in a rehearing.

In the meantime, the VWAP coordinator began efforts to determine how KMT, the named victim of the affirmed Article 120, UCMJ, sexual assault charge, could request representation by a victims’ counsel (VC), if she desired. On 7 October 2022, the VWAP coordinator spoke with KMT by telephone. KMT indicated she would like to participate in resentencing Appellant and would like to be represented by a VC.

On 17 October 2022, the Fairchild AFB legal office delivered the referral package to the GCMCA’s SJA. On 19 October 2022, assistant trial counsel contacted Appellant’s appellate counsel to inquire about her

availability for a rehearing. On 21 October 2022, Appellant's trial defense counsel, Captain (Capt) SR, notified the Fairchild AFB legal office that she represented Appellant for his rehearing. During discussions with the legal office on 21 October 2022, Capt SR indicated the Defense would be ready for trial on 12 December 2022, expressed willingness to exclude time for speedy trial purposes until then, did not advise the legal office Appellant was still in confinement, and did not demand speedy trial.

On 24 October 2022, the Fairchild AFB legal office inquired of Capt SR where Appellant was located and whether he was still in confinement. On 1 November 2022, Capt SR responded that Appellant was still confined at Miramar, should be released immediately, and demanded speedy trial. She also updated the Defense's availability for a rehearing to 30 November 2022.

On 2 November 2022, the GCMCA dismissed the Article 80, UCMJ, charge and specification and referred the case to a sentencing-only rehearing. The same day the base legal office contacted Miramar to inquire about Appellant's release.

The Defense made additional written demands for speedy trial on 4 and 8 November 2022. On 8 November 2022, trial defense counsel advised they were now available on 16 November 2022 for the rehearing. On 9 November 2022, trial defense counsel confirmed the Defense's agreement to the exclusion of 21 October 2022 to 16 November 2022, and again demanded speedy trial. On 13 November 2022, trial defense counsel updated their availability to 17 November 2022, and agreed to exclude 21 October 2022 to 17 November 2022 for speedy trial purposes.

Appellant was served with the referred charge sheet on 15 November 2022. Appellant's new additional trial defense counsel, Major (Maj) AA, subsequently asserted the Defense could no longer agree to the previously agreed-upon exclusion of time because Appellant had only been served with the referred charge sheet on 15 November 2022. Maj AA indicated the Defense would agree to exclude the period from 15 November 2022 until the Defense's case ready date.

Appellant was released from Miramar on 17 November 2022, and was present at his rehearing which began at Fairchild AFB on 21 November 2022. At no time following the issuance of *Martinez II* was Appellant ordered into *pretrial* confinement, nor were any pretrial confinement procedures required by R.C.M. 305 implemented.

At the rehearing, the Defense filed a motion to “dismiss the charges and specifications [sic]” due to violation of Appellant's speedy trial rights under the Due Process Clause of the Fifth Amendment;⁴ Article 10, UCMJ; and R.C.M. 707. In the alternative, the Defense requested the military judge impose a sentence of no punishment due to Appellant's “blatant illegal pretrial confinement” in violation of Article 13, UCMJ, 10 U.S.C. § 813, and R.C.M. 305. The Government opposed the motion to dismiss. The Government contended there was no speedy trial violation, and that the findings of guilty as to the remaining charge and specification had been affirmed by this court and the purpose of the rehearing was sentencing only. However, the Government acknowledged Appellant had been erroneously,

⁴ U.S. CONST. amend. V.

though not maliciously, kept in a pretrial confinement status at Miramar without appropriate process. The Government contended the appropriate remedy was “day-for-day confinement credit under R.C.M. 305(k)” from 20 July 2022, when the GCMCA received the record of trial and opinion of this court, until 1 November 2022, when the Prosecution belatedly realized Appellant was still in confinement and “moved as quickly as possible to obtain [his] release.”

The military judge issued an oral ruling on the defense motion to dismiss, which he later supplemented in writing after the court-martial. The military judge found Appellant was not entitled to relief for violation of his speedy trial rights. With respect to the R.C.M. 707 requirement that Appellant be brought to trial within 120 days, the military judge found this period began to run on 20 July 2022 when the GCMCA received the record of trial and the opinion of this court authorizing a rehearing. The military judge further found the period between 15 November 2022 and 21 November 2022 was excludable delay. Therefore, the military judge found “it took the [G]overnment 119 days to bring [Appellant] to the first session of the rehearing,” and there was no R.C.M. 707 violation. With respect to the alleged Article 10, UCMJ, violation, the military judge applied the four-factor test from *Barker v. Wingo*, 407 U.S. 514 (1972), to determine whether the Government met the “reasonable diligence standard.” See *United States v. Reyes*, 80 M.J. 218, 226 (C.A.A.F. 2020). The military judge weighted most heavily his finding Appellant suffered no “actual prejudice” from the delay, and also considered that Appellant’s Article 120, UCMJ, conviction already had been affirmed on appeal, in concluding Appellant’s Article 10, UCMJ,

and constitutional speedy trial rights were not violated.

With respect to unlawful pretrial confinement, the military judge found Appellant “spent 121 days in a pretrial confinement status in violation of R.C.M. 305’s requirements.” He awarded Appellant two days of confinement credit for each day of illegal pretrial confinement, or 242 days total. However, he found the Defense had not met its burden to demonstrate Appellant was entitled to additional sentence credit for illegal pretrial punishment in violation of Article 13, UCMJ.

The military judge imposed a dishonorable discharge, confinement for 46 months, reduction to the grade of E-1, and forfeiture of all pay and allowances. Appellant received 1,055 days of confinement credit based on confinement Appellant served pursuant to his original sentence; 121 days of pretrial confinement credit; and 242 days of judicially ordered credit for illegal pretrial confinement. Because the total credit exceeded Appellant’s term of confinement, the military judge directed “182 days of credit against the portion of the adjudged sentence to total forfeiture of all pay and allowances.”

II. DISCUSSION

A. Credit for Unlawful Pretrial Confinement

1. Law

a. Article 13, UCMJ

Article 13, UCMJ, provides in part: “No person, while being held for trial, may be subjected to punishment or penalty other than arrest or

confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence” The CAAF has “interpreted Article 13[, UCMJ,] to prohibit two types of activities: (1) the intentional imposition of punishment on an accused prior to trial, i.e., illegal pretrial punishment; and (2) pretrial confinement conditions that are more rigorous than necessary to ensure the accused’s presence at trial, i.e., illegal pretrial confinement.” *United States v. Fischer*, 61 M.J. 415, 418 (C.A.A.F. 2005) (citations omitted). The CAAF has explained:

[T]he question of whether particular conditions amount to punishment before trial is a matter of intent, which is determined by examining the purposes served by the restriction or condition, and whether such purposes are “reasonably related to a legitimate governmental objective.”

[I]n the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition, which may on its face appear to be punishment, is instead but an incident of a legitimate nonpunitive governmental objective.

Howell v. United States, 75 M.J. 386, 393 (C.A.A.F. 2016) (alterations in original) (quoting *United States v. Palmiter*, 20 M.J. 90, 95 (C.M.A. 1985)) (additional citation omitted); see also *United States v. Guardado*, 79 M.J. 301, 303 (C.A.A.F. 2020) (relying on *Howell*). “Conditions that are sufficiently egregious may give rise to a permissive inference that an accused is being

punished, or the conditions may be so excessive as to constitute punishment.” *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005) (citations omitted).

“The question whether appellant is entitled to credit for a violation of Article 13[, UCMJ,] is a mixed question of fact and law.” *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002) (citations omitted). “The burden is on [an] appellant to establish entitlement to additional sentence credit because of a violation of Article 13[, UCMJ].” *Id.* (citing R.C.M. 905(c)(2)); *see also Guardado*, 79 M.J. at 303 (“Appellant bears the burden of proof to establish a violation of Article 13, UCMJ.” (citation omitted)). “We will not overturn a military judge’s findings of fact, including a finding of no intent to punish, unless they are clearly erroneous. We will review de novo the ultimate question whether an appellant is entitled to credit for a violation of Article 13[, UCMJ].” *Mosby*, 56 M.J. at 310 (citation omitted).

b. Pretrial Confinement

R.C.M. 305(b) authorizes the pretrial confinement of “[a]ny person who is subject to trial by court-martial if the requirements of this rule are met.” R.C.M. 305 subsections (d) through (j) set forth a number of procedural requirements for initiating and continuing pretrial confinement. In general, an accused is entitled to day-for-day confinement credit against his or her sentence for every day spent in pretrial confinement pursuant to R.C.M. 305. *See United States v. Allen*, 17 M.J. 126, 128–29 (C.M.A. 1984). R.C.M. 305(k) addresses remedies for noncompliance with particular procedural requirements of the rule, specifically:

an administrative credit against the sentence adjudged Such credit shall be computed at the rate of 1 day credit for each day of confinement served as a result of such noncompliance. The military judge may order additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances. This credit is to be applied in addition to any other credit the accused may be entitled as a result of pretrial confinement served.

We review a military judge's decision whether to award credit under R.C.M. 305(k) for an abuse of discretion. *See United States v. Adcock*, 65 M.J. 18, 24 (C.A.A.F. 2007); *United States v. Rodriguez*, No. ACM 38519 (reh), 2019 CCA LEXIS 35, at *15 (A.F. Ct. Crim. App. 30 Jan. 2019) (unpub. op.) (citing *Adcock*, 65 M.J. at 24).

Decisions of the Courts of Criminal Appeals (CCAs) are not "self-executing." *United States v. Miller*, 47 M.J. 352, 361 (C.A.A.F. 1997) (citations omitted). "The Judge Advocate General [TJAG] shall, unless there is to be further action by the President, the Secretary concerned, the [CAAF], or the [United States] Supreme Court, instruct the appropriate authority to take action in accordance with the decision of the [CCA]." 10 U.S.C. § 866(g). "If [TJAG] immediately decides not to pursue a case further, there must be immediate notice to the convening authority of the opinion of the [CCA] and immediate direction to release an accused or conduct a hearing under [R.C.M.] 305 . . . on pretrial confinement." *Miller*, 47 M.J. at 361 (citation omitted). If TJAG does

not make an immediate decision, there is a period during which the Government considers whether to seek reconsideration of the CCA opinion and TJAG considers whether to certify the case to the CAAF for review. *Id.* “During such period, an accused remains in confinement because the opinion below is inchoate.” *Id.* However, when a CCA has set aside the sentence and no further appellate review is pending, once the record has been remanded to the convening authority the CCA’s decision is no longer inchoate, and any further lawful confinement would be subject to R.C.M. 305. *See United States v. Mancini*, No. ACM 38783 (reh), 2018 CCA LEXIS 495, at *15 (A.F. Ct. Crim. App. 16 Oct. 2018) (unpub. op.).

2. Analysis

Appellant contends he is entitled to greater relief for illegal pretrial confinement than the 242 days of credit provided by the military judge. He makes two primary arguments. First, Appellant contends the military judge should have found his pretrial confinement began on 30 June 2022—30 days after this court issued its opinion in *Martinez II*—rather than 20 July 2022—when the convening authority received the record and decision of this court. Second, Appellant contends the military judge erred in finding Appellant was not illegally punished in violation of Article 13, UCMJ. We address each contention in turn.

a. Pretrial Confinement Start Date

Appellant cites *Miller*, which stated that if a CCA sets aside a sentence and TJAG does not immediately order the appellant’s release, “there will be a 30-day period” during which the CCA opinion is inchoate while a possible motion for reconsideration or

certification to the CAAF are pending. 47 M.J. at 361. In Appellant's case, these 30 days would have ended on 30 June 2022. However, as the Government observes, the CAAF's decision in *Miller* was based on the then-current version of the CAAF's rules, which required TJAG's certificate of review be filed not later than 30 days after the CCA decision. *Id.* Appellant concedes that prior to this court's decision in *Martinez II*, the CAAF's rules had since been changed to permit TJAG 60 days from the CCA's decision to certify a case for the CAAF's review. *See* C.A.A.F. R. 19(b)(3). Applying the reasoning of *Miller* to this change, this court's decision in *Martinez II* could have remained inchoate until 30 July 2022, when TJAG's opportunity to certify the case would expire. In the event, *Martinez II* ceased to be inchoate when the record was returned to the convening authority on 20 July 2022, the date the military judge correctly identified. Accordingly, we find no error in this respect.

b. Article 13, UCMJ

The military judge concluded the Defense "ha[d] not met its burden to persuade this court that any additional sentence credit is warranted for alleged violations of Article 13[, UCMJ]." *See Guardado*, 79 M.J. at 303. He explained "the evidence before the court d[id] not demonstrate" either that Appellant's "continued confinement from 20 July 2022 through 17 November 2022 was the result of an intent of detention officials or government representatives to punish [Appellant] prior to his rehearing," or that Appellant "was subject to unduly rigorous circumstances during this period of detention prior to the rehearing." We conclude these factual determinations by the military judge are not clearly erroneous. The record supports a conclusion that

Appellant's continued confinement at Miramar, although not in compliance with R.C.M. 305, was attributable to inertia and lack of awareness of Appellant's circumstances rather than an intent to subject Appellant to pretrial punishment. In addition, the record supports the military judge's conclusion Appellant failed to prove he was subjected to unusually harsh conditions at Miramar.

Appellant contends the military judge applied the wrong standard to the question of illegal pretrial punishment. He cites *Howell* for the principle that "[i]n the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition, which may on its face appear to be punishment, is instead but an incident of a legitimate nonpunitive governmental objective." 75 M.J. at 393 (citations omitted). Appellant reasons his continued confinement "under the auspices" of his original sentence, without following the procedures required by R.C.M. 305 for pretrial confinement, served no legitimate government purpose and violated Article 13, UCMJ. In response, the Government contends, *inter alia*, that although it was negligent in failing to either release Appellant or initiate a confinement hearing pending the court-martial rehearing, "there was no illegal intent," and "[t]he military judge appropriately addressed the illegal confinement with two-for-one credit under R.C.M. 305."

We are not persuaded by Appellant's argument. The military judge found, and the parties agree, that Appellant's continued confinement at Miramar was illegal in the sense that it was not conducted in accordance with R.C.M. 305. However, the fact that confinement was imposed erroneously does not mean the confinement itself was necessarily without a

“legitimate nonpunitive governmental objective.” *Howell*, 75 M.J. at 393 (citations omitted). For comparison, in *Howell* itself, the CAAF found the Government misinterpreted Article 75(a), UCMJ, 10 U.S.C. § 875(a), when it paid the appellant at the E-1 rate rather than his original E-6 rate after the appellant’s sentence had been set aside, pending a rehearing. *Howell*, 75 M.J. at 391. However, the fact that the Government acted erroneously (in the CAAF’s view) did not mean the Government lacked a legitimate, nonpunitive governmental objective in attempting to pay the appellant at the correct rate, and the CAAF found no Article 13, UCMJ, violation. *Id.* at 394.

In the instant case, the Government had a legitimate, nonpunitive governmental objective in ensuring Appellant would be present for his rehearing. Appellant already had an affirmed conviction for a serious sexual offense. Until the convening authority dismissed the Article 80, UCMJ, attempted sexual assault charge on 2 November 2022, Appellant also faced possible re-prosecution for that offense. As discussed above, the military judge recognized the Government failed to properly serve that legitimate objective by failing to comply with R.C.M. 305, and the military judge provided appropriate relief. We conclude the military judge did not abuse his discretion when he found Appellant was not entitled to Article 13, UCMJ, relief in the absence of either an intent to impose pretrial punishment on Appellant or unusually harsh conditions of confinement.

B. Speedy Trial

1. Law

a. R.C.M. 707

In general, “[t]he accused shall be brought to trial within 120 days after the earlier of: [p]referral of charges; [t]he imposition of restraint . . . ; or [e]ntry on active duty under R.C.M. 204.” R.C.M. 707(a). However,

[i]f a rehearing is ordered or authorized by an appellate court, a new 120-day time period under this rule shall begin on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing. An accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904 or, if arraignment is not required . . . at the time of the first session under R.C.M. 803.

R.C.M. 707(b)(3)(D) (emphasis added).

“All . . . pretrial delays approved by a military judge or the convening authority shall be . . . excluded” for purposes of “determining whether the [120-day] period . . . has run.” R.C.M. 707(c); *see also United States v. Guyton*, 82 M.J. 146, 151 (C.A.A.F. 2022) (quoting R.C.M. 707(c)). R.C.M. 707 does not prohibit after-the-fact approval of delays nor ex parte requests for excludable delay. *Guyton*, 82 M.J. at 151 (quoting *United States v. Thompson*, 46 M.J. 472, 475 (C.A.A.F. 1997)); *United States v. Heppermann*, 82 M.J. 794, 803 (A.F. Ct. Crim. App. 2022).

We review alleged R.C.M. 707 violations de novo. *Guyton*, 82 M.J. at 151 (citations omitted); *Heppermann*, 82 M.J. at 803 (citation omitted). However, “[w]e give substantial deference to findings of fact made by the military judge and will not overturn such findings unless they are clearly erroneous.” *United States v. Fujiwara*, 64 M.J. 695, 697 (A.F. Ct. Crim. App. 2007) (citations omitted). We review a decision to approve a delay and exclude time from the 120-day period pursuant to R.C.M. 707(c) for an abuse of discretion. *See United States v. Lazauskas*, 62 M.J. 39, 41–42 (C.A.A.F. 2005). “Abuse of discretion occurs when the military judge: (1) bases a ruling on findings of fact that are not supported by the evidence; (2) uses incorrect legal principles; (3) applies correct legal principles in a clearly unreasonable way; or (4) does not consider important facts.” *United States v. Ramirez*, 84 M.J. 173, 176 (C.A.A.F. 2024) (citing *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017)). “The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be ‘arbitrary, fanciful, clearly unreasonable,’ or ‘clearly erroneous.’” *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (quoting *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)).

“A failure to comply with [R.C.M. 707] will result in dismissal of the affected charges, or, in the case of a sentence-only rehearing, sentence relief as appropriate.” R.C.M. 707(d)(2); *see also United States v. Becker*, 53 M.J. 229, 232 (C.A.A.F. 2000) (explaining that in the case of a sentence-only rehearing, dismissal of charges is not an appropriate remedy for an R.C.M. 707 violation).

b. Article 10, UCMJ

Article 10(b), UCMJ, provides in pertinent part: “When a person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken [] to inform the person of the specific offense of which the person is accused[] and [] to try the person or to dismiss the charges and release the person.” 10 U.S.C. § 810(b). “[T]he factors from *Barker v. Wingo*[, 407 U.S. 514 (1972),] are an apt structure for examining the facts and circumstances surrounding an alleged Article 10[, UCMJ,] violation.” *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005) (citations omitted). Accordingly, “our framework to determine whether the Government proceeded with reasonable diligence includes balancing the following four factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant.” *Id.* at 129 (citing *Barker*, 407 U.S. at 530) (additional citation omitted). In this context, the “three recognized interests of prejudice are (1) preventing oppressive pretrial incarceration; (2) minimizing anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired.” *Cooley*, 75 M.J. at 262 (citing *Mizgala*, 61 M.J. at 129). However, these factors are not “talismanic” and “must be considered together with such other circumstances as may be relevant.” *United States v. Wilson*, 72 M.J. 347, 351 (C.A.A.F. 2013) (quoting *Barker*, 407 U.S. at 533).

“Article 10, UCMJ, does not demand constant motion but does impose on the Government the standard of ‘reasonable diligence in bringing the charges to trial.’” *Cooley*, 75 M.J. at 259 (quoting *Mizgala*, 61 M.J. at 127, 129). “Short periods of

inactivity are not fatal to an otherwise active prosecution.” *Mizgala*, 61 M.J. at 127 (quoting *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965)). We evaluate “the proceeding as a whole and not mere speed.” *Id.* at 129 (citation omitted).

We review de novo whether an appellant was denied the right to speedy trial under Article 10, UCMJ. *Cooley*, 75 M.J. at 259 (citation omitted). We are bound by the military judge’s findings of fact unless they are clearly erroneous. *Id.* (citation omitted). “A finding of fact is clearly erroneous when ‘there is no evidence to support the finding’ or when ‘although there is evidence to support it, the reviewing court on the evidence is left with the definite and firm conviction that a mistake has been committed.’” *United States v. Harrington*, 81 M.J. 184, 189 (C.A.A.F. 2021) (quoting *United States v. Criswell*, 78 M.J. 136, 141 (C.A.A.F. 2018)).

In general, “[t]he remedy for an Article 10[, UCMJ,] violation [is] dismissal with prejudice of the affected charges.” *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993). However, “dismissal of the charges with or without prejudice . . . is not appropriate in the case of an accused whose guilt has already been determined, and affirmed on appeal, and where the only remaining determination is the sentence.” *Becker*, 53 M.J. at 232. The CAAF has explained that in such cases, a servicemember’s Article 10, UCMJ, rights may be protected by tailoring the remedy to the harm suffered, “such as an appropriate sentence credit or, in a case where the delay has interfered with the defense’s ability to receive a fair hearing, a sentence to no punishment at all.” *Id.*

2. Analysis

Appellant contends the Government violated both his R.C.M. 707 and Article 10, UCMJ, speedy trial rights. We address each contention in turn.

a. R.C.M 707

First, Appellant contends the military judge miscalculated the length of the pretrial delay from 20 July 2022, rather than 30 June 2022. Reiterating his argument from issue (1), *supra*, Appellant contends this court's opinion in *Martinez II* setting aside the Article 80, UCMJ, conviction and the sentence ceased to be inchoate on 30 June 2022, at which point the R.C.M. 707 "clock began to run." However, R.C.M. 707(b)(3)(D) provides that in the case of a rehearing, "a new 120-day time period under this rule shall begin on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing." The military judge found the convening authority received the record and opinion on 20 July 2022, a finding which is not clearly erroneous. Accordingly, we find no error in this respect.

Next, Appellant contends the military judge erred by excluding the delay from 17 November 2022—the Defense's stated ready date—until 21 November 2022—when Appellant's sentencing rehearing began. Appellant argues "[a]ny delay incurred after the defense ready date could not be counted against [Appellant], even if the [D]efense benefited from it in some way." Therefore, Appellant argues, even if the military judge did not err by beginning to count the 120 days from 20 July 2022, the length of the delay attributable to the Government should have been 122 days, rather than 119 days.

We do not find the military judge abused his discretion in excluding the delay from 17 November 2022 until 21 November 2022. In reaching his conclusion, the military judge explained the record indicated the Defense had previously repeatedly agreed to the exclusion of time between 21 October 2022 and the scheduled rehearing date. On 15 November 2022, the Government submitted a revised docketing request to the trial court “indicating both parties request the rehearing be set for 21 November 2022.” On the same day, at the parties’ request, the military judge set the rehearing for 21 November 2022. Also on 15 November 2022, trial defense counsel “represent[ed] to the [G]overnment that due to the date of service, the [D]efense [now] only agree[d] . . . on the exclusion of time from the speedy trial calculation from 15 November 2022 until the [D]efense’s stated ready date of 17 November 2022.” However, despite having “the opportunity to request a docketing conference and press for the rehearing to begin on its stated ready date,” the Defense “agreed with the [G]overnment on setting the rehearing to begin on 21 November 2022,” and the date was set in reliance on that agreement. Under these circumstances, we find the military judge’s exclusion of time was not arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *See McElhaney*, 54 M.J. at 130. Accordingly, Appellant is not entitled to relief under R.C.M. 707.

b. Article 10, UCMJ

Appellant contends the military judge erred by concluding the Government did not violate Appellant’s Article 10, UCMJ, right to a speedy court-martial. We find Appellant is not entitled to relief.

i. The Military Judge's Ruling

As stated in Section I, *supra*, the military judge evaluated the Defense's allegation of an Article 10, UCMJ, violation by applying the four-factor *Barker* test. *See Mizgala*, 61 M.J. at 127. The military judge found the first three factors weighed in favor of the Defense. He found the length of the delay was facially unreasonable, and in particular that the Government's "blatant failure" to comply with R.C.M. 305 pretrial confinement procedures "significantly outweigh[ed]" considerations favoring the Government, such as the seriousness of the offenses and the Prosecution's need to determine "the availability of proof" for the Article 80, UCMJ, attempted sexual assault charge.

As to the reasons for delay, the military judge found the Government had not acted with the intent to hamper the Defense, and some periods of delay appeared "legitimate," such as the need to determine whether the alleged victim of the Article 80, UCMJ, offense was willing to participate in a rehearing. However, the military judge found other periods of delay, such as that from 20 July 2022 until 9 September 2022, when the VWAP coordinator began contacting the victim's counsel, were "largely unexplained by the [G]overnment." Moreover, the military judge found "no legitimate reason" why the Government should have been unaware Appellant remained confined at Miramar. On the whole, the military judge "weigh[ed] this factor against the [G]overnment, but does not weigh it as heavily as it would had the [G]overnment's delay [been] an attempt to hamper [Appellant's] defense."

The military judge noted the Defense did demand speedy trial on 1 November 2022. However, he found several circumstances undermined how much this factor weighed in the Defense's favor. For example, at the time of the demand, trial defense counsel had indicated she was not available until 30 November 2022, and the Defense later agreed with the Government on a 21 November 2022 start date. Ultimately, the military judge found "this factor weighs very slightly against the [G]overnment."

However, the military judge further found that Appellant suffered no actual prejudice from the delay to the three "recognized interests" identified in *Barker*, 407 U.S. at 532. With regard to prejudice, the military judge explained:

The court concludes the evidence before the court demonstrates no actual prejudice to [Appellant]. While the court recognizes [Appellant] should have been released from confinement immediately after 20 July 2022 or ordered into pretrial confinement if deemed appropriate, the evidence before the court does not indicate the accused suffered oppressive conditions while held in pretrial confinement. The record also does not demonstrate any particularized anxiety and concern outside of the normal anxiety associated with the appellate process. Finally, and most importantly, the evidence in the record does not demonstrate that [Appellant's] ability to prepare and defend himself at this sentence-only rehearing w[as] impaired. The court recognizes that

[Appellant] experienced difficulties with making phone calls anytime he wanted, but the record does not demonstrate that [Appellant's] defense has been affected in any[]way by these logistical hurdles.

Because the military judge found the absence of prejudice outweighed the other factors, he “found no violation of [Appellant's] Article 10[, UCMJ,] right to a speedy trial,” nor a violation of any constitutional right to speedy trial.

Appellant argues the military judge erred in finding no prejudice, and that in fact Appellant was prejudiced with respect to all three recognized interests. We address each argument in turn.

ii. Oppressive Pretrial Incarceration

With respect to oppressive pretrial incarceration, Appellant contends he was “illegally confined” and “treated the same as inmates that were sentenced,” a violation of his “due process rights” that was “inherently prejudicial.” However, Appellant does not identify any specific condition that rendered his confinement “oppressive.” We agree Appellant's continued confinement was “illegal” in the sense that it was not implemented in accordance with R.C.M. 305, and the military judge reasonably recognized this failing as an R.C.M. 305 violation and awarded relief accordingly on that basis, as described *supra* with respect to issue (1). However, we are not persuaded that pretrial confinement without the procedures required by R.C.M. 305 is inevitably “oppressive” for purposes of an Article 10, UCMJ, *Barker* analysis.

We recognize that that the total amount of confinement credit the military judge awarded Appellant for confinement served (1,418 days)

exceeded the amount of confinement the military judge imposed in the rehearing sentence (46 months).⁵ In other words, had the Government not unreasonably delayed the rehearing, Appellant might have spent less time confined at Miramar. Although not an argument specifically advanced by Appellant, one might argue that Appellant's pretrial confinement was therefore oppressive due to its duration, if not due to specific conditions of confinement. Surely Appellant had a significant interest in his physical freedom, and in *Barker* itself the Supreme Court spoke not only of the "societal disadvantages" but the "detrimental impact on the individual" of lengthy pretrial incarceration. 407 U.S. at 532.

However, we cannot say the military judge's finding of no oppressive pretrial incarceration was clearly erroneous in this respect. *See Cooley*, 75 M.J. at 259. First, the CAAF has clearly implied that pretrial confinement that exceeds the adjudged sentence is not necessarily prejudicial in terms of a *Barker* analysis. *United States v. Danylo*, 73 M.J. 183, 188 (C.A.A.F. 2014) ("[W]e have never held that pretrial confinement which exceeds an adjudged sentence is per se prejudicial." (citation omitted)). In addition, at the time the military judge made his oral ruling, Appellant's sentence was yet to be determined and the adjudged term of confinement might potentially have exceeded the amount of confinement credit. Moreover, the excess confinement credit could be, and ultimately was, used to offset other elements

⁵ As stated *supra*, the military judge applied excess confinement credit against Appellant's adjudged total forfeiture of pay and allowances.

of the sentence—specifically adjudged forfeitures. Under these circumstances we do not find clear error.

iii. Anxiety and Concern

Appellant contends he “faced particularized anxiety that was unique from that typically experienced by pretrial detainees because he was illegally confined without an adjudicated sentence.” We note that the military judge’s written findings of fact included that “[f]rom the time [Appellant] was initially informed about the original [] opinion [of this court] until his release from confinement, [Appellant] was confused, anxious, and despondent. He was also upset with the Government for forgetting about him.” Nevertheless, the military judge concluded “[t]he record . . . does not demonstrate any particularized anxiety and concern outside of the normal anxiety associated with the appellate process.” Another judge might have reasonably disagreed with this conclusion as to what constitutes “normal anxiety.” Nevertheless, given the deference we afford the military judge’s determinations regarding the existence of anxiety and concern, we do not hold the military judge’s conclusion was clearly erroneous. *See Cooley*, 75 M.J. at 259 (citation omitted).

iv. Impairment of the Defense

As to impairment of the defense, Appellant cites “a series of technical failures and staffing issues” at Miramar, as described in Appellant’s declaration to the trial court, which “prevented him from being able to work on his case.” However, on appeal as at trial, Appellant does not identify any specific adverse impact these logistical difficulties had on the Defense at the rehearing. The record supports the military judge’s conclusion that Appellant’s ability to prepare

and defend himself at the rehearing was not materially impaired.

v. Conclusion as to Article 10, UCMJ

Accordingly, we do not find the military judge's findings with respect to the prejudice prong of his *Barker* analysis were clearly erroneous. In addition, we do not find the military judge erred in holding the absence of prejudice outweighed the first three *Barker* factors which, on balance, did not heavily favor the Defense. Viewing the circumstances as a whole, although the Government's processing of this case was "not stellar," *Mizgala*, 61 M.J. at 129, in the absence of prejudice we do not find the military judge erred in concluding there was no Article 10, UCMJ, violation. *Cf. United States v. Laubach*, No. ACM 39396, 2019 CCA LEXIS 245, at *30 (A.F. Ct. Crim. App. 7 Jun. 2019) (unpub. op.) ("We note Appellant has failed to identify any decision by the CAAF or by this court finding a violation of Article 10, UCMJ, in the absence of some finding of prejudice to the accused.").

C. Post Trial Delay

1. Additional Background⁶

a. Pre-Docketing Delay

Appellant's rehearing concluded on 22 November 2022. On 22 December 2022, trial defense counsel submitted Appellant's post-trial matters to the

⁶ The following information is drawn from the record as well as from declarations and chronologies from the Fairchild AFB Deputy SJA, which the Government moved this court to attach to the record. We conclude we may consider the declaration and chronology in order to "resolv[e] issues raised by materials in the record." *United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020).

convening authority prior to the convening authority's decision on action. Trial defense counsel requested the convening authority not approve the adjudged total forfeiture of pay and allowances. In part, trial defense counsel contended this relief was warranted because Appellant had accrued 164 days of "good conduct time" while serving his original sentence to confinement from the 2019 court-martial which, when added to confinement credit awarded by the military judge at the rehearing, resulted in 295 days of confinement credit in excess of the 46 months of confinement adjudged at the rehearing. On 23 January 2023, the convening authority approved the adjudged sentence in its entirety.

The court reporter certified the transcript on 30 January 2023. On 22 February 2023, the military judge contacted trial counsel and trial defense counsel by email, identifying an issue relating to the convening authority's action and soliciting their views on whether the Defense had waived its opportunity to challenge the convening authority's decision. After further communication, on 2 March 2023 the Defense submitted a post-trial motion requesting the military judge "correct" the confinement sentence credit in light of Appellant's earned good conduct time from his original sentence to confinement. The Government opposed the motion on 8 March 2023, and the Defense submitted a reply brief on 21 March 2023. The military judge issued a written ruling on the motion on 8 May 2023, concluding Appellant was entitled to good time credit and ultimately awarding "a total of 182 days credited against the portion of the adjudged sentence to total forfeiture of all pay and allowances."

The military judge then signed a first corrected copy of the Statement of Trial Results (STR) on 12

May 2023, and then a second corrected copy of the STR on 18 May 2023, before signing the entry of judgment on 31 May 2023. The court reporter certified the record on 1 June 2023. On 23 June 2023, the convening authority indicated he would not modify his decision on action in light of “the new post-trial documents.” However, copies of the record were not delivered to Appellant and trial defense counsel until 18 and 21 September 2023, respectively. The record was docketed with this court on 12 October 2023, 324 days after sentencing.

b. Post-Docketing Delay

After docketing, Appellant requested and was granted ten enlargements of time before he filed his assignments of error on 21 October 2024. The Government filed its answer brief on 14 November 2024. On the same date, the Government moved to attach several documents to the record, including, *inter alia*, four appellate exhibits it had “discovered” were “missing” from the record. Specifically, these missing exhibits consisted of the Defense’s post-trial motion, the Government’s opposition, the Defense’s reply, and the military judge’s ruling from March and May 2023 described above. On 26 November 2024, this court ordered the Government to show good cause as to why the court should not return the record for correction with respect to the missing exhibits. On 9 December 2024, the Government responded that remand was unnecessary.⁷ Nevertheless, on 16 December 2024 this court remanded the record for correction pursuant to R.C.M. 1112(d) to account for the missing exhibits, “and any other portion of the

⁷ In the meantime, Appellant submitted his reply to the Government’s answer on 2 December 2024.

record that is determined to be missing or defective hereafter.”

On 6 January 2025, the military judge signed a certificate of correction inserting the four previously identified documents in the record as appellate exhibits, as well as an additional appellate exhibit consisting of certain email traffic between the military judge and parties. The record was re-docketed with this court on 5 February 2025. Appellant requested and was granted another enlargement of time before submitting an additional brief on 6 June 2025. The Government filed its answer on 14 July 2025.

2. Law

“[C]onvicted servicemembers have a due process right to timely review and appeal of courts-martial convictions.” *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citations omitted). In *Moreno*, the CAAF established a presumption of facially unreasonable delay “where the action of the convening authority is not taken within 120 days of the completion of trial,” “where the record of trial is not docketed by the [CCA] within thirty days of the convening authority’s action,” or “where appellate review is not completed and a decision is not rendered within eighteen months of docketing the case before the [CCA].” 63 M.J. at 142. In *United States v. Livak*, this court adapted the *Moreno* standard for cases referred to trial on or after 1 January 2019 and established an aggregated 150-day standard for facially unreasonable delay from sentencing to docketing with the CCA. 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020).

Where there is a facially unreasonable delay, we examine the four factors set forth in *Barker*, 407 U.S.

at 530: “(1) the length of the delay; (2) the reasons for the delay; (3) the appellant’s assertion of the right to timely review and appeal; and (4) prejudice [to the appellant].” *Moreno*, 63 M.J. at 135 (citations omitted). The CAAF identified three types of cognizable prejudice for purposes of the right to timely post-trial review: (1) oppressive incarceration; (2) “particularized” anxiety and concern “that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision;” and (3) impairment of the appellant’s grounds for appeal or ability to present a defense at a rehearing. *Id.* at 138–40 (citations omitted). Where there is no qualifying prejudice from the delay, there is no due process violation unless the delay is so egregious as to “adversely affect the public’s perception of the fairness and integrity of the military justice system.” *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006).

Independent of an appellant’s due process rights, the Courts of Criminal Appeals have authority to “provide appropriate relief if [an appellant] demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered” 10 U.S.C. § 866(d)(2); *see United States v. Valentin-Andino*, 85 M.J. 361 (C.A.A.F. 2025).

We review de novo an appellant’s entitlement to relief for post-trial delay. *Livak*, 80 M.J. at 633 (citing *Moreno*, 63 M.J. at 135).

3. Analysis

Appellant contends he is entitled to relief due to unreasonable post-trial delay at both the pre-docketing and post-docketing stages. We consider each stage in turn.

a. Due Process: Pre-Docketing Delay

The 324 days that elapsed from Appellant's sentencing to the initial docketing by this court exceeded the 150-day *Livak* standard by 174 days and was facially unreasonable. One notable period of delay was from 22 February 2023, when the military judge identified to the parties an issue with Appellant's clemency request and the convening authority's action, to 8 May 2023, when the military judge ruled on the Defense's post-trial motion. We find this period of delay weighs little against the Government because it was evidently prompted and controlled by the military judge. However, a second notable period of delay, from the certification of the record on 1 June 2023 until Appellant and trial defense counsel were served with copies of the record on 18 and 21 September 2023, finds little explanation in the record and is attributable to the Government. The chronology supplied by the Government implies gaps in leadership positions at the base legal office may have played some role, but this is neither specifically stated nor a sufficient explanation. However, the record provides no indication, and Appellant makes no claim, that he asserted his right to speedy processing and review prior to filing his assignments of error with this court.

Importantly, Appellant fails to demonstrate he was prejudiced by the delay. He asserts he suffered impairment to his grounds for appeal because he "was unable to petition this [c]ourt for relief sooner." However, he fails to explain how his appeal might have been more successful or beneficial had it been filed earlier. Moreover, we note this court has not found in Appellant's favor with respect to his other assignments of error. Appellant also asserts he

“suffered severe mental hardship,” citing a declaration he has provided to this court.⁸ However, the declaration primarily addresses Appellant’s time in confinement, which ended before the post-trial phase of his rehearing began. To the extent Appellant expresses that during the post-trial and appellate process he felt “overwhelmed,” “treated unfairly by the process throughout the legal proceedings,” and “unable to move on,” we are not persuaded Appellant experienced anxiety and concern materially “distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision.” *Moreno*, 63 M.J. at 139.

The post-trial processing of Appellant’s court-martial left much to be desired. However, in the absence of cognizable prejudice, we do not find the delay from sentencing to docketing was so egregious as to impugn “the fairness and integrity of the military justice system.” *Toohey*, 63 M.J. at 362. We therefore find no due process violation.

b. Due Process: Post-Docketing Delay

More than 18 months have elapsed since Appellant’s record was docketed with this court on 12 October 2023; thus, there is a facially unreasonable delay under *Moreno*. We note this court is issuing its opinion approximately four months after receiving the Government’s final brief. The delay exceeds the *Moreno* standard by approximately seven months and is largely attributable to two notable factors. First,

⁸ We conclude we may consider Appellant’s declaration in order to “resolv[e] issues raised by materials in the record.” *Jessie*, 79 M.J. at 444.

Appellant requested a total of 11 enlargements of time in which to file his assignments of error with this court—ten enlargements for the original brief, and one enlargement for the post-remand additional brief. Second, the record was remanded from 16 December 2024 until 6 February 2025 for correction due to several missing appellate exhibits, as described above. This latter delay is attributable to the Government, but accounts for a significantly shorter period of time than Appellant’s motions for enlargements of time. As noted above, Appellant did not demand speedy post-trial and appellate review until he filed his assignments of error on 21 October 2024.

With respect to prejudice due to delay during the post-docketing phase, Appellant does not significantly elaborate on the arguments addressed above with respect to the pre-docketing phase, which we found unpersuasive. However, in light of the need to remand the record to insert the missing exhibits, Appellant contends this court should grant him relief to address the Government’s “institutional neglect and gross indifference” toward post-trial processing. Specifically, Appellant requests this court set aside his reduction in rank and reduce his term of confinement. In response, the Government denies that its processing during the remand was unreasonable or that there was institutional harm or neglect in the handling of Appellant’s case.

Viewing the post-docketing phase as a whole, in the absence of prejudice to Appellant, and having carefully considered the reasons for delay, we do not find the delay so egregious as to adversely affect public perception of the fairness and integrity of the military justice system. *See Toohey*, 63 M.J. at 362. We again find no due process violation.

c. Article 66(d)(2), UCMJ, Relief

We have also considered whether to grant “appropriate relief” for “excessive delay” pursuant to Article 66(d), UCMJ, 10 U.S.C. § 866(d)(2), independent of any due process violation. Having considered the post-trial processing of Appellant’s rehearing as a whole, and particularly the baffling delay between the court reporter’s certification of the record on 1 June 2023 and delivery of the record to Appellant on 18 September 2023, we find it appropriate to partially disapprove the adjudged reduction in grade.

III. CONCLUSION

The findings of guilty were previously affirmed. We affirm only so much of the sentence as entered as provides for a dishonorable discharge, confinement for 46 months, total forfeiture of pay and allowances, and reduction to the grade of E-2. The sentence, as modified, is correct in law and fact, and no additional 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 sentence, as modified, is **AFFIRMED**.



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 39903
	)	(reh)
<i>Appellee</i>	)	
	)	
v.	)	
	)	ORDER
Jesus MARTINEZ	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
<i>Appellant</i>	)	Special Panel

On 14 November 2024, the Government moved to attach several documents including:

- (1) a chronology of events from Appellant’s sentence rehearing on 21 November 2022 until the record of trial was mailed from Fairchild Air Force Base (AFB) to the general court-martial convening authority on 21 September 2023 (Chronology);
- (2) a declaration by Major (Maj) CP, the Fairchild AFB Deputy Staff Judge Advocate (DSJA), “certify[ing]” the accuracy of the chronology (Maj CP Declaration);
- (3) four appellate exhibits (AEs) the Government had “discovered” are “missing” from the record of trial which

“explain some of the delay in post-rehearing processing” (AEs XVI, XVII, XVIII, and XIX); and

(4) a declaration by Lieutenant Colonel (Lt Col) JM, the Fairchild AFB Staff Judge Advocate (SJA), “certify[ing]” the four appellate exhibits as “authentic copies” from the legal office’s “records” (Lt Col JM declaration).

The four appellate exhibits include a post-trial defense motion to “correct the sentence credit [Appellant] received,” dated 2 March 2023 (AE XVI); the Government’s response to the defense motion, dated 8 March 2023 (AE XVII); the Defense’s reply to the Government’s response, dated 21 March 2023 (AE XVIII); and the military judge’s ruling on the motion, dated 8 May 2023 (AE XIX).¹ The Government’s 14 November 2024 motion to attach asserts, “The declarations of the SJA and DSJA for Fairchild AFB address the post-trial processing of Appellant’s case and are, thus, relevant and necessary to resolve and disprove Appellant’s claim that the United States deprived him of speedy post-trial processing.” *See United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020) (holding the Courts of Criminal Appeals may “consider affidavits . . . when doing so is necessary for resolving issues raised by materials in the record”).

¹ We note AE XIX, the military judge’s ruling, ordered the Defense “to affirmatively state whether or not it intends to submit any new matters to the convening authority in light of the [military judge’s] decision. The [D]efense’s statement will be marked at [sic] Appellate Exhibit XX.” The record does not contain such a statement marked as Appellate Exhibit XX.

On 21 November 2024, Appellant responded and requested this court deny the motion to attach. Specifically with regard to the “missing” exhibits, Appellant contends “[t]he Government’s failure to include all appellate exhibits is a substantial omission that renders the [record of trial] substantially incomplete and warrants remand for a correction.”

On 26 November 2024, this court issued an order to the Government to show good cause as to why the court should not return the record for correction. The Government filed its response on 9 December 2024. The Government contended, *inter alia*, the omission of AEs XVI–XIX was not prejudicial to Appellant, who was not raising the military judge’s post-trial ruling as an error, and this court could complete its Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, review without returning the record for correction.

“A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut.” *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000) (citations omitted). “Omissions are quantitatively substantial unless ‘the totality of omissions . . . becomes so unimportant and so uninfluential when viewed in the light of the whole record, that it approaches nothingness.’” *United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014) (quoting *United States v. Nelson*, 13 C.M.R. 38, 43 (C.M.A. 1953)).

Rule for Courts-Martial (R.C.M.) 1112(b) provides, *inter alia*, the “record of trial in every general and special court-martial shall include . . . [e]xhibits” R.C.M. 1112(d)(2) provides, in part:

A record of trial is complete if it complies with the requirements of subsection (b). . . . A superior competent authority may return a record of trial to the military judge for correction under this rule. The military judge shall give notice of the proposed correction to all parties and permit them to examine and respond to the proposed correction. . . .

We are not persuaded the Government has rebutted the presumption of prejudice arising from the substantial omission of AEs XVI–XIX from the record.

Accordingly, it is by the court on this 16th day of December, 2024,

ORDERED:

The Government’s Motion to Attach dated 14 November 2024 is **GRANTED IN PART** and **DENIED IN PART**. The motion is granted with respect to the Chronology and the Maj CP Declaration identified above; it is denied with respect to Appellate Exhibits XVI, XVII, XVIII, and XIX and the Lt Col JM Declaration identified above.

The record of trial in Appellant’s case is returned to the Chief Trial Judge, Air Force Trial Judiciary, for correction under R.C.M. 1112(d) to account for Appellate Exhibits XVI, XVII, XVIII, and XIX, and any other portion of the record that is determined to be missing or defective hereafter, after consultation with the parties. *See* Article 66(g), UCMJ, 10 U.S.C. § 866(g); R.C.M. 1112(d)(2)–(3). Thereafter, the record of trial will be returned to this court for completion of its appellate review under Article 66, UCMJ, 10 U.S.C. § 866.

216a

The record of trial will be returned to the court not later than **24 January 2025** unless a military judge or this court grants an enlargement of time for good cause shown.



FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

217a

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

No. ACM 39903 (f rev)

UNITED STATES

Appellee

v.

Jesus MARTINEZ

Airman First Class (E-3), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial
Judiciary

Upon Further Review

Decided 31 May 2022¹

Military Judge: Christopher M. Schumann;
Andrew R. Norton (remand).

Sentence: Sentence adjudged on 30 August 2019 by GCM convened at Fairchild Air Force Base, Washington. Sentence entered by military judge on 18 October 2019 and reentered on 22 June 2021: Dishonorable discharge, confinement for 6 years, forfeiture of all pay and allowances, and reduction to E-1.

¹ The court heard oral argument in this case on 10 December 2021.

For Appellant: Major Jenna M. Arroyo, USAF (argued); Major Rodrigo M. Caruço, USAF; Allison R. Weber, Esquire (argued).

For Appellee: Lieutenant Colonel Matthew J. Neil, USAF; Major Alex B. Coberly, USAF; Major Brian E. Flanagan, USAF; Major John P. Patera, USAF (argued); Mary Ellen Payne, Esquire.

Before JOHNSON, KEY, and ANNEXSTAD,
Appellate Military Judges.

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

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

KEY, Senior Judge:

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of sexual assault and one specification of attempted sexual assault, in violation of Articles 120 and 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920, 880.² The court-martial sentenced Appellant to a dishonorable discharge, confinement for six years, forfeiture of all

² References to the punitive articles of the Uniform Code of Military Justice (UCMJ) are to the *Manual for Courts-Martial, United States* (2016 ed.). Unless otherwise specified, all other references to the UCMJ, the Military Rules of Evidence (Mil. R. Evid.), and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

pay and allowances, and reduction to the grade of E-1. The convening authority has approved the sentence as adjudged.³

Appellant has raised 11 issues, one of which asserts an error in the post-trial processing of Appellant's court-martial: that the convening authority erred by not taking action on Appellant's sentence as required by Executive Order 13,825, § 6(b), 83 Fed. Reg. 9889, 9890 (8 Mar. 2018), and Article 60, UCMJ, 10 U.S.C. § 860 (*Manual for Courts-Martial, United States* (2016 ed.) (2016 MCM)). In an earlier opinion, this court agreed with Appellant and remanded his case to the Chief Trial Judge, Air Force Trial Judiciary, for corrective action. *See United States v. Martinez*, No. ACM 39903, 2021 CCA LEXIS 250, at *7–8 (A.F. Ct. Crim. App. 21 May 2021) (unpub. op.). The convening authority subsequently approved Appellant's sentence, resulting in a new entry of judgment. With this error having been corrected, we now turn to Appellant's remaining ten issues, along with a supplemental issue raised subsequent to our first opinion on this case.

³ On 31 March 2022, we issued an unpublished opinion in this case. *United States v. Martinez*, No. ACM 39903 (f rev), 2022 CCA LEXIS 202 (A.F. Ct. Crim. App. 31 Mar. 2022) (unpub. op.). On 29 April 2022, Appellant moved for reconsideration of this decision with respect to whether the military judge abused his discretion by failing to recuse himself. On 2 May 2022, the Government moved for reconsideration with respect to our decision to set aside of the finding of guilty as to the Specification of Charge II, and suggested this court consider the case *en banc*. On 20 May 2022, we granted both motions for reconsideration, but we denied the Government's *en banc* suggestion after a unanimous vote against such request. After reconsideration, we withdraw the court's 31 March 2022 opinion and substitute this opinion.

The assignments of error Appellant has raised through counsel are: (1) the military judge should have recused himself from Appellant's trial; (2) the military judge failed to take appropriate action with respect to a witness who refused to disclose contact information for another witness; (3) the military judge erred in reconsidering an earlier ruling; (4) the evidence is legally and factually insufficient to support Appellant's attempted sexual assault conviction; (5) the military judge should have granted a motion for a finding of not guilty with respect to the attempted sexual assault specification; (6) the military judge failed to instruct the members on the overt acts forming the basis for the attempted sexual assault offense; (7) the record of trial is defective and incomplete; (8) Appellant's record was not docketed with this court within 150 days of his sentencing; and (9) the cumulative error doctrine requires relief. Appellant personally raised a tenth issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982): (10) the military judge erred in a ruling under Mil. R. Evid. 412 which prohibited the Defense from cross-examining a victim on a particular matter.⁴

Regarding Appellant's sixth assignment of error, we conclude the military judge's instructions with respect to the attempted sexual assault offense were erroneous, and we dismiss this specification without prejudice. As a result, Appellant's fourth and fifth

⁴ We granted oral argument on the first two of Appellant's assignments of error. We further directed oral argument on two specific issues: whether we were permitted to consider matters from another court-martial in assessing whether the military judge should have recused himself; and whether the military judge erred in not ordering the production of the witness whose contact information was not disclosed in Issue (2).

assignments of error are moot, and we defer his eighth assignment of error until the record is returned to this court for completion of our review under Article 66(d), UCMJ, 10 U.S.C. § 866(d).

Appellant also personally raises as a supplemental eleventh issue his claim that the Constitution guarantees him the right to a unanimous verdict, a right not reflected in the current court-martial framework. We have carefully considered this issue as well as Appellant’s ninth assignment of error and find neither warrants further discussion or relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).⁵

I. BACKGROUND

In August 2018, while stationed at Fairchild Air Force Base, Washington, Appellant met Ms. KT—a

⁵ Appellant raises this claim under *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), along with both the Fifth and Sixth Amendments. U.S. CONST. amend. V, VI. However, our superior court has held “there is no Sixth Amendment right to trial by jury in courts-martial.” *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012) (citations omitted); *see also United States v. McClain*, 22 M.J. 124, 128 (C.M.A. 1986) (noting that “courts-martial have never been considered subject to the jury-trial demands of the Constitution”). The United States Supreme Court similarly concluded neither the Fifth Amendment nor the Sixth Amendment creates a right to a jury in a military trial in *Ex parte Quirin*, 317 U.S. 1, 45 (1942). *See also Whelchel v. McDonald*, 340 U.S. 122, 127 (1950) (“The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions. . . . The constitution of courts-martial . . . is a matter appropriate for congressional action.”); *Ex parte Milligan*, 71 U.S. 2, 123 (1866); *United States v. Anderson*, No. ACM 39969, 2022 CCA LEXIS 181, at *56–57 (A.F. Ct. Crim. App. 25 Mar. 2022) (unpub. op.) (concluding *Ramos* does not create a requirement for unanimous court-martial verdicts).

civilian college student who lived about 90 minutes away—through an online dating application. A few days after meeting Appellant online, Ms. KT drove to Appellant’s off-base house and spent the weekend with him, during which time the two embarked upon a fast-moving and sexually intimate relationship. Ms. KT returned home Monday morning, and she and Appellant made plans to see each other the following weekend, with Ms. KT making the trip back to Appellant’s house that Friday evening. Appellant and Ms. KT engaged in consensual sexual intercourse Sunday night, but at some point after Ms. KT had fallen asleep, Appellant woke her up in order to initiate further sexual conduct. Despite telling Appellant “no” and physically trying to prevent his advances, Appellant penetrated Ms. KT’s vagina with his penis until he ejaculated; he did not use a condom.

Ms. KT spent the following day with Appellant until early in the afternoon when she drove back to her house. Before she left, the two went shopping for an emergency contraceptive, which Appellant purchased for Ms. KT. After a few days passed, she reported to civilian law enforcement that Appellant had assaulted her, and military authorities were subsequently notified. In the ensuing investigation, Air Force Office of Special Investigations agents interviewed Ms. ES—Appellant’s then-wife who was seeking a divorce from Appellant. Ms. ES disclosed that Appellant had attempted to sexually assault her in the middle of July 2018, an offense which she had not previously reported.⁶ Appellant was charged with, and convicted of, sexually assaulting Ms. KT and

⁶ Appellant and Ms. ES had divorced by the time of Appellant’s court-martial.

attempting to sexually assault Ms. ES. He was also charged with, but acquitted of, committing abusive sexual contact on Ms. ES.

II. DISCUSSION

A. Military Judge Recusal

Appellant argues the military judge was biased against the lead trial defense counsel, and the military judge should have therefore recused himself from Appellant's court-martial. Appellant argues as a second basis for relief that the military judge should have recused himself based upon the appearance of bias on the military judge's part. As a remedy, Appellant asks us to set aside the findings and sentence. In support of his argument, Appellant cites to a number of events occurring both before and during his court-martial; we only address the most significant events raised.

1. Additional Background

a. Motion for Recusal

Appellant's court-martial began with a two-day-long motions hearing on Thursday, 22 August 2019. The trial itself started Monday, 26 August 2019, with Appellant being represented by a circuit defense counsel as lead counsel along with a more junior area defense counsel. The military judge had previously issued a scheduling order in April 2019 which set a deadline of 22 July 2019 for filing motions.

On 15 July 2019—one week before that deadline and more than a month before the motions hearing—the Defense asked the military judge via email for permission to delay filing a motion “pertaining to charging defects” until trial, because making the motion sooner “would simply allow the Government

the opportunity to correct the defects.” Alternatively, the Defense sought permission to file the motion *ex parte*. Less than ten minutes later, the military judge sent a reply email to both parties in which he denied both the Defense’s request to file the motion late and the request to file the motion *ex parte*. That same day, the Defense submitted a written motion asking the military judge to reconsider his ruling. The Defense argued the military judge’s scheduling order was in conflict with the Rules for Courts-Martial insofar as the order set deadlines in advance of those found in the rules.⁷ The Government opposed reconsideration, and, on 20 July 2019, the military judge sent the parties an email in which he said he had reconsidered his ruling on the Defense’s motion for relief from the scheduling order deadline, and he was again denying the Defense’s motion as well as the proposed alternative relief of an *ex parte* filing.

The next day, the Defense submitted a motion to dismiss the attempted sexual assault charge under the theory that the charge’s specification failed to state an offense. The tenor of the motion was that the specification did not provide Appellant adequate notice because it did not explain either how Appellant attempted to sexually assault Ms. ES or why he was unable to complete the offense. The Defense implied in the motion that by being compelled to submit the motion earlier than required by the Rules for Courts-Martial, there may be an appearance of the Defense

⁷ Under R.C.M. 905(b)(2), a motion asserting a failure to state an offense may be resolved at any time during a court-martial. The Defense proposed serving their motion on the Government “after arraignment or empanelment, and the court can recess for however long is necessary to provide the trial counsel the opportunity to respond on the merits.”

“attempting to assist the Government perfect their case.” The Government opposed this motion, arguing it had no obligation to allege specific acts which “amount to an attempt.” Trial counsel also added in their motion this line: “General gripes about the Government’s charging in this case may be therapeutic to express in a motion, but they do not give rise to the requested remedy. Had the Defense requested in a Bill of Particulars this information, it would have been theirs.”⁸ Trial counsel did not comment on the Defense’s claim regarding the timing of the motion.⁹

During the week of 12 August 2019—that is, the week before the motions hearing—the Air Force’s circuit trial and defense counsel, along with all the military trial judges, participated in the Air Force Circuit Advocacy Training workshop at Joint Base Andrews, Maryland. During the workshop, the Chief Trial Judge of the Air Force Trial Judiciary conducted a session with the circuit defense counsel in which he asked the counsel for their feedback with respect to the Air Force trial judges. Afterwards, the Chief Trial Judge held another session with just the trial judges, all of whom are subordinate to, and in the rating chain of, the Chief Trial Judge. In that session, the Chief Trial Judge explained that one of the circuit defense counsel had raised a concern about a military judge

⁸ The Defense had submitted a request for a bill of particulars, but trial counsel contended it did not specifically request information pertaining to the conduct underlying the attempt specification.

⁹ The military judge later denied the motion after the motions hearing but before trial on the merits began. He concluded that Appellant was on adequate notice of the offense he was to defend against.

requiring defense counsel to disclose details of a particular motion earlier than required by the *Manual for Courts-Martial*. The military judge detailed to Appellant's court-martial participated in this session and concluded that the defense counsel in question was the circuit defense counsel in Appellant's case, and that the motion being referenced was the one he had denied a few weeks earlier. When the session concluded, the military judge approached the Chief Trial Judge and explained that the motion pertained to an ongoing court-martial and that, as a result, he was "probably going to mention it on the record."

After the workshop, but before the motions hearing, the military judge issued a written ruling on the Defense's reconsideration motion seeking relief from the scheduling order. The military judge's ruling denying the Defense motion was largely rooted in the prohibition of using *ex parte* communications for the purpose of gaining a tactical advantage over the other party. Because the Government would be able to withdraw defective specifications and then re-refer them to a new court-martial, the military judge reasoned that permitting the Defense to untimely file their motion would have little practical impact other than either delaying Appellant's trial or subjecting Appellant to a second court-martial. The military judge further rejected trial defense counsel's contention that they may "violate a potentially invalid modification of the [Rules for Courts-Martial] by directly ignoring a now direct requirement from this court to file the motion and serve all parties." In doing so, the military judge posited that it was a routine practice of military judges to set deadlines earlier than those found in the Rules for Courts-Martial in order to promote efficiency in the trial process. The

military judge then noted that while he could not prevent the Defense from raising a motion alleging a failure to state an offense outside the time period specified in his scheduling order, he had “other potential remedies available,” such as “addressing the alleged conduct on the record during trial” and holding counsel in contempt.

At the outset of the first day of motions, and apparently without advance notice to the parties, the military judge explained on the record what had happened at the workshop. He characterized the episode as the Chief Trial Judge “inform[ing] the group that a defense counsel had specifically complained that a military judge had issued a scheduling order and provided an additional, more specific order requiring the defense counsel to disclose the details of a defense motion.” The military judge went on to state on the record that he found “expressing dissatisfaction to the Chief Trial Judge regarding a specific ruling issued by a military judge” was “problematic, to say the least,” as it “may impact that military judge’s independent judicial decision-making process in that case or future cases.” Discussing rulings by our court and our superior court, the military judge said that “the process for expressing displeasure with the military judge’s ruling” do not include “raising the complaint to that military judge’s supervisor.”¹⁰ He also told the parties that “[e]xpressing dissatisfaction with the military

¹⁰ The military judge cited *United States v. Hutchinson*, No. ACM 38503, 2015 CCA LEXIS 269 (A.F. Ct. Crim. App. 29 Jun. 2015) (unpub. op.). That case, however, dealt with government attorneys contacting a judge’s supervisor regarding the judge’s scheduling decisions and whether, by doing so, the attorneys’ conduct created the appearance of unlawful command influence.

judge's ruling in a specific case to that military judge's supervisor is strictly prohibited."¹¹

The military judge went on to explain that "[s]uch conduct could call into question the military judge's decision to reconsider or not reconsider a particular motion issue out of fear of reprisal from his judicial supervisor" or, alternatively, "that the military judge's judicial independence is in question because a decision on a motion issue has been influenced by a supervisory judge." He said doing so "places the military judge in an undesirable position of having his impartiality called into question through no fault of his own because a counsel disagrees with a judicial decision and chooses to raise that concern with the military judge's direct supervisor." The military judge explained various options for counsel to address his rulings, ultimately advising them that "[c]ontacting the military judge's supervisor to express dissatisfaction with an adverse ruling in an ongoing case is not an appropriate remedy."

After providing the foregoing guidance, the military judge described the circuit defense counsel's comments at the workshop as "an unfortunate misstep on the part of counsel" but which were

¹¹ Although not entirely clear, the military judge seemed to derive this premise from *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976), a case which dealt with claims that The Judge Advocate General—not a defense counsel—improperly scrutinized a judge's sentencing decisions. In *Ledbetter*, the Court of Military Appeals held "official inquiries . . . which question or seek justification for a judge's decision" were barred "unless such inquiries are made by an independent judicial commission established in strict accordance" with a 1972 American Bar Association standard—a standard which no longer appears to exist.

“immaterial on the merits of this case.” He explained that at the time he learned of the comments, he had ruled and already drafted—but not yet provided to counsel—his written ruling on the scheduling-order matter. He noted the Chief Trial Judge had not sought to influence the court with respect to any rulings related to Appellant’s trial. He told the parties he “ha[d] no concerns with his impartiality going forward and [was] confident that his fairness cannot be reasonably questioned” and that he “will not be improperly influence[d] by this particular matter.” The military judge explained he raised the matter of the workshop out of his duty to ensure the fairness of Appellant’s trial as well as his concern for “absolute transparency with regard to an issue that has at least some potential to call into question the impartiality” of the court. The military judge then asked the parties if they had any questions or desired to challenge him, and circuit defense counsel answered: “No questions and no challenges.”

The military judge proceeded to hear motions over the rest of the day and the next day, Friday, 23 August 2019, including a defense motion to compel the assistance of a computer analyst who could review data the Government had extracted from Appellant’s cell phone. The Government had previously made a hard drive containing the extracted data available to the Defense, but trial defense counsel asserted they had no ability to access the contents of the drive, much less review the data. At some point after the court recessed on Friday, the military judge granted this motion and the analyst began his review. This analysis continued over the weekend with the Defense periodically providing newly discovered information to trial counsel.

On the morning of Monday, 26 August 2019, the military judge and the parties discussed proposed voir dire questions, and about ten minutes before the members were scheduled to be brought into the courtroom, trial defense counsel provided the military judge with 13 affidavits from people who had attended the advocacy workshop earlier in the month. In essence, the affidavits suggested Appellant's circuit defense counsel had not been referring to any particular case during the meeting with the Chief Trial Judge and that the comments were not so much a "complaint" as they were the catalyst for a discussion. Circuit defense counsel then asked to voir dire the military judge and to call the Chief Trial Judge as a witness "to determine if there's an attempt to create bias of the military judge, if the trial judge is biased against defense counsel, or if there's been [an] attempt made to chill the role of defense counsel in this case."

The military judge agreed to answer defense questions, and during the ensuing voir dire, he explained the Chief Trial Judge had never mentioned a particular counsel or a particular case, but he concluded the Chief Trial Judge was referring to Appellant's case and the detailed circuit trial counsel based upon what the Chief Trial Judge had said about the issue. The military judge further explained he felt obligated to disclose the fact the matter came up out of concern for the possible perception that he might be reviewing his decisions based upon comments made to his supervisor, even though the Chief Trial Judge had not told him to do or not do anything with respect to the court-martial. The military judge asserted he "will not be influenced by anybody" and that he "hold[s] absolutely no animus towards any counsel, ever,"

noting that he was “retirement eligible” and “not going to be a general officer.”

The military judge did concede he might “get a little bit fired up when it comes to issues” and perhaps had been “hypersensitive” about circuit defense counsel’s comments at the workshop and added, “in the future, I would love counsel, even in an academic setting, to not raise issues that are pending before any court.” At one point, circuit defense counsel posed the following question:

Noting that we sit in the same building when we’re not on the road, and we never discuss ongoing cases in *ex parte* fashion. You’ve always had an open door to me. Our families have socialized at holiday parties. You’ve always invited me to sit down for conversations about the Air Force, about officership, and been a mentor to me in those things. Has any of that changed as a result of this?

The military judge answered, “No, I hope not. I hope not from your perspective.” Circuit defense counsel then commented, “It hasn’t.”

After questioning the military judge for about 30 minutes, circuit defense counsel made an oral motion for the military judge to recuse himself from the court-martial. Circuit defense counsel essentially argued there was an appearance of unfairness based upon the military judge’s concession of being “perhaps hypersensitive” and having concluded counsel had “complained” at the workshop, although circuit defense counsel also said, “I want to put on the record, based on the military judge’s responses, and based on the affidavits, there appears to be no actual bias in

this case.”¹² The military judge verbally denied the motion, and the rest of the day was spent selecting court members. Once that process was complete, the members were told to report back at 0830 hours the following morning.

When the court convened the next day, Tuesday, 27 August 2019, the military judge placed his written decision on the recusal motion on the record. His ruling indicated he found that “no persuasive connection has been drawn between the military judge’s raising on the record the manner in which a pending matter was addressed to the [Chief Trial Judge] and a reasonable inference of partiality.”

b. Opening Statement Slides

At 0830 hours, after placing his recusal ruling on the record, the military judge asked the parties if there were any other matters to take up before calling the members for opening statements. At that point, trial counsel told the military judge the Government had just received a copy of the slides that the Defense intended to use in their opening, and said those slides contained “screen shots of things that are not in evidence” such as text messages between [Ms. ES] and Appellant, which trial counsel asserted had not been previously disclosed to the Government. The military judge turned to trial defense counsel and said,

Once again, [five] minutes after the time I told the members to be here that we would get started, I’m dealing with another last minute issue. I’m just—I’m curious defense. What did you think was

¹² Circuit defense counsel did not renew his earlier request to have the Chief Trial Judge called to testify.

going to happen when you presented these slides to the [G]overnment this morning? What did you think the outcome would be? . . . What did you think was going to happen? Did you think that we were going to just roll right into the court members or did you think that they might have a concern about some of the content to [sic] this?

Trial defense counsel confirmed the text messages in the slides had been discovered in their expert's analysis over the weekend of the data the Government had seized from Appellant's phone, leading the military judge to ask,

Did we or did we not discuss two or three days ago when the court granted your expert to allow you to gain access to that extraction, that there might be some issues with regard to discovery? For example, if you found anything in there that certainly you intended to introduce at trial or use at trial, you had disclosure obligations to the [G]overnment under the discovery rules under [Rule for Courts-Martial (R.C.M.)] 701, right? It's not a one-way street. It's not they have to provide you with everything and then you get to come in seven [] minutes after we told the members to be here and say, "Here's some stuff that we found. We're just going to give it to you now." Do you understand that?^[13]

¹³ During the motions hearing regarding the Defense's motion to compel expert assistance, circuit trial counsel argued that if the

After more discussion of the matter, the military judge said,

All right. I've heard enough. Government, how much time do you need? I'll give you as much time as you need. I'm not going to operate this trial on the fly and do things because they just keep dropping in my lap. I haven't—I haven't offered recesses yet to deal with these surprise issues but now we're going to start doing it because I'm just not going to deal with these on the fly.

The court reconvened shortly before noon, and the military judge said the Defense had, in fact, complied with their discovery obligations regarding the text messages. However, he concluded the Defense's use of the text messages in the opening slides "would amount to publishing an exhibit to the court members before an evidentiary ruling can be provided," and that he felt it would be "improper" to show the members the messages "without any further instruction as to how the members can consider the specific messages." As a result, trial defense counsel

Defense found "something on the phone that they wish to use, that will create additional discovery obligations" which could result in a trial delay. The military judge asked the Defense, "Have you contemplated the implications of what will likely happen through the course of the appointment of an expert[?]" You go beyond the scope of what the [G]overnment searched in that extraction, what that means as far as your obligations under discovery and potentially your obligations to provide information to the United States [G]overnment that comes off of your client's phone?" Trial defense counsel replied, "Absolutely. That has been fully considered." The military judge then said, "They're going to want to look as deeply as you want to look. Do you understand that?" Trial defense counsel responded affirmatively.

removed the text messages from their slides and did not reference them in the Defense's opening statement.

c. Mil. R. Evid. 412 Ruling and Opening Statements

The preceding Friday, the military judge had heard arguments on a defense motion to admit evidence under Mil. R. Evid. 412 related to Ms. KT, and he provided the parties a written ruling on Saturday.¹⁴ One part of this motion was the Defense's request to be able to reference the specific number of times Appellant and Ms. KT allegedly had sex during their relatively short relationship, a number which we need not repeat here. The Defense's theory, as we understand it, was that Appellant and Ms. KT had rapidly escalated the intensity and intimacy of their relationship and were frequently engaged in sexual activity such that Appellant may have had a valid mistake of fact defense as to Ms. KT's consent during the assault. An alternative defense theory was that Ms. KT was unnerved by the speed of the relationship—in which she and Appellant were discussing marriage by their second weekend together—and she falsely claimed she had been assaulted in order to extricate herself from the relationship.¹⁵ Trial counsel specifically objected to

¹⁴ The pretrial motions and the transcript of the related hearing were sealed by the military judge. This opinion contains discussion of sealed material only as necessary for our analysis.

¹⁵ This theory also relied on the fact Ms. KT and Appellant bought an emergency contraceptive for Ms. KT to use before she returned home at the end of the second weekend. The Defense sought to characterize this as a "pregnancy scare." Ms. KT

the admission of this evidence, arguing that the number of times the two had sex was irrelevant and it was being offered simply to paint Ms. KT as being promiscuous.¹⁶ Ms. KT's special victims' counsel said he thought it was "completely fair" for the Defense to "ask if it was multiple times or if it was more than one time," but noted Ms. KT did not agree with the number the Defense proposed.¹⁷ In his written ruling, the military judge ruled that the Defense *could* present evidence regarding the specific number of times the Defense alleged Appellant and Ms. KT had sex because—according to the military judge—there had been no objection from either trial counsel or the special victims' counsel.¹⁸ The military judge ruled the

described it as a precautionary measure following the assault, because Appellant had not worn a condom.

¹⁶ Trial counsel's written response to the Defense's motion was more ambiguous on this point; they wrote: "The Government has no objection to the admission of evidence that [Appellant] and [Ms. KT] had consensual sex before the charged incident. That said, detailed testimony as to the frequency of the pre-assault consensual sex or an implication that it formed the whole basis of the relationship quickly risks running afoul of [Mil. R. Evid.] 412 and [Mil. R. Evid.] 403." The written motion did not address the specific number of times the two had sex that trial defense counsel alleged in their Mil. R. Evid. 412 motion.

¹⁷ However, Ms. KT's special victims' counsel's written response said Ms. KT "does not object" to admission of evidence that she and Appellant had sex the specific number of times alleged by the Defense.

¹⁸ In paragraph 27 of the military judge's ruling, he wrote that "the Defense identified the following matters for admission . . . (e) Between on or about 17 Aug and 27 Aug 2018 [Ms. KT] and [Appellant] had consensual sex approximately [X] times." Immediately following the heading of "Admissible Without Objection," paragraph 28 states the information in paragraph 27(e) is admissible based on the absence of objection from the

Defense *could not* present evidence either that Appellant and Ms. KT talked about having sex before they met or that they had sexual intercourse just a few hours after they did meet.

The Defense also made a motion to admit evidence under Mil. R. Evid. 412 regarding Ms. ES, Appellant's ex-wife. The military judge's ruling on that motion permitted trial defense counsel to admit evidence that Ms. ES and Appellant had been in a sexual relationship for five years, but prohibited eliciting "testimony regarding the frequency of intercourse or specific sexual acts."

In the Defense's opening statement, trial defense counsel began explaining the origins of Appellant's relationship with Ms. KT, telling the members, "They immediately start moving from [an online dating application] to talking on text message and things ramp up and intensify, intensify considerably very quickly. They get to know each other with a deep, personal, intimate level and no topic is off conversation." Trial counsel objected, saying, "[w]e have litigated this issue," and the military judge sustained the objection, telling the members to disregard trial defense counsel's "last statement." Moments later, trial defense counsel told the members about the first weekend Ms. KT spent with Appellant: "They go out on the town, they're drinking, they go to coffee shops, he shows her Spokane, and they have consensual sex on multiple occasions the first week." Trial counsel objected again, saying, "We have litigated this issue. Your ruling was clear." As a result,

Government and based on the information being "relevant to the issues of consent or mistake of fact as to consent . . . and may be constitutionally required."

the military judge excused the members and convened an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session outside their presence. This session was closed to spectators other than the parties, Ms. KT, and Ms. KT's special victims' counsel.

In the session, trial counsel re-raised the first objection and said, "I don't know what exactly the defense counsel was trying to do. If he's trying to pull something over the [c]ourt; if he's trying to infer something; if it's bad faith; or just bad lawyering." Trial counsel further indicated the Government might need to evaluate whether new members would be required if the Defense "continue[d] to flaunt" the military judge's ruling. Trial counsel argued that by saying "no topic is off conversation," the Defense had violated the military judge's ruling regarding how soon Appellant and Ms. KT first had sex. Regarding the second objection, trial counsel pointed to the military judge's ruling prohibiting evidence of Appellant's and Ms. KT's pre-meeting discussions about having sex.¹⁹ This led the military judge to turn to the Defense and say,

Okay. Defense, so we had pretty extensive motions practice under [Mil. R. Evid.] 412, I've given you an 11-page ruling that was pretty detailed—I thought—with regards the left and rights, with regards to what you could and couldn't get into. I'm being as patient as I can with these types of issues that keep sort of popping up as if there's no

¹⁹ We presume trial counsel unintentionally reversed which part of the military judge's ruling pertained to which objection.

recollection of the discussions that we've had in the past on these types of issues.

The military judge next incorrectly asserted the Defense had told the members Appellant and Ms. KT had sex just a few hours after meeting and claimed the Defense had also violated the ruling regarding Appellant and Ms. KT talking about having sex before they had met. He asked trial defense counsel, "Why are you talking about that in light of the [c]ourt's ruling on [Mil. R. Evid.] 412?" Trial defense counsel denied he made either of those statements and argued the opening statement had been consistent with the military judge's ruling. The military judge responded,

What are you implying there with regard to "all topics, nothing was off-limits?" Do you mean baseball, weekends in the park? What are you talking about when you say—what's the implication that you're trying to lead with the court members when you say, before they met, they talked about all topics. Nothing was off-limits. Because, you know, we are all adults here, right? What was the implication of that? What are you trying to imply?

The Defense explained they were trying to show how quickly the relationship between Appellant and Ms. KT formed, describing that as "an incredibly crucial component to this case." The military judge said,

I'm just trying to—I don't want to believe that you're just being clever and that you're going to scrape up against the line from an implication standpoint, sort of

“wink-wink, nod-nod,[] hey members, they talked about everything. All topics were on the table.[”] I’m hoping you’re not doing that. I really want to believe that that’s not what’s going here. [sic] But I share the [G]overnment’s concern because in a matter such as this, when I’ve already ruled on the issue, when counsel sort of try to push the envelope on an issue that I’ve already ruled on to the point where I’m concerned it’s going to leave an impression with the members, that causes me concern because I’ve already ruled on it. And now it’s—I don’t even need his objection because I’ve ruled on something and somebody goes against that ruling, well I kind of wonder what happened to the part where I ruled on it. Do people not care what my rulings are if they’re going to sort of go around them?

The military judge turned to the objection regarding the Defense’s statement that Appellant and Ms. KT had sex on multiple occasions, and he stated on the record that he would take a moment to read his written ruling. The military judge paused and then announced, “Okay, listen. I’m going to overrule the second objection.” This led trial counsel to say that the Government and the Defense seemed to have “a fundamental misunderstanding” about the ruling, and that trial counsel were not asking for the military judge to reconsider his ruling, but that they would like to ask for “additional guidance or a supplemental ruling” regarding sexual conduct between Appellant and Ms. KT. In explaining this “misunderstanding,”

trial counsel pointed to the ruling regarding Ms. ES in which the Defense was prohibited from eliciting the “frequency of intercourse” between Ms. ES and Appellant.

The military judge then embarked on a lengthy explanation about how an existing sexual relationship—but not necessarily specific details of the relationship—is relevant to the issue of mistake of fact as to consent. He acknowledged his ruling did permit the Defense to elicit the number of times Appellant and Ms. KT had sex and then—somewhat mid-stream—he said, “consider this a reconsideration of the ruling to provide a little bit more clarity,” and “[t]o the extent that is in-artfully drafted, consider it artfully drafted at this point forward.” He then said that “no questions, no testimony, no statements regarding frequency or any implication that Ms. [KT] is a promiscuous person sexually” would be permitted. He said that although his ruling had permitted the Defense to elicit the number of times Appellant and Ms. KT had sex, he did not intend to permit an “inference that frequency of sex mattered, if that makes sense.”

Before concluding the Article 39(a), UCMJ, session, the military judge said he was sustaining both of the Government’s objections, in spite of his earlier ruling. However, when the members returned to the courtroom, the military judge neglected to inform them what his ruling was on the second objection.

d. Examination of Witnesses

As discussed in greater detail below in Section II.B. of this opinion, *infra*, Ms. KT declined the Defense’s requests for a pretrial interview. As a result,

trial defense counsel periodically indicated during trial that they were surprised by portions of her testimony. At one point during her direct examination, trial counsel elicited that the morning after the assault, Appellant attempted to initiate sexual conduct again, and Ms. KT told him “no.” Trial defense counsel objected based on lack of notice and the military judge sustained the objection. Despite having objected to this evidence, circuit defense counsel elicited the exact same evidence during his cross-examination of Ms. KT and obtained her agreement that when she told Appellant “no” on this occasion, Appellant “just respected [her].” After five questions and answers on the topic, trial counsel said, “Your Honor, I understood that the [G]overnment was precluded from asking these questions.” The following colloquy ensued in front of the members:

MJ [military judge]: Yeah, I don’t understand. I sustained an objection, didn’t I?

CDC [circuit defense counsel]: It was very important to the members, Your Honor, so I think—

MJ: No it wasn’t. When I sustain an objection that means it’s not before the members. That means I sustained the objection. It means to disregard the question and the answer. Did I not sustain an objection on that issue?

CDC: You . . . You—I agree. So, Your Honor,—understand. So I’m asking about now as [sic] something I just learned about as part of my expanded

cross and having not had the opportunity to interview this witness.

MJ: Well, this is no surprise because you heard it in the direct examination and then you objected to it and I sustained the objection.

CDC: Yes. So I think it's fair game to talk about it—and this is by which [sic] I discovered it. I'm hearing her say it for the first time. And so had I known about it before certainly would have wanted to ask.

This led the military judge to move the discussion into an Article 39(a), UCMJ, session outside the members' presence at the end of which the military judge called the members back in and told them he had overruled the objection. Trial defense counsel then proceeded to ask Ms. KT about her telling Appellant “no” that morning after the assault and how Appellant respected her wishes.

Appellant contrasts this reaction by the military judge with an objection raised by the Defense during Ms. ES's direct testimony after trial counsel asked her if she had “made any additional allegations against [Appellant] to try to get back at him for some reason.” Ms. ES answered, “No. I have not,” and trial defense counsel objected. In the Article 39(a), UCMJ, session that followed, trial defense counsel reminded the military judge that he had denied the Defense's pretrial motion to be allowed to elicit evidence that Ms. ES *had* accused Appellant of other sexual offenses—most of which the Government had not charged Appellant with. Regarding one offense the Government had charged Appellant with, Ms. ES

apparently admitted the sexual conduct in question was, in fact, consensual, and the Government withdrew that specification before trial. Thus, trial defense counsel argued, the Government had violated the ruling—or at least created a situation wherein the only way the Defense could rebut Ms. ES’s claim of not making any other allegations was to cross-examine her on matters the military judge had disallowed. After a lengthy discussion, the military judge overruled the Defense’s objection and refused the Defense’s request for permission to question Ms. ES on the matter.

The military judge explained his ruling on the objection as being for Appellant’s benefit, insofar as it would avoid suggesting to the members that Ms. ES had, in fact, made other allegations against Appellant. Turning to trial counsel, the military judge cautioned them to “tread lightly” and to “be more careful than ever that you don’t ask certain trigger questions that trigger discussions about things that this [c]ourt’s already ruled on. Okay?” When the members returned to the courtroom, the military judge failed to tell them he had overruled the Defense’s objection.

Appellant also highlights that, during the Defense’s cross-examination of Ms. KT, the military judge interrupted the questioning when Ms. KT and trial defense counsel began talking over each other. The military judge told trial defense counsel to “stop it,” and that if it happened again he would convene an Article 39(a), UCMJ, session and “do some other remedies.” The military judge then told trial defense counsel, “If you need to count to five—whatever trick you need to do to allow her to finish her answer, do it.”

During the direct examination of another witness, the Government offered as an exhibit one page of phone records, a large portion of which had been redacted. Circuit defense counsel objected, explaining that he wished to have the option to question the witness about some of the obscured calls. After some discussion, the military judge convened an Article 39(a), UCMJ, session. Circuit defense counsel attempted to explain why he thought some of the blacked-out information was relevant, leading the military judge to apologize if it appeared that he was “getting frustrated” because he did not understand the Defense’s argument as to the relevance. The following colloquy then occurred:

MJ: Okay. Do you have a copy of this prepared that’s un-redacted?

CDC: Not prepared because—

MJ: When did you get this?

CDC: I’ve had that for weeks, Your Honor.

MJ: You’ve had that for weeks, and you don’t have a copy that’s un-redacted?

CDC: Not printed with me.

MJ: Did you anticipate an objection when they gave this to you weeks ago and you thought they might use it and you didn’t anticipate an objection weeks ago? You just anticipated it right now?

CDC: I’ve never seen it in that form before right now.

MJ: Hold on, you just told me you had this. Did you have this? I asked you if you had this.

CDC: Oh, no. I'm seeing it for the first time a few minutes ago. Sorry.

MJ: Okay. So you don't have—you didn't have the redacted version of this? When did you get the redacted version of this?

CDC: It was as it arrived on my table today.

CTC [circuit trial counsel]: Your Honor—and I'm sorry to interrupt the [D]efense—I will take responsibility for not ensuring that this had been provided to the [D]efense. To the extent that there was a notice issue, I will take responsibility for that, Your Honor.

In the end, the military judge overruled the Defense's objection, telling trial defense counsel that they could offer their own version of the call log into evidence if they felt such was warranted.

e. Revisiting the Military Judge's Mil. R. Evid. 412 Ruling

Once the Government rested, the military judge convened an Article 39(a), UCMJ, session outside the presence of the members in order to hear several matters the Defense wished to raise, the first of which the Defense asserted was “just in an effort to protect the record for both the [G]overnment and the [D]efense.” Trial defense counsel pointed to trial counsel's “bad lawyering” comment as accusing the Defense of providing Appellant with ineffective assistance and asked the military judge for “a finding

of fact that no such ineffective assistance of counsel happened” based upon the Defense’s adherence to the military judge’s written ruling regarding Ms. KT.

In response, the military judge said he would “state a couple things for the record, sort of unscripted and unprepared kind of off the top of [his] head.” The military judge then described litigation as a “contentious” and “emotional” process in which “things often get heated.” He noted that “[c]ounsel are sometimes more well-behaved than old judges when it comes to keeping their cool” and “that sometimes we all say things or do things that we would like to grab back . . . particularly in the sort of heat of battle for lack of a better phrase.” The military judge said courts and parties “tend to be . . . particularly sensitive” about matters related to Mil. R. Evid. 412 and that he knows “it’s particularly difficult for counsel, [three] or [four] days later in the trial to kind of remember the left and rights of any particular given ruling.”

The military judge conceded his written ruling had contained

at least one finding of fact that made a specific reference to the number of instances. . . . But the [c]ourt recognized that while it wasn’t the intention of the court, one implication might be that that might open the door to issues such as frequency, et cetera, regarding prior sexual behavior, which was specifically not something that the court was permitting to get into based on the state of the law.

. . . .

So certainly once the [c]ourt recognized the inclusion of that particular reference certainly did provide at least some indication that at least discussing frequency or numbers, or however you want to characterize it, was somewhat on the table, I think we went through that, we clarified that, that frequency wasn't on the table, and we moved on from there.

Addressing trial counsel's "bad lawyering" comment, the military judge described it as "a momentary lapse of hyperbole, an emotion based on a contentious issue" and not "a formal allegation against the defense of being ineffective." The military judge went on to say he had not seen anything in the court-martial "remotely close to ineffective assistance," that he had "zero concerns with the quality of the defense services that have been provided to [Appellant]," and that trial defense counsel "very zealously" represented Appellant. He then said, "[S]o that it's clear for the record, regardless of any frustration or intemperate comments that may have come from any source in this courtroom, the court is absolutely convinced that ineffective assistance of counsel is not a concern."

f. Closing Argument Slides

Just before giving the Government's closing argument, while the members were present in the courtroom, circuit trial counsel said he would mark a copy of the slides he intended to use as an appellate exhibit, to which circuit defense counsel said, "I have not seen them Your Honor, but if there is a printed copy, I can give it a 30 second flip." The military judge

asked trial counsel if they had a copy for the Defense, but trial counsel said they did not. It is unclear from the record what happened next in the courtroom, but circuit defense counsel announced “no objection,” and trial counsel proceeded with closing argument.

g. Motion for Mistrial

The members announced their verdict in the evening of 29 August 2019. The next morning, the Defense asked the military judge to declare a mistrial under R.C.M. 915. The Defense advanced two grounds: (1) inadequate notice with respect to the specification alleging an attempted sexual assault on Ms. ES (and relatedly, a perceived incongruity between a conviction for that offense and an acquittal for abusive sexual contact arising out of the same conduct), discussed in greater detail in Section II.D., *infra*; and (2) disparate treatment of the parties by the military judge. With respect to the second ground, trial defense counsel asserted there were “countless examples” of such disparate treatment, but they specifically referred to three instances they believed supported their argument: (1) discovery related to opening and closing slides; (2) objections to the Defense’s opening statement regarding the military judge’s Mil. R. Evid. 412 ruling; and (3) selective enforcement of the military judge’s scheduling order.

As to the Defense’s opening-statement slides, trial defense counsel said the military judge had “admonished” the defense team “for ambushing the trial counsel by surprise” and granted “a substantial three to four hour delay” in the court-martial. Conversely, trial defense counsel argued that just before closing argument, “trial counsel in live real time before the members went to start argument and

play his PowerPoint slides through the computer without providing any notice to the defense counsel about what was in those slides and . . . what it may have contained.” The Defense argued the military judge “did not treat that act in the same way [towards the Government] that the [D]efense absorbed admonishment” with respect to the Defense’s opening slides. Responding to this claim, the military judge drew a couple distinctions, noting that the Defense’s slides contained matters which “were part of the discovery issue” and that trial defense counsel said they had no objection to the Government’s closing slides. The military judge also contended he “didn’t admonish anybody in front of the members,” although he conceded he “might have given [trial defense counsel] a little bit of a hard time.”

Regarding the military judge’s Mil. R. Evid. 412 ruling during the Defense’s opening statement, trial defense counsel said trial counsel’s objections resulted in “a considerable delay within the opening statement.” Moreover, trial defense counsel argued, once the military judge realized the Defense had not, in fact, violated his ruling, the military judge still “strictly cautioned defense counsel from using surreptitious language that could connote the underlying prohibited conduct from the [Mil. R. Evid.] 412 ruling.” Trial defense counsel then pointed to the re-direct examination of Ms. ES in which trial counsel asked about matters which the military judge had prohibited the parties from raising. Trial defense counsel said the military judge’s reaction “was in stark contrast to how it was dealt with just a couple of days earlier.”

With respect to the scheduling order, trial defense counsel argued trial counsel filed nearly all of their

motions late and submitted their proposed voir dire questions on the first day of trial, none of which gave the military judge “any concern.” Yet, when the Defense sought relief from the scheduling order, trial defense counsel claimed the military judge told them to consider the order “as a direct order from the court and from a superior commissioned officer to not violate it.”²⁰ The military judge said the reason he denied the Defense’s request was because he did not want to “let one side create a strategic advantage over the other.” He continued:

I mean, if we want to re-litigate that motion then the truth of the matter is what you wanted to do was file a motion late because you mistakenly believed that they would be foreclosed from fixing an offense that failed to state an offense. It didn’t[,] but you believed they would be foreclosed from fixing that offense and that you would therefore gain a tactical advantage. . . . I don’t know where you all are getting this notion that you’re being tactically disadvantaged by filing—by not being allowed to file a motion at the last minute. . . . [T]here’s lots of things that didn’t happen in this case that were not consistent with my scheduling order from both sides because I didn’t enforce it the way I probably should have and maybe I will better in the future. But the denial was not based on preference. It was based on what you

²⁰ We are unable to locate in the record any instance of the military judge saying this.

wanted to do in your motion. In my firm belief that it was going to be negative towards [Appellant] that he was going to face[—]potentially face a second trial.

Although trial defense counsel did not specifically allege the military judge was biased against the Defense, they did focus their argument on the claimed disparate treatment of the parties. The military judge reframed their argument: “I believe what you’re essentially articulating is that the military judge should recuse himself because of bias.” He said the court would recess and gave the Defense an hour to brief the issue in writing, saying, “I think there’s factual distinctions between the issues that you raised but in any event I’m not inclined to put myself in a position where I have to constantly defend myself against allegations that I’m biased.” Trial defense counsel subsequently submitted a written motion for a mistrial in which they stated:

In isolation, no decision or ruling by the Court would ever come close to requiring such mistrial, but the pervasive nature of such rulings over a two week litigated trial, in context with the issue put substantial doubt in the eyes of any reviewing authority or member of the public watching this trial.

Citing R.C.M. 915, the Defense further argued that “[s]ubstantial disparate treatment between the parties is evident throughout the entire recording [sic] of trial,” that “no amount of curative instructions could cure the irreparable harm of continued adverse ruling and admonishments to defense counsel in a way that so starkly contrasts how the trial counsel

was treated in open court,” and “[t]his suggests bias in a way that for the integrity of the military justice system, this case should be declared a mistrial.”

In his written ruling, the military judge found as an “essential finding[] of fact” that he did not take any remedial action against the Government for their late filings “[b]ecause the Defense never raised any objections to the Court’s consideration of the Government [sic] late responses until today nor articulated any prejudice because of the Government’s failures.” With respect to the text messages the Defense wished to refer to in their opening statement slides, the military judge found as fact that “[n]o negative action was taken by the Court towards the Defense in response to this issue, other than addressing the matter on the record,” and that he sustained the Government’s objection to the slides “as it amounted to publishing exhibits to the members that were not yet admitted into evidence.” The military judge ruled that he “remain[ed] unconvinced that a reasonable person knowing all the circumstances—including the various court rulings in this case that have been favorable to the Defense . . . would harbor doubt as to the Court’s impartiality.” The judge continued,

[T]his [c]ourt has granted several requests for reconsideration, has allowed for expanded argument on issues raised to include multiple additional argument on the same issue, has not precluded the Defense from raising any matter despite timeliness concerns, and has considered oral motions on potentially case or offense dispositive issues raised without

written filings or accompanying legal authority.

He concluded that while some matters “and the manner in which they are raised” may “generate heated discussions,” the exchanges in Appellant’s trial were not so “extraordinary” that they called for either recusal or a mistrial.

The military judge ruled that the Defense had not “identified any particular ruling that indicated bias on the part of the Court,” or shown that trial defense counsel were precluded from presenting any evidence or raising any objections due to timeliness concerns. He also ruled the Defense had not identified any examples of him doing something that could be perceived as assisting the Government “outside of citing anecdotal examples of interactions with counsel that the Defense argues differed in tone between the Defense and the Government, without acknowledging the context surrounding those various interactions.” The military judge noted that “at no time during the course of this trial did [he] make any statement expressing concern or frustration with counsel and the manner in which they were presenting their case in front of the court members.” He also pointed to his instruction to the members that they were to disregard any comment or expression suggesting his opinion as to Appellant’s guilt.

h. Clemency Submission Addressing Military Judge Bias

The Defense reiterated its complaint that the military judge demonstrated both implied and actual bias in a clemency submission written by trial defense counsel. In that submission, trial defense counsel contended that when the military judge denied the

Defense's motion for recusal, "[t]here was an uncomfortable tension in the air, based on the language, tone, body language, and facial expressions of the military judge. All in the room could observe it. Several in the gallery commented on it after the trial." Trial defense counsel argued the Defense "lost" nearly every motion submitted to the military judge and "lost objection after objection." Trial defense counsel also reiterated that the Defense's argument for recusal was based on public perception of the proceedings, and the argument for mistrial was additionally based on a claim of the military judge's actual bias against the Defense.

i. Post-Trial Matters Presented for Our Consideration

Once this case was docketed with this court, Appellant again asserted the military judge was personally biased against circuit defense counsel. In support of this contention, Appellant moved to attach a portion of a transcript from another court-martial featuring the same military judge and circuit defense counsel in which the military judge, *inter alia*, threatened circuit defense counsel with contempt proceedings for not following the military judge's directions. Appellant argues we should overlook the fact that the prior proceeding was not raised as evidence of bias at his court-martial under the theory that circuit defense counsel was not responsible for post-trial processing in the prior case, and—as a result—circuit defense counsel "would not have [had] access" to the transcript of the prior case.

2. Law

a. Recusal of a Military Judge

“An accused has a constitutional right to an impartial judge.” *United States v. Wright*, 52 M.J. 136, 140 (C.A.A.F. 1999) (first citing *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); and then citing *Tumey v. Ohio*, 273 U.S. 510 (1927)). The validity of the court-martial system “depends on the impartiality of military judges in fact and in appearance.” *Hasan v. Gross*, 71 M.J. 416, 419 (C.A.A.F. 2012). Under R.C.M. 902(a), “a military judge shall disqualify himself or herself in any proceeding in which that military judge’s impartiality might reasonably be questioned.” Moreover, a military judge is required to disqualify himself or herself if “the military judge has a personal bias or prejudice concerning a party.” R.C.M. 902(b)(1). Military judges “should broadly construe grounds for challenge but should not step down from a case unnecessarily.” R.C.M. 902(d)(1), Discussion. A motion to disqualify a military judge “may be raised at any time, and an earlier adverse ruling does not bar later consideration of the same issue, as, for example, when additional evidence is discovered.” *Id.*

When considering a challenge based on the appearance of bias under R.C.M. 902(a), we review the matter under an objective standard, “asking whether a reasonable person knowing all the circumstances would conclude that the military judge’s impartiality might reasonably be questioned.” *United States v. Sullivan*, 74 M.J. 448, 453 (C.A.A.F. 2015) (citing *Hasan*, 71 M.J. at 418). Once a military judge’s impartiality is challenged, we ask whether the “court-martial’s legality, fairness, and impartiality were put

into doubt by the military judge's actions," taking the trial as a whole. *United States v. Foster*, 64 M.J. 331, 333 (C.A.A.F. 2007) (quoting *United States v. Quintanilla*, 56 M.J. 37, 78 (C.A.A.F. 2001)). Recusal in such cases "is intended to 'promote public confidence in the integrity of the judicial process.'" *Hasan*, 71 M.J. at 418 (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988)).

We recognize "a strong presumption that a judge is impartial," as well as the premise that "a party seeking to demonstrate bias must overcome a high hurdle." *Quintanilla*, 56 M.J. at 44 (citation omitted). When a military judge disclaims partiality, such a disclaimer "carries great weight." *United States v. Harvey*, 67 M.J. 758, 764 (A.F. Ct. Crim. App. 2009) (citing *Foster*, 64 M.J. at 333) (additional citations omitted). Rulings and comments made by a judge "do not constitute bias or partiality, 'unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.'" *Quintanilla*, 56 M.J. at 44 (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

We review a military judge's decision on a recusal motion for abuse of discretion. *United States v. McIlwain*, 66 M.J. 312, 314 (C.A.A.F. 2008) (citation omitted).²¹ Such a decision amounts to an abuse of discretion "if it is 'arbitrary, fanciful, clearly unreasonable or clearly erroneous,' not if [the reviewing court] merely would reach a different

²¹ Our superior court, the United States Court of Appeals for the Armed Forces, has specifically rejected the de novo standard for judicial recusal decisions. *United States v. Butcher*, 56 M.J. 87, 90-91 (C.A.A.F. 2001).

conclusion.” *Sullivan*, 74 M.J. at 453 (quoting *United States v. Brown*, 72 M.J. 359, 362 (C.A.A.F. 2013)).

If we conclude a military judge has abused his or her discretion in denying a recusal motion, we determine whether to reverse a conviction by reviewing the factors established by the Supreme Court in *Liljeberg*. *United States v. Uribe*, 80 M.J. 442, 449 (C.A.A.F. 2021) (citing *United States v. Martinez*, 70 M.J. 154, 159 (C.A.A.F. 2011)). These factors are: (1) what injustice was personally suffered by the appellant; (2) whether granting relief would foster more careful examination of possible disqualification grounds and their prompt disclosure; and (3) whether the circumstances of the case at hand would “risk undermining the public’s confidence in the military justice system” when viewed through an objective lens. *Id.* (quoting *Martinez*, 70 M.J. at 159).

b. Consideration of Matters Outside the Record

In conducting a review under Article 66, UCMJ, 10 U.S.C. § 866, military Courts of Criminal Appeals are generally limited to considering the “entire record,” which includes the record of trial, allied papers, and briefs and arguments presented by appellate counsel addressing matters found in either the record of trial or allied papers. *United States v. Jessie*, 79 M.J. 437, 440–41 (C.A.A.F. 2020). One exception to this rule covers matters submitted for the first time on appeal regarding issues “raised by materials in the record but not fully resolvable by those materials.” *Id.* at 445.

3. Analysis

a. Post-Trial Matters Presented for Our Consideration

We begin our analysis by declining to consider the portion of the earlier trial’s transcript submitted by Appellant as evidence of a claimed bias of the military judge against circuit defense counsel. Appellant’s defense team thoroughly litigated the issue of the military judge’s participation in Appellant’s court-martial from their pretrial recusal motion through their post-findings mistrial motion and clemency submission. In the Defense’s initial recusal motion, trial defense counsel focused solely on the appearance of bias, specifically stating, “there appears to be no actual bias in this case.” By the time of the mistrial motion, trial defense counsel had broadened their argument to include actual bias against the Defense, but even then, the claimed bias was towards the Defense generally, not against circuit defense counsel himself.

We also find unavailing Appellant’s claim on appeal that circuit defense counsel did not raise personal bias—as supported by portions of a transcript from proceedings in the prior court-martial—because this counsel was not responsible for handling Appellant’s representation for that court-martial’s post-trial processing. Whether or not circuit defense counsel possessed his own copy of the transcript from those earlier proceedings, he was indisputably present at those proceedings and therefore had personal knowledge of his interactions with the military judge. We see nothing in the record indicating circuit defense counsel intended to make a claim of personal bias, much less that he did not raise

the matter because he had tried to obtain and was somehow denied access to a copy of the earlier proceedings. Given his statement disavowing any actual bias on the military judge's part, we think the more correct assessment is that circuit defense counsel chose not to claim the military judge was personally biased against him, and—by extension—elected not to support such a claim with evidence derived from other courts-martial.

We acknowledge the matter of the appearance of the military judge's fairness was called into question by the Defense, but that argument was never premised on the military judge's interaction with circuit defense counsel in other cases. Appellant may not raise this new theory for the first time on appeal. *See, e.g., United States v. Carpenter*, 77 M.J. 285, 289 (C.A.A.F. 2018) (noting that appellate review of a motion is limited to the motion submitted to military judge at trial, not the motion which appellate counsel wished had been submitted).²² By disavowing the claim of personal bias at trial, we conclude Appellant not only failed to raise this argument, but that he has waived it for purposes of appellate review. Although we have authority under Article 66, UCMJ, 10 U.S.C. § 866, to pierce an appellant's trial waiver in order to correct a legal error, we decline to do so here. *See United States v. Hardy*, 77 M.J. 438, 443 (C.A.A.F. 2018). In any event, the fact this matter was not

²² Having carefully reviewed the record in this case, we see no indication the theory Appellant now seeks to advance on appeal was apparent from the claims he made at trial. *See United States v. Toy*, 65 M.J. 405, 409 (C.A.A.F. 2008) (concluding an alleged error—while not raised at trial—was “apparent from the context” of an issue that was raised, and was therefore arguably preserved for appeal).

raised in the record means Appellant may not now supplement the record with transcript excerpts from unrelated proceedings under *Jessie*.

b. Recusal

On appeal, Appellant argues the military judge should have recused himself due to “actual bias and/or appearance of partiality” in order to “ensure public confidence in the judicial process.” While many aspects of the interaction between the military judge and trial defense counsel may be subject to valid criticism, we conclude the record does not support a conclusion the military judge abused his discretion in not recusing himself.

In their original recusal motion, trial defense counsel essentially disclaimed any actual bias on the military judge’s part. That, as explained above, changed by the time the Defense moved for a mistrial, and Appellant’s actual-bias argument is not entirely without basis. The record contains several instances where the military judge was squarely confrontational with trial defense counsel. One example was when the military judge admonished the Defense for disclosing text messages Monday morning that they discovered over the weekend—when the military judge had only granted the Defense’s request for expert assistance to look for the messages the preceding Friday. The military judge’s language speaks to his frustration, as he chastised the Defense for “another last minute issue,” asking them “[d]id we or did we not discuss” the matter and “[w]hat did you think was going to happen?” while complaining that issues “keep dropping in my lap.”

The military judge was also quick to lecture the Defense about following his rulings, asking

rhetorically at one point, “Do people not care what my rulings are if they’re going to sort of go around them?” This question, of course, came in the middle of a longer critique of the Defense which had been initially spurred by the military judge’s erroneous recollection of his own written Mil. R. Evid. 412 ruling. Rather than admit his error, the military judge suggested the ruling was just “inartfully drafted,” *sua sponte* reconsidered the ruling “to provide a little bit more clarity,” and sustained two of the Government’s objections to the Defense’s opening statement—even though that opening statement fell within the bounds of the military judge’s original ruling. In the midst of Ms. KT’s cross-examination, the military judge lectured the Defense on the meaning of an objection being sustained and asked, “Did I not sustain an objection on that issue?” Yet, once an Article 39(a), UCMJ, session was convened and emotions seemed to have calmed, the military judge ruled in the Defense’s favor. During another Article 39(a), UCMJ, session, however, the military judge essentially cross-examined trial defense counsel about why they did not have an unredacted copy of phone records on hand—an interrogation that only ended when trial counsel interjected and told the military judge they were to blame for not having earlier provided the Defense with the document trial counsel wished to admit.

Government counsel, on the other hand, largely escaped unscathed. For example, when trial counsel suggested trial defense counsel had engaged in “bad lawyering”—a comment flowing from trial counsel’s incorrect recollection of the military judge’s written Mil. R. Evid. 412 ruling—the military judge charitably referred to the comment as “a momentary lapse of hyperbole, an emotion based on a contentious issue.”

When trial counsel defied the military judge's ruling prohibiting evidence of Ms. ES's prior allegations of sexual assault, the military judge not only allowed Ms. ES's arguably false answer to stand, but he simply told trial counsel to "tread lightly" and "be more careful than ever."

We are nonetheless mindful that "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky*, 510 U.S. at 555. The question is whether those remarks "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.* We find the matter of the training workshop telling in this case. The military judge's lengthy and sharp on-the-record critique of circuit defense counsel, punctuated by invocations of questionable—if not entirely inapplicable—legal standards, seems far out of proportion to the scale of the perceived "misstep" at issue. When the Defense re-raised the matter, the military judge conceded he might have been "a little bit fired up" and "hypersensitive" about the events at the workshop. This paints a picture not of a military judge who harbored a bias against the Defense, but instead of one who was acting somewhat impulsively on occasion rather than in the calm, temperate manner judges aspire to. Based upon our review of the record, we see scant support for the claim that the military judge was actually biased against the Defense, and we will not conclude the military judge erred in not recusing himself on that ground.

The closer question is whether or not there was an appearance of bias—that is, whether the military judge's impartiality might reasonably be questioned.

In his ruling on the mistrial motion, the military judge claimed he had not made any statement expressing concern or frustration with counsel nor had he admonished them in front of the court members. Even if this statement were accurate, this is not the standard for determining a judge's impartiality. The correct standard is "whether a reasonable person *knowing all the circumstances*" would question the military judge's impartiality. *Sullivan*, 74 M.J. at 453 (emphasis added). Thus, we consider the military judge's words and actions regardless of whether they occurred before the court members or even in the courtroom at all. This is so because the appearance of fairness is tied to the public's confidence in our judicial system, a concern that reaches far beyond the deliberation room in Appellant's court-martial.

Considering all the circumstances present in this case, we conclude the military judge did not abuse his discretion in not recusing himself, even under an "appearance of bias" standard. We arrive at this conclusion based on the fact that, notwithstanding caustic comments directed at trial defense counsel, the military judge's conduct raised more questions about his patience than his partiality. For example, the military judge seemingly assumed the worst with respect to the events of the workshop and decided to suggest on the record that the circuit defense counsel had committed professional misconduct, rather than discuss the matter in an off-the-record R.C.M. 802 conference and provide more tailored commentary in open court. However, once the Defense re-raised the issue with the military judge, his demeanor changed, and he admitted he had perhaps been "hypersensitive" about the matter. Similarly, when trial counsel objected during the Defense's opening

statement, the military judge initially insinuated that trial defense counsel had intentionally flouted his ruling. When he revisited the matter, the military judge commended trial defense counsel for “very zealously” representing Appellant. That being said, the military judge also minimized trial counsel’s “bad lawyering” comment as “a momentary lapse of hyperbole,” when it was trial counsel’s misreading of the military judge’s written ruling and ensuing objection that gave rise to the lengthy excusal of the members in the middle of the Defense’s opening statement in the first place.

Other aspects of the military judge’s treatment of the Defense do give us pause. For example, the military judge’s summary conclusion that trial defense counsel were prohibited from showing text messages to the members during the Defense’s opening statement was seemingly untethered to the basis of the Government’s objection, even if within the military judge’s discretion. Notably, the exchange over this issue—in which the military judge complained of “another last minute issue”—occurred just after the military judge issued his ruling on the Defense’s motion for his recusal. Later, when the Government elicited Ms. ES’s arguably false claim that she had not made any other allegations against Appellant—a matter which was the subject of a pretrial ruling adverse to the Defense—the military judge not only did not rebuke trial counsel, but he prohibited the Defense from challenging Ms. ES on that point. The military judge said he based this conclusion on his view that such a challenge would work to Appellant’s disadvantage. While one could chalk these instances up to debatable decisions, one could also legitimately ask whether a reasonable

person might conclude the military judge's impartiality could be questioned.

Contrary to Appellant's argument, we do not place much stock in certain events he points to on appeal, such as the Defense's last-minute review of the Government's closing-argument slides. From our review of the record, trial defense counsel offered to quickly review the slides on the spot, and they did so. The Defense did not object or ask for an Article 39(a), UCMJ, session or seek any other remedy, so we see nothing that would illuminate our analysis of the military judge's decision not to recuse himself. Similarly, the alleged "selective enforcement" of the scheduling order is insufficiently supported by the record before us. To the extent Appellant is trying to point to the Defense's request to file their failure to state an offense motion only after trial commenced, we conclude the military judge was on firm legal footing and well within his discretion in denying that request.

While we may see indications of an annoyed or brusque military judge, we see less to support the notion of actual deep-seated antagonism towards the Defense. Reasonable observers could question whether this court-martial was carried out in an exemplary fashion, but we conclude that—on balance—the military judge's conduct would not give rise to a reasonable person concluding his impartiality might reasonably be questioned. His conduct did not rise to the level that would undermine the court-martial's legality and fairness, and we therefore decline to find the military judge abused his discretion in not recusing himself.

Even if we had concluded the military judge should have recused himself from Appellant's court-martial,

we would not grant Appellant relief based upon our analysis of the *Liljeberg* factors. First, Appellant points to only a few examples of injustice he personally suffered. Trial defense counsel were denied the ability to display text messages to the members during their opening statement, even after satisfying their discovery obligations. The Defense's opening statement was also derailed for a period of time based upon trial counsel's objection and the subsequent confusion over and discussion about the military judge's written ruling. Beyond these examples, however, Appellant argues less that he was personally prejudiced by adverse rulings and more that his trial might seem unfair to an outside observer. We may not endorse the tone of the entire court-martial, but even caustic comments towards counsel are qualitatively different from incorrect adverse rulings with prejudicial impacts. Our review of the record reveals comparatively few instances of the latter and no indication that the errors we do find were the result of this particular military judge's service on Appellant's court-martial.

Regarding the second *Liljeberg* factor, we see little indication that granting relief in this case would result in other military judges more carefully examining their own possible grounds for disqualification. We make this assessment based upon the fact that if the military judge here should have recused himself, he should have done so under an appearance of bias standard. Given the highly context-specific analysis that standard calls for, we are unconvinced that granting relief under the unique facts presented here would provide other judges with much useful guidance for assessing their own conduct in other cases. Instead, we believe military judges will

be mindful of our above analysis and be vigilant for the appearance of bias even in the absence of Appellant being granted relief.

Finally, under the third *Liljeberg* factor, we see little risk of undermining the public's confidence in the military justice system for many of the same reasons we determine that a reasonable person is not likely to conclude the military judge's impartiality might reasonably be questioned. We think that while the public may rightfully have high expectations for the military justice system, the public must also recognize that it is an adversarial system comprised of imperfect human beings—one in which counsel and military judges will invariably debate and disagree with each other. Demonstrations of impatience or criticism by the military judge in this case are simply inadequate to give rise to an objective risk of undermining the public's confidence in the overall justice system.

B. Ms. KT's Refusal to Disclose Contact Information

On appeal, Appellant argues the military judge abused his discretion by permitting Ms. KT to testify without first compelling her to either provide contact information for her mother or, alternatively, answer questions in support of the Defense's motion to compel her mother's production.

1. Additional Background

One of the Defense's theories was that Ms. KT only alleged she had been sexually assaulted after she talked to her mother. Specifically, the Defense alleged that Ms. KT spent the weekend as well as the morning and early afternoon of Monday, 27 August 2018, with Appellant before driving back home. Over the course

of several hours, Ms. KT continued to exchange affectionate text messages with Appellant and discussed her plan to spend time with Appellant the upcoming weekend. That night, Ms. KT texted Appellant—apparently in response to an incoming phone call from him—stating that she was talking to her mother. The following morning, Ms. KT texted Appellant that she “just need[ed] time.” About three hours later, she texted him that she felt “super disrespected.” This led to a response from Appellant in which he said, *inter alia*, “I got carried away and I’m so sorry for what happened. . . . I regret everything. This is the biggest mistake I’ve ever made. . . . It’ll take time to heal and I know that. I don’t expect you to be over this right now.” Over the following days, Ms. KT expressed her frustration with Appellant and the impact his actions had on her, while Appellant made significant additional admissions about the assault.

The Defense postulated that it was after Ms. KT’s Monday-night conversation with her mother that Ms. KT’s attitude towards Appellant shifted dramatically. Ms. KT, however, refused to be interviewed by trial defense counsel prior to trial. The Defense requested Ms. KT’s mother’s contact information in discovery, but trial counsel maintained they did not have it. Upon receiving the Defense’s request, the Government sought the contact information from Ms. KT, but Ms. KT—through her special victims’ counsel—declined to provide it. Government agents attempted to assist the Defense in this endeavor by providing possible phone numbers for Ms. KT’s mother, but none of the numbers was valid. As a result, the Defense had little else other than the text

message to confirm or refute their understanding of when Ms. KT spoke with her mother.

On 21 August 2018—the day before the motions hearing began—the Defense made a motion to compel the production of Ms. KT’s mother via subpoena and to abate of the proceedings until Ms. KT agreed to interview with the Defense.²³ During the hearing on this motion, trial defense counsel indicated they wished to call Ms. KT to testify. Circuit trial defense counsel also said he did not intend “to call her to interview her,” and that perhaps the military judge would “accept the proffer from her counsel that she won’t talk to [the Defense].” He continued: “So I don’t know if the [c]ourt needs to hear from her saying she won’t talk to me, but we have an issue in which—there some [sic] evidence in conversation with her mother happens [sic] both very approximate [sic] in time to the charged event.” After some discussion, the following colloquy occurred:

MJ: All right. But you don’t actually know what, if anything, she discussed with her mother?

CDC: I don’t. I haven’t spoken with mother and I haven’t spoken with [Ms. KT].

MJ: And so you want to call [Ms. KT] to find out what she talked about with her mother?

CDC: Yes.

²³ Nothing in the record indicates that the Defense requested the Government produce Ms. KT’s mother for trial prior to making this motion.

MJ: And if she says on the stand, I never talked to my mother that night. I was lying to him.

CDC: Yes. And instead we have an impeachable statement, but it doesn't help me with producing the mother. You're right.

MJ: Sure. And it doesn't help—I'm not here to help build impeachable statements either. I mean, if we don't know what she's going to say, then we don't know if she's going to be helpful to me in the analysis of whether or not you've met your burden of production of mother. That's really what it's all about. But you haven't—I understand you haven't spoken to [Ms. KT] and that's another discussion. But I understand that you want to talk to someone to find out what that conversation was with mom but you have no idea what they are [sic] she talked about.

CDC: Well—

MJ: You're speculating that there was discussion post-alleged assault that then led to [Ms. KT] taking some certain action—breaking up with the accused, et cetera—and you believe that mother may have said something to [Ms. KT] that caused her to suddenly change her attitude towards the accused, but you don't know that for sure.

CDC: I have—well, I don't know for sure, but I have a very good faith basis to

believe it because [Ms. KT's father] says, mom called me and told me that [Ms. KT]—something happened to her, and that's why you need to call her.

MJ: So the father said that the mother called him and said call her because she just told me something happened.

CDC: Yes, Your Honor. So that's my good faith basis, not just that this content was discussed but when it was discussed, because of where [Ms. KT's father]—what he says about the conversation and when he places it.

MJ: Okay. And you're being told that the contact information is—the family is not willing to provide you with the contact information?

CDC: Yes, Your Honor. . . .

. . . .

MJ: Okay. So the relevance is essentially—the defense theory is that it's potential impeachment evidence. That's the relevance of [Ms. KT's] mother because there's at least some indication that the alleged victim was in a certain positive frame of mind—however you want to characterize it—with the accused. Post-offense, she spoke to her mother then immediately thereafter, things turned. And the theory being is that something that mom said to her or implied to her caused her to change and then ultimately report an offense?

CDC: Yes, sir.

Before moving on to the next motion, the military judge asked, “Anything further on [Ms. KT’s] mother?” Trial defense counsel answered, “In terms of argument or evidence, Your Honor?” The military judge replied,

Just argument. I mean I think I’ve got the gist of the relevance. I think you do have a bit of a problem in that you don’t know what she’s going to say. So relevance, in the traditional sense, I’m not sure 100 percent that you’ve established relevance because you don’t know what she’s going to say. I get that that’s not your fault, but ultimately it is [a] factor to consider in the analysis. But I do believe you’ve raised a valid theory as to why she might be relevant on the issue of motive, bias, impeachment, et cetera. So I’ll consider all that, but ultimately I see this as a witness production issue [] so I’ll analyze that through that particular lens.

Although the Defense conceded the military judge had no authority to compel Ms. KT to submit to a pretrial interview, trial defense counsel argued the proceedings should be abated until Ms. KT agreed to a defense interview due, in part, to the fact Ms. KT had been interviewed by trial counsel. The military judge declined to abate the proceedings on this ground, finding there was no indication the Government had done anything to impede the Defense’s access to Ms. KT. The military judge did direct trial counsel to continue to encourage Ms. KT to

interview with the Defense, and he said he would consider such remedies as allowing the Defense some period of time after her direct testimony to prepare for cross-examination as well as greater latitude in that cross-examination.

The military judge further ruled he would not order the production of Ms. KT's mother, whom he treated as an unavailable witness. He invoked the standard for production of an unavailable witness under R.C.M. 703(b)(3), which relates to witnesses deemed unavailable under the meaning of Mil. R. Evid. 804(a). Under this standard, a military judge shall grant relief when the testimony of an unavailable witness "is of such central importance to an issue that it is essential to a fair trial, and . . . there is no adequate substitute for such testimony." R.C.M. 703(b)(3). The military judge said Ms. KT's mother's testimony was "being raised under an impeachment theory, and only to the extent that it would provide [Ms. KT] with a motive to fabricate or be some evidence of bias." He concluded the Defense had not met the R.C.M. 703(b)(3) "central importance" standard, "even assuming [Ms. KT] did discuss the alleged assault with her mother and then changed her tone towards [Appellant] after that conversation." He based this conclusion on the fact that in the text messages, Appellant was "apologizing for his conduct in a manner that could constitute consciousness of guilt;" that Ms. KT's mother's testimony would only be relevant for impeachment if Ms. KT denied speaking to her mother; and that Ms. KT's mother's testimony was unnecessary to establish motive or bias, because the Defense already had the text message. The military judge explained: "The timing of the text message reference to a conversation with her mother

provides the [D]efense with the opportunity to explore this issue on cross-examination . . . to demonstrate on the part of [Ms. KT] a possible bias or motive to fabricate.” The military judge also concluded the Defense had failed to meet their burden “to provide the witness[']s name, contact information and a synopsis of her expected testimony” under R.C.M. 703(c)(2)(B)(i).²⁴

Just before opening statements, the military judge returned to the issue of Ms. KT refusing to interview with the Defense and asked trial defense counsel for their “proposed remedies.” The Defense suggested a recess for Ms. KT to reconsider submitting to an interview; that the military judge personally encourage her to be interviewed; being afforded “expanded cross,” to include asking Ms. KT about her refusal to interview with the Defense and her “refusal to provide access to other witnesses in this case to include her mother;” and the military judge giving an instruction to the members on the matter.²⁵ The military judge said he would permit “a reasonable inquiry on cross examination into the fact that [Ms. KT] declined to submit to a pretrial interview and that she did not wish for her mother to meet with [the D]efense for an interview.” He further said he would entertain a request for a 30-minute recess after Ms.

²⁴ The military judge further said: “Defense has provided no legal authority, nor could the court find any legal authority to support the proposition that the [D]efense is entitled to the relief requested when they are unable to discover through their own reasonable efforts information sufficient to meet their burden under [R.C.M.] 703 when there is no evidence of government interference.”

²⁵ The Defense indicated a draft instruction would be prepared at a later point in time.

KT's direct testimony to permit the Defense to prepare for her cross-examination.

In the Defense's opening statement, trial defense counsel told the members the events regarding Ms. KT "turn[ed] from a misunderstanding to a criminal investigation" once Ms. KT talked to her mother after she returned home from visiting Appellant. Trial defense counsel said that it was after the call when "the tone changes" and "[i]t's no longer a mistake. Now it's an accusation." He told the members they would not be hearing from Ms. KT's mother.

When Ms. KT took the stand, her testimony ran counter to the Defense's theory about the timing of her call with her mother. Ms. KT testified on direct that she first talked to her mother and disclosed the assault as she drove home from Appellant's house and not at some later point, as the Defense had posited during their opening statement. On cross-examination, Ms. KT further testified she had lied to Appellant when she texted him that she was talking to her mother, and she was actually talking to a friend of hers at the time. She explained she felt Appellant was less likely to question her choosing to talk to her mother instead of him, versus than if she was merely talking to a friend. Ms. KT also conceded she hid her mother's contact information from the Defense and asked her father to do the same. Trial defense counsel did not ask Ms. KT to provide that contact information while she was on the stand, nor did they ask the military judge to direct Ms. KT to disclose it.

After the Government rested, the Defense moved to strike Ms. KT's testimony or, alternatively, to dismiss the specification alleging Appellant had sexually assaulted her. The Defense said their

alternate request was rooted in an alleged violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The Defense accused the Government of not revealing that Ms. KT had lied to Appellant in her text message when she said she was talking to her mother. The Defense also argued that even if the Government was unaware Ms. KT had lied to Appellant about whom she was talking to, the Defense was blindsided by this testimony, resulting in undue prejudice to Appellant because the theory the Defense advanced to the members in the opening statement had been squarely undermined. The Defense also suggested Ms. KT had been able to modify her testimony after hearing the Defense explain their theory during the motions hearing.

In discussing the matter with the military judge, trial defense counsel conceded they did not know whether or not trial counsel were aware that Ms. KT was not actually talking to her mother when she texted Appellant that she was. Trial counsel said they did not recall asking Ms. KT about the text message and were “not tracking that [they] even talked with her about that message, let alone knew that there was some dishonesty there.” The military judge found there had been no violation of *Brady*, saying, “I don’t believe the [G]overnment specifically knew that the witness was going to say that[,] she may have just never been asked by anyone,” and that there was no evidence the Government withheld or failed to turn over any evidence.

The military judge reminded the Defense that he had no authority to compel Ms. KT to submit to a pretrial interview and that Appellant’s constitutional confrontation rights were satisfied by virtue of Ms. KT testifying. He then said that the Defense had approached their opening statement “with eyes wide

open”—that is, they knew they had not been able to interview Ms. KT or her mother to confirm the two of them actually had a conversation at the time the Defense believed they had. Although the military judge said he recognized Ms. KT had undermined the Defense’s theory, such did not warrant striking her testimony—especially in light of the fact he had granted trial defense counsel additional time after the direct examination to prepare their cross-examination.

In the Defense’s closing argument, trial defense counsel told the members:

Reasons for reporting. We hear for the first time, she talked to her mom on the way home . . . she was trying to figure out what to do And she talks to her dad and there is an important intervening step that I hope you picked up her dad does not hear what happens. Dad gets a text from a mysterious, unheard from mother. And what it says is you need to talk to your daughter. And so this first version what happens, this first version of what she says, he never got to hear. The Government did not present it to you.

At this point, trial counsel said, “Objection, Your Honor, it is improper argument.” The military judge sustained the objection and told the members to recall his instruction that they “are to consider the evidence that is properly before [them] when considering whether or not the Government has met their burden in this case.” Trial defense counsel then continued, “And what you heard from [Ms. KT] is that she hid

her. Among other things hid in this investigation, she hid her.”

2. Law

a. Discovery

Under Article 46(a), UCMJ, “the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence” pursuant to rules prescribed by the President. 10 U.S.C. § 846(a). One of those rules, R.C.M. 701(e), provides that each party shall have “equal opportunity to interview witnesses.” Even in the absence of a defense request, trial counsel must disclose “the existence of evidence known to trial counsel” which tends to be exculpatory, be evidence in mitigation or extenuation, or “[a]dversely affect the credibility of any prosecution witness or evidence.” R.C.M. 701(a)(6). Trial counsel has the “duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.” *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady*, 373 U.S. at 87. “Evidence is favorable if it is exculpatory, substantive evidence or evidence capable of impeaching the [G]overnment’s case.” *United States v. Behenna*, 71 M.J. 228, 238 (C.A.A.F. 2012) (citations omitted). Impeachment evidence “may make the difference between conviction and acquittal.” *United States v. Bagley*, 473 U.S. 667, 676 (1985). Evidence is material “when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding

would have been different.” *Smith v. Cain*, 565 U.S. 73, 75 (2012) (quoting *Cone v. Bell*, 556 U.S. 449, 470 (2009)).

b. Production

An accused has the due process right under the Sixth Amendment²⁶ to compulsory process to obtain and present witnesses to establish a defense. *Washington v. Texas*, 388 U.S. 14, 18–19 (1967). Under the rules promulgated by the President, “[e]ach party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.” R.C.M. 703(b)(1). This includes “the benefit of compulsory process.” R.C.M. 703(a). An accused’s right to compel the production of witnesses for trial is not unfettered; rather, the right is tied to “consideration of relevancy and materiality of the expected testimony.” *United States v. Carpenter*, 1 M.J. 384, 385 (C.M.A. 1976) (citations omitted).

Under R.C.M. 703(c)(2)(A) and (B), the Defense is required to submit a written request for the production of witnesses to trial counsel, and that request “shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence” along with “a synopsis of the expected testimony sufficient to show its relevance and necessity.” Trial counsel then arranges for the production of such witnesses unless trial counsel contends production is not required—a contention the defense may challenge before a military judge. R.C.M. 703(c)(2)(D).

²⁶ U.S. CONST. amend. VI.

If the military judge grants a defense motion to produce a witness, trial counsel shall produce the witness. *Id.* The presence of civilian witnesses may be obtained by subpoena issued by trial counsel. R.C.M. 703(g)(3). When a subpoenaed witness neglects or refuses to appear, the military judge may issue a warrant of attachment to compel that witness's attendance at a court-martial. R.C.M. 703(g)(3)(H).

In the event a witness is deemed "unavailable," the standard for relief is not simply that the witness's testimony is relevant and necessary, but that it "is of such central importance to an issue that it is essential to a fair trial, and . . . there is no adequate substitute for such testimony." R.C.M. 703(b)(3). The term "unavailable" is given the meaning found in Mil. R. Evid. 804(a). Under that rule, a witness is unavailable if he or she "is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure" the witness's attendance. Mil. R. Evid. 804(a)(5). Upon a showing that a witness both meets the "central importance" standard and is unavailable, "the military judge shall grant a continuance or other relief in order to attempt to secure the witness[s] presence or shall abate the proceedings" R.C.M. 703(b)(3). Unavailability is determined by asking "whether the witness is not present in court in spite of good-faith efforts by the Government to locate and present the witness." *United States v. Cabrera-Frattini*, 65 M.J. 241, 245 (C.A.A.F. 2007) (quoting *United States v. Cokeley*, 22 M.J. 225, 228 (C.M.A. 1986)). Government effort to produce a witness is a prerequisite to finding a witness to be unavailable. *Id.* (citing *Barber v. Page*, 390 U.S. 719, 724–25 (1968)).

We review a military judge's rulings on discovery and production matters, as well as a military judge's selection of remedies for violations, for an abuse of discretion. *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015) (citations omitted) (reviewing military judge's ruling finding discovery violations); *United States v. Breeding*, 44 M.J. 345, 349 (C.A.A.F. 1996) (citation omitted) (reviewing military judge's denial of request for production of witnesses); *Cokeley*, 22 M.J. at 229 (citation omitted) (reviewing military judge's determination of witness availability). "The abuse of discretion standard calls for more than a mere difference of opinion." *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014) (internal quotation marks and citation omitted). An abuse of discretion only occurs "when [the military judge's] findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008) (citations omitted).

A military judge's denial of a witness request will not amount to an abuse of discretion unless we have "a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993) (internal quotation marks and citations omitted). In the context of witness-production issues, the factors to be considered in determining whether a witness is necessary include: "the issues involved in the case and the importance of the requested witness to those issues; . . . whether the witness's testimony would be merely cumulative; and the availability of

alternatives to the personal appearance of the witness.” *United States v. McElhaney*, 54 M.J. 120, 127 (C.A.A.F. 2002) (citations omitted). The timeliness of the defense’s request may also be considered. *Id.* (citations omitted).

If an appellant is entitled to the production of a witness, the erroneous denial of such production will not require relief if we are convinced the error was harmless beyond a reasonable doubt. *United States v. Shelton*, 62 M.J. 1, 3 (C.A.A.F. 2005) (citing *United States v. Powell*, 49 M.J. 220, 225 (C.A.A.F. 1998)).

3. Analysis

a. Compelling Ms. KT to Answer Questions

The thrust of Appellant’s argument on appeal is that Ms. KT improperly withheld her mother’s contact information from the Defense and that the military judge erred in allowing her to testify without first disclosing that information. Appellant also argues that although Ms. KT was not a party to the court-martial, she “should be viewed as a party, or at the very least, a quasi-party, to the proceeding” based upon the rights afforded to crime victims—and she was therefore bound by discovery rules.

Analysis of Appellant’s allegation of error is complicated by the fact that Appellant does not precisely identify what the error was or who committed it. In his pleadings before this court, Appellant framed this assignment of error as the military judge erring by “failing to compel [Ms. KT] to answer relevant questions to remedy her obstruction of access to witnesses and evidence.” Yet, at no point during Appellant’s court-martial did the Defense ask the military judge to compel Ms. KT to answer any

particular questions. When Ms. KT testified during the trial, she admitted she had withheld information from the Defense and that she had urged her father to do the same. But Ms. KT did not refuse to answer any questions put to her, nor did the Defense ask the military judge to compel her to answer any.

During the earlier motions hearing, the Defense sought two forms of relief regarding Ms. KT via written motion: (1) to abate the proceedings on the specification related to Ms. KT until Ms. KT agreed to be interviewed by the Defense, and (2) to order the Government to subpoena Ms. KT's mother for trial. As to the first form of relief, the Defense's argument was that Ms. KT had agreed to be interviewed by the Government while declining to be interviewed by the Defense, thereby depriving the Defense of the equal opportunity to interview witnesses. Despite conceding the military judge had no authority to compel such an interview, the Defense asked him to abate the proceedings until she submitted to an interview. The motion did not, however, seek to require Ms. KT to divulge her mother's contact information or any other particular matter, nor did it indicate any particular topics the Defense wished to ask Ms. KT about in the interview.

With respect to the production of Ms. KT's mother, trial defense counsel asked to call Ms. KT to testify on the motion so that they could ask her about the substance of her phone call with her mother. Trial defense counsel did not, however, specifically indicate what information they intended to elicit from Ms. KT, much less whether they wished to ask her for the contact information while she was on the stand. The military judge declined to receive evidence on the motion, short-circuiting the Defense's effort to

question Ms. KT at all, so we can only speculate about what specific questions trial defense counsel might have wanted to ask Ms. KT. The military judge did, however, expressly state the Defense would be permitted to cross-examine Ms. KT during the findings portion of the trial about the fact she did not want her mother to be interviewed by the Defense.

At the close of the Government's case—when the Defense asked the military judge to either strike Ms. KT's testimony or dismiss the sexual assault specification pertaining to Ms. KT—the Defense did not argue that Ms. KT had refused to answer any particular question or that the military judge should have compelled her to provide any information. Instead, the Defense's arguments were: (1) that the Government failed to disclose that Ms. KT lied to Appellant when she told him via text that she was talking to her mother, when in fact she was talking to a friend; and (2) that Ms. KT's refusal to be interviewed resulted in a "trial by ambush."

We are somewhat stymied by Appellant's claim that the military judge abused his discretion by not compelling Ms. KT to "answer relevant questions," because she never refused to answer any questions, and the Defense never asked the military judge to compel her to do so. During oral arguments in this case, Appellant asserted his claim of Ms. KT not being compelled to answer relevant questions should be read as an allegation the military judge erred by not allowing the Defense to call Ms. KT to the stand for the purposes of the motion.

Had the military judge simply permitted the Defense to present evidence on this motion by way of Ms. KT's testimony, we would actually know what

questions Ms. KT did or did not answer, and we would have clearer understanding of the relevance of Ms. KT's mother's testimony. Instead, the military judge decided the motion based upon the proffers of counsel, even though the better practice is to permit counsel to call witnesses and present actual evidence. *See, e.g., United States v. Stubbs*, 23 M.J. 188, 195 (C.M.A. 1987). Nevertheless, it is not necessarily an abuse of discretion to accept undisputed representations of counsel for purposes of deciding motions. *See, e.g., United States v. Vanderwier*, 25 M.J. 263, 266 n.3 (C.M.A. 1987). In the end, the only indication we have as to what exactly trial defense counsel wished to ask Ms. KT about—besides her declining to interview with the Defense—is trial defense counsel's ambiguous statement that they “have an issue” regarding “evidence in conversation with her mother happens [sic] both very approximate [sic] in time to the charged event.” This statement is far too vague for us to determine what questions the Defense wanted to put to Ms. KT, and we see no basis for concluding the military judge abused his discretion by denying the Defense the ability to call her as a witness on the motion.

b. Ms. KT's Refusal to Submit to Pretrial Interview

At trial and on appeal, Appellant has correctly conceded Ms. KT was under no obligation to submit to a pretrial interview. *See United States v. Morris*, 24 M.J. 93, 95 (C.M.A. 1987). Similarly, in the absence of evidence that trial counsel was involved in Ms. KT's refusal to be interviewed by the Defense, there is no basis for finding an Article 46, UCMJ, violation. *Id.*; *see also United States v. Killebrew*, 9 M.J. 154, 160 (C.M.A. 1980) (citations omitted) (noting that a

witness may refuse to answer defense questions as long as the Government did not induce the refusal). “No *party* may unreasonably impede the access of another party to a witness or evidence.” R.C.M. 701(e) (emphasis added). However, Ms. KT was a not a “party.” See R.C.M. 103(17) (defining “party” as the accused, defense counsel, trial counsel, and agents acting on their behalf).²⁷ We reach the same conclusion regarding her special victims’ counsel who represented not the Government, but Ms. KT herself. And given that Appellant has not alleged—and there is no evidence to support—that the Government possessed and failed to turn over the information Appellant sought, there has been no *Brady* violation.

c. Ms. KT’s Withholding of Her Mother’s Contact Information

As a result of the foregoing, we are left with a situation in which Ms. KT, a civilian victim, sought to prevent the Defense’s access to a witness—her mother. Because the Defense did not seek to compel Ms. KT to provide her mother’s contact information, the question becomes whether the military judge erred by not *sua sponte* compelling Ms. KT to disclose it. We conclude he did not. While military judges are not potted plants, they must remain impartial, and we see no error—plain or otherwise—in a military judge refraining from seeking discovery for one party’s

²⁷ Appellant asks us to consider Ms. KT to be a party or a “quasi-party” based upon the fact crime victims have been afforded certain rights with respect to courts-martial. Appellant cites no authority for this proposition, and we are aware of none. We decline to extend the definition of “party” beyond that found in R.C.M. 103(17).

benefit when that party has not requested the military judge's help in securing it in the first place.

d. Denial of the Defense's Motion to Produce Ms. KT's Mother

In spite of Appellant framing this issue as one in which Ms. KT should have been compelled to provide her mother's contact information, the more pertinent question seems to be whether the military judge erred in not ordering production of Ms. KT's mother for trial pursuant to the Defense's motion. We asked the parties to provide oral argument on this point.

We conclude that the military judge's ruling was erroneous insofar as he determined Ms. KT's mother was unavailable under Mil. R. Evid. 804(a). Under that rule, a witness is "unavailable" when she either refuses to testify about the subject matter *despite an order from the military judge to do so*; or when she is absent and her presence cannot be procured *by process or other reasonable means*. In this case, the military judge never ordered Ms. KT's mother to testify, nor did he direct the Government to explore any means at all to secure her presence. Despite having the ready ability to require trial counsel to seek Ms. KT's mother's presence at trial, the military judge simply found that Ms. KT's mother was unavailable without providing any explanation for how he reached that conclusion. Ms. KT's desire that her mother not testify is inadequate to establish her mother's actual unavailability; even if Ms. KT's mother was reluctant to testify—which, of course, there is no direct evidence so indicating—the standard for unavailability would be that she *refused* to testify after being ordered to do so, she was not amenable to process, or her presence could not be procured by other reasonable means.

Because the military judge erred in finding Ms. KT's mother "unavailable," he thereby applied the wrong standard for deciding whether to order her production. Under R.C.M. 703(b)(1), Appellant had the right to the production of any witness whose testimony on a matter in issue would be relevant and necessary. Once a witness was deemed unavailable, however, Appellant was only entitled to relief upon meeting the heightened standard of demonstrating the witness's testimony was "of such central importance to an issue that it [was] essential to a fair trial." The military judge determined Appellant had not met this higher standard and was, therefore, entitled to no relief. By incorrectly finding Ms. KT's mother unavailable, the military judge applied the wrong standard to analyzing the question of whether he should order Ms. KT's mother's production. That is, instead of correctly deciding Appellant's motion to order the production of Ms. KT's mother, the military judge erroneously analyzed whether Appellant was entitled to relief based upon Ms. KT's mother's purported unavailability.

In employing the incorrect standard regarding a witness who had not actually been shown to be "unavailable," the military judge abused his discretion insofar as his analysis was predicated on an erroneous view of the law. This does not end our inquiry, as we next ask whether Appellant was entitled to Ms. KT's mother's production. Answering that question is difficult, as the military judge hobbled the Defense's attempt to demonstrate the relevancy of her testimony when he declined to permit the Defense to call Ms. KT to testify about her conversation with her mother. Instead, the military judge largely decided the production motion not upon evidence, but upon the

proffers of counsel—proffers which were vague in light of the fact the Defense had never been able to talk to either Ms. KT or—because of Ms. KT’s efforts—Ms. KT’s mother.

For the purposes of this appeal, we will assume, without deciding, that Ms. KT’s mother’s testimony would have been relevant and necessary on the merits, and Appellant was therefore entitled to have her produced. As a result, the issue becomes whether the military judge’s denial of her production was harmless beyond a reasonable doubt. We conclude that it was. Whatever Ms. KT’s mother might have said about influencing her daughter with regards to Ms. KT’s report of sexual assault, Appellant’s text messages largely corroborate Ms. KT’s testimony that Appellant in fact assaulted her. In those messages, Appellant said he “got carried away,” that he was “so sorry for what happened,” that he “regret[ted] everything,” and that it was “the biggest mistake [he had] ever made.” Two days later, he texted Ms. KT saying he had had time to think about “what [he] did,” that he “regret[s] it so much,” that he would “never do that again,” and that he “respect[s her] boundaries.” He wrote: “I wish it never happened. I wish I would have never did that.” Any ambiguity in those texts is removed by other texts in which Appellant responds to a question from Ms. KT asking him why he did “that”—he replied, “I think that in that moment I wanted to have sex with you again. And when it was happening it felt really good;” “I wasn’t listening in that point of time and I was being selfish as to how you felt. I should have stopped and listened to you;” and, “It’s your body and you have the right to say no.”

Based upon Ms. KT’s testimony about the assault and Appellant’s own words in the following days, we

conclude the denial of Ms. KT's mother's production was harmless beyond a reasonable doubt. *See United States v. Hall*, 58 M.J. 90, 94–95 (C.A.A.F. 2003).

**c. Reconsideration of the Mil. R. Evid.
412 Ruling**

As discussed above in Section II.A.1.c., *supra*, the military judge *sua sponte* reconsidered his ruling under Mil. R. Evid. 412 regarding Appellant's and Ms. KT's relationship in the midst of the Defense's opening statement. Appellant asserts this reconsideration was erroneous, and he argues that he was prejudiced by the reconsideration insofar as it occurred while trial defense counsel was delivering the Defense's opening statement, thereby "disturbing the flow of information and impact" of that presentation. Appellant theorizes that "[t]he members were more than likely left wondering what had happened and what the Defense did wrong" to result in trial counsel's objection and the ensuing 30-minute delay—in part because the military judge did not explain anything to them about trial counsel's objection or the delay when they returned to the courtroom. The Government contends this is "pure speculation" and that the military judge's as-reconsidered ruling was more appropriate than his original ruling. We note that trial defense counsel neither requested any particular instruction nor sought any other relief as a result of the ruling's reconsideration.

Appellant does not argue that the military judge's reconsidered ruling on the Mil. R. Evid. 412 motion was incorrect. Instead, he argues the military judge erred in deciding to reconsider the original ruling.

1. Law

Under R.C.M. 905(f), the military judge may reconsider any ruling—other than one amounting to a finding of not guilty—either upon the request of a party or *sua sponte*. Military judges must be sensitive to the possibility that reconsidering an earlier ruling favorable to the defense may unduly prejudice an accused or otherwise raise the question of whether a mistrial is appropriate. *See United States v. Cofield*, 11 M.J. 422, 431 n.14 (C.M.A. 1981). We review a military judge’s decision to reconsider a ruling for abuse of discretion. *See, e.g., United States v. Newhouse*, No. ACM 38019 (recon), 2014 CCA LEXIS 660, at *10 (A.F. Ct. Crim. App. 4 Sep. 2014) (unpub. op.) (“The fact that a ruling upon reconsideration differs from an initial ruling does not necessarily compel a finding that either was an abuse of discretion.”).

2. Analysis

Although the military judge’s handling of this matter left a great deal to be desired, he had the inherent authority to reconsider his original ruling at any point during Appellant’s court-martial. Because Appellant does not argue the military judge’s as-reconsidered ruling on the Mil. R. Evid. 412 issue was erroneous, our focus is on whether the military judge abused his discretion in electing to reconsider the motion or whether he unfairly prejudiced Appellant in doing so. We conclude he did neither.

At the point of trial counsel’s objection, trial defense counsel had just told the members that Appellant and Ms. KT had “consensual sex on multiple occasions the first week.” The military judge’s written ruling originally permitted the parties

to elicit evidence as to a specific number of times Appellant and Ms. KT engaged in sexual intercourse, but his reconsidered ruling barred any evidence “regarding frequency.” Because trial defense counsel did not actually comment on the specific number of instances of sex prior to the objection, the military judge’s reconsidered ruling did not create the situation wherein the Defense promised to present evidence of a fact they would no longer be permitted to prove. Instead, the Defense’s case was prospectively limited to a degree, although Appellant does not argue that his defense was prejudiced in any substantive way by the new ruling. Thus, we do not see any indication Appellant’s presentation of his overall case was impacted by the substance of the reconsidered ruling, and we perceive no unfair prejudice from there being a reconsideration at all. That conclusion is further bolstered by the fact that the military judge never told the members that he had, in fact, sustained the Government’s objection to the “multiple occasions” comment, which meant the members were never told to disregard or otherwise minimize trial defense counsel’s comment.

We agree that the extended break during the Defense’s opening statement likely left the members wondering what was going on, but that is generally true of all Article 39(a), UCMJ, sessions during which members are directed to leave the courtroom. As is typically done, the military judge in this case told the members in his initial instructions that there would be hearings outside of their presence, and he asked for their patience and understanding when those hearings occurred. This tells us the members were generally aware they would be asked to leave the courtroom on occasion in order for the military judge

to resolve matters. Appellant has provided no evidence the members drew any conclusion adverse to his case based on this particular session, and we will not infer they did, especially in light of the fact that not only did this occur very early in the trial, but the military judge never informed the members he had ruled adversely to the Defense. Plainly, a better approach would have been to accurately establish the parameters of the allowable evidence prior to opening statements so that the parties had a degree of clarity on how to frame their respective cases, but we see no unfair prejudice to Appellant under the facts presented here. Thus, Appellant is entitled to no relief on this ground.

D. Military Judge's Instructions on Attempted Sexual Assault

On appeal, Appellant argues the military judge erred when he declined the Defense's request to specify in his instructions to the members which overt acts the Government needed to prove in order to establish Appellant had attempted to sexually assault Ms. ES as alleged in the Specification of Charge II. Although we disagree with Appellant's argument as he frames it, we conclude the military judge's instructions were incorrect and that Appellant's conviction on this specification cannot stand.

1. Additional Background

In July 2018, Ms. ES and Appellant had been together about five years and married for the last two of those years. The marriage, however, was not going well, and the two had talked about divorcing. Ms. ES was also making arrangements to fly to her parents' home in California with no immediate plans to return

to the house she shared with Appellant in Washington.

Although Ms. ES could not remember the exact date, she testified that one night in July 2018 she was laying on the couch when Appellant came home at the end of his typical mid shift—a shift which she said ended at 2200 hours.²⁸ According to her testimony, Appellant took off his uniform jacket and hat and then walked over to her, got down on his knees in front of the couch so that his waist was “probably on level with the couch,” and tried to kiss her despite her saying “no.” She testified, “And he kept trying to kiss me and he was touching me and I was telling him to stop.” She said Appellant then “grabbed [her] arms and held them together with one of his hands” while he “was touching [her] all over” as she was “asking him to stop.” Ms. ES said she was “struggling” with Appellant, but he was able to “move[her] leg open so that he can get in between [her] legs,” while still touching and trying to kiss her. During the struggle, Ms. ES said she could feel Appellant’s erect penis on her vagina through their respective clothing. Ms. ES kept telling Appellant to stop, at which point Appellant “grabbed both of [her] arms” and said, “[N]o, you stop,” and then “shook” her, finally “[throwing her] leg to the side.” Ms. ES testified Appellant “shuffle[d] back on his knees . . . to get out.” She “closed [her] legs,” and then Appellant said, “[Y]ou’re my wife so I can take it if I want to.” A photograph of a bruise on Ms. ES’s right forearm was

²⁸ One of Appellant’s co-workers, as well as his roommate, who was the shift lead, testified the mid shift ended at 2300 hours, not 2200.

admitted as evidence of an injury she sustained during the struggle.

A few days after the assault, Ms. ES called her brother, Mr. AK, and told him what had occurred. Mr. AK then called Appellant to hear his version of events. Mr. AK testified that during that call, Appellant admitted grabbing Ms. ES's wrists, holding her down and trying to kiss her and said that "[h]e wanted to have sex with his wife to see if there's anything still there emotionally."

Based on these events, Appellant was charged with committing abusive sexual contact on Ms. ES by touching her vulva with his penis through their clothing with an intent to gratify his sexual desire, without her consent, and by causing her bodily harm by so touching her. He was also charged with attempting to sexually assault her with a specification which alleged Appellant "did . . . attempt to commit a sexual act upon [Ms. ES], to wit: penetrating her vulva with his penis, by causing bodily harm to her, to wit: penetrating her vulva with his penis, without her consent."

Appellant was acquitted of the former and convicted of the latter. As discussed in Section II.A.1.a., *supra*, the Defense unsuccessfully sought the pretrial dismissal of the attempted sexual assault specification under the theory that it did not provide Appellant with adequate notice of how he was being accused of attempting to commit the offense. Essentially, the Defense argued the Government had failed to allege in the specification what particular act Appellant had taken in furtherance of the attempt.

Once the Government rested, the Defense moved the military judge to enter a finding of not guilty for

the attempted sexual assault specification. In this mid-trial motion, trial defense counsel argued the evidence was insufficient to show Appellant had taken a substantial step towards committing sexual assault, which had been charged as Appellant penetrating Ms. ES's vulva with his penis and causing her bodily harm by doing the same without her consent. The Defense's first argument was that—even accepting Ms. ES's testimony that Appellant had held her arms and kissed her—such conduct did not amount to a substantial step towards committing the charged conduct of attempting to penetrate Ms. ES's vulva with his penis, especially in light of the fact both Ms. ES and Appellant were fully clothed. The Defense's second argument was rooted in the notion that Appellant never intended to sexually assault Ms. ES because he did not try to penetrate her vulva with his penis, and not because he was thwarted by “unexpected intervening circumstances.” The Defense's hypothesis seemed to be that the most Appellant intended to do was touch Ms. ES with his penis, through their respective clothing.

The military judge denied the Defense's motion, finding that Ms. ES's testimony established that Appellant “initiated contact by getting on top of her, forcing her legs apart, kissing her, holding her wrist, touching her body, and trying to remove her clothing.”²⁹ He concluded this was “at least some evidence that would amount to more than mere preparation . . . and could be considered a substantial step towards the commission of the offense of sexual assault.” The military judge further noted Appellant's

²⁹ Ms. ES never testified that Appellant either got on top of her or tried to remove her clothing during the episode.

statement that he could “take it,” along with his comments to Ms. ES’s brother, indicated Appellant’s desire to engage in “sexual activity” with Ms. ES. Finally, the military judge found that Ms. ES’s resistance to Appellant’s advances was “at least some evidence of an intervening cause or circumstance that would prevent completion of the offense.”

Although the specification did not allege a particular act committed by Appellant in furtherance of his attempt, the military judge proposed to instruct the members:

In order to find the Accused guilty of this offense you must be convinced by legal and competent evidence beyond a reasonable doubt, 1) That at or near Spokane, Washington, on or about 18 July 2018, the Accused did a certain act, that is: attempt to commit a sexual act upon [Ms. ES], to wit penetrating her vulva with his penis, by causing bodily harm to her, to wit: penetrating her vulva with his penis without her consent; 2) That the act was done with specific intent to commit the offense of sexual assault; 3) That the act amounted to more than mere preparation, that is, it was a substantial step and a direct movement toward the commission of the intended offense; 4) That such act apparently tended to bring about the commission of the offense of sexual assault, that is the act apparently would have resulted in the actual commission of the offense of sexual assault except for an unexpected intervening circumstance

which prevented completion of that offense.

In defining preparation, the military judge proposed:

To find the Accused guilty of this offense you must find beyond a reasonable doubt that the Accused went beyond preparatory steps and his acts amounted to [a] substantial step [and] a direct movement toward the commission of the intended offense. A “substantial step” is one that is strongly corroborative of the Accused[s] criminal intent and is indicative of his resolve to commit the offense. Proof that the offense of sexual assault actually occurred or was completed by the Accused is not required, however it must be proved beyond a reasonable doubt that at the time of the acts the Accused intended every element of sexual assault.

Trial defense counsel objected to the proposed instructions because they did not specify what the “certain acts” were that Appellant allegedly committed which tended to bring about the commission of the offense of sexual assault. Trial defense counsel further pointed to the instruction in the *Military Judge’s Benchbook*³⁰ that calls for specifying such acts for the members. In the *Benchbook*, the model instruction employs the following template for an attempted offense:

³⁰ Department of the Army Pamphlet 27-9, *Military Judges’ Benchbook* (10 Sep. 2014) (*Benchbook*).

(1) That . . . the accused did (a) certain act(s), *that is: (state the act(s) alleged or raised by the evidence)*; (2) That the act(s) (was) (were) done with the specific intent to commit the offense of (state the alleged attempted offense); (3) That the act(s) amounted to more than mere preparation, that is, (it was) (they were) a substantial step and a direct movement toward the commission of the intended offense; and (4) That such act(s) apparently tended to bring about the commission of the offense of (state the alleged attempted offense), (that is, the act(s) apparently would have resulted in the actual commission of the offense of (state the alleged attempted offense) except for (a circumstance unknown to the accused) (an unexpected intervening circumstance) (_____) which prevented completion of that offense).

Department of the Army Pamphlet 27-9 at 177, *Military Judges' Benchbook* (10 Sep. 2014) (*Benchbook*) (emphasis added).

The Government opposed identifying any specific acts which might amount to a substantial step in the instructions. The military judge said the Defense's objection was "definitely noted," but that he would not modify his proposed instructions. He explained:

It is for the members to determine after considering all the evidence, whether or not the acts that constitute the attempted offense[,] i.e.[,] the substantial step toward the movement of

that offense. Whether or not those acts actually meet that element or not is for them to decide and for the [c]ourt to essentially sit down and plug in all of the evidence that may have come out during the trial that the [c]ourt anticipates the Government may argue constitutes evidence of a substantial step. I think would be[,] number one would be somewhat improper for the [c]ourt to plug that in there because of the suggestion that the [c]ourt[']s dictating to the members the scope of the evidence that they can consider[a]s evidence amounting to a substantial step, but again I do not want to intrude on their ability to decide on their own based on the evidence presented and how [c]ounsel characterize and argue that evidence[, w]hat actually constitutes more than a mere preparation or substantial step.

And so therefore, and based on samples and examples that I have reviewed in the past. [sic] While there may be a circumstance depending on the type of offense charged where it is drafted differently in this particular offense. [sic] I am comfortable plugging in the attempt, the actual nature of the offense that has been attempted. And then leave it to the parties to characterize with regard to elements two and three, excuse me three really, three and four, whether

or not the evidence presented meets those elements.

The military judge gave the members the instructions as he had originally proposed. In the Government's closing argument, trial counsel argued, "You either believe that the Accused did a certain number of acts, kissing, and touching, and all that right, a substantial step toward having sex with Ms. [ES] or you do not. I do not know how much more I can say about it."

When the members returned their verdict acquitting Appellant of abusive sexual contact, but convicting him of attempted sexual assault, trial defense counsel moved the military judge to declare a mistrial, explaining that their

principal concern permeating all of this is that there were no specific acts pled in the Specification of Charge II. . . . [T]here was never any specific articulation in the pleading or otherwise that put [Appellant] on notice of the exact things that he would have done to contemplate or actually complete the attempt.

In addition to asserting Appellant was prejudiced by a lack of notice and that the members' findings were inconsistent, trial defense counsel said the military judge's instruction "caused confusion in such a way and did not properly guide the members on making findings of specific acts." In discussing the matter with counsel, the military judge said,

The act and I know it sounds inconsistent but I didn't see anything—any legal authority to say otherwise. The act is actually the effort to penetrate the

vagina with the penis. That's the act. Whether or not he noticed [sic] substantial step towards completing that act, tried to take off clothes, kissed, held arms, et cetera, those are—that's all facts and circumstances that the members are free to consider when deciding whether or not there was a substantial step towards completion of the act. There is no requirement and we've been over this in the failure to state an offense motion. There is no requirement for the [G]overnment to plead all of that information

In their written motion for a mistrial, trial defense counsel argued that the military judge's failure to specify particular acts raised by the evidence in his instructions amounted to "an abdication of the judicial role in a members findings case," because doing so "essentially nullified the members having to find anything" with respect to the first element of the offense. In his ruling, the military judge indicated he relied upon *United States v. Payne*, 73 M.J. 19 (C.A.A.F. 2014), to assess the sufficiency of his instructions to the members on the attempt charge, asserting the military judge in that case had instructed the members on the first element "identically" to how he had.³¹ He also concluded that—

³¹ Contrary to the military judge's statement, the military judge in *Payne* did instruct the members regarding what the "overt act" was in that case, as the overt act was charged in the pertinent specification. 73 M.J. at 24. The United States Court of Appeals for the Armed Forces concluded other aspects of the military judge's instructions on the attempt specification in *Payne* amounted to plain error. *Id.* at 25.

because the Government was not required to allege the specific overt acts it intended to prove in order to establish an attempt charge—the Defense had not shown that a mistrial was “manifestly necessary in the interests of justice.”

2. Law

In charging an attempted offense under the UCMJ, it is not necessary to allege the overt act or the elements of the underlying predicate, or target, offense, as long as the accused is adequately on notice of the nature of the offense. *United States v. Norwood*, 71 M.J. 204, 206–07 (C.A.A.F. 2012) (citations omitted).

Military judges have a duty to provide instructions which deliver “an accurate, complete, and intelligible statement of the law.” *Behenna*, 71 M.J. at 232 (citations omitted). Instructions must be “clear and correctly conveyed.” *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011). We review instructions given “to determine if they sufficiently cover the issues in the case and focus on the facts presented by the evidence.” *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002) (quoting *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996)). “Whether a panel was properly instructed is a question of law reviewed de novo.” *United States v. Hale*, 78 M.J. 268, 274 (C.A.A.F. 2019) (quoting *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011)). Military judges are required to instruct members on the elements of charged offenses. R.C.M. 920(e)(1).

Instructional errors with constitutional dimensions are tested for prejudice against the standard of “harmless beyond a reasonable doubt.” *United States v. Upshaw*, 81 M.J. 71, 74 (C.A.A.F.

2021) (citation omitted). “This standard is met ‘where a court is confident that there was no reasonable possibility that the error might have contributed to the conviction.’” *Id.* (citing *United States v. Prasad*, 80 M.J. 23, 29 (C.A.A.F. 2020) (quoting *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019))).

3. Analysis

On appeal, Appellant concedes the Government was not required to allege any particular overt acts in its charging document, but he argues it was error for the military judge to not list any overt acts in his instructions. Appellant largely points to the *Benchbook* guidance that the military judge should specify the overt acts for the members to consider. The Government responds that the *Benchbook* is merely guidance, and it was within the military judge’s discretion whether to identify such facts for the members. The Government also notes that neither of the parties at trial proposed any specific overt acts for the military judge to incorporate into his instruction.³²

We agree the military judge deviated from the model instruction in the *Benchbook* by not identifying any particular “certain acts” that the Appellant did with the specific intent to commit the offense of sexual assault, but Appellant cites to no authority requiring the military judge to specify these acts for the members in his instructions, and we are aware of none. The *Benchbook* may provide useful guidance to

³² Considering the Defense had protested both in pretrial motions and throughout the duration of Appellant’s court-martial that the Government had failed to explain what overt acts were being offered to prove the attempted sexual assault offense, it is not particularly noteworthy that the Defense did not volunteer to fill that perceived void for the Government.

military judges, but military judges are not required to follow it. *See, e.g., United States v. Simpson*, 58 M.J. 368, 378 (C.A.A.F. 2003) (noting military judges are “not required to follow literally the non-binding examples” in the *Benchbook*). The fact the Government is not required to allege any specific act in its charging instrument somewhat undercuts Appellant’s argument that the military judge was required to identify such acts for the members. The members, however, were required to find that Appellant did do a certain act; that the act was done with the specific intent to commit an offense under the UCMJ; that the act amounted to more than mere preparation; and that the act tended to effect the commission of the intended offense. 2016 *MCM*, pt. IV, ¶ 4.b.

The flaw here is that—contrary to what he said to the parties at the time— the military judge *did* instruct the members what “certain act” they had to find. He told them they had to be convinced Appellant did the certain act of “attempt[ing] to commit a sexual act upon [Ms. ES], to wit penetrating her vulva with his penis, by causing bodily harm to her, to wit: penetrating her vulva with his penis without her consent.” He further told them that in order to find Appellant guilty, they must be convinced beyond a reasonable doubt that this act “apparently tended to bring about the commission of the offense of sexual assault.” Thus, the “certain act” identified by the military judge in the first element was the same as the “target” offense of sexual assault in the fourth element.³³ As a result, the military told the members

³³ The military judge himself appeared to acknowledge that he had instructed as such. When discussing the Defense motion for a mistrial, the military judge stated: “The act and I know it

they had to conclude Appellant committed the act of attempting to sexually assault Ms. ES, and that this attempted sexual assault tended to bring about the commission of the offense of sexual assault. In sum, the instructions set up the paradox of Appellant being convicted of attempting to sexually assault Ms. ES based upon Appellant taking the substantial step of attempting to sexually assault her.

Although the military judge was not obligated to identify in his instructions any particular overt act committed by Appellant in furtherance of the attempt, his decision to do so required him to give an instruction which amounted to “an accurate, complete, and intelligible statement of the law.” *Behenna*, 71 M.J. at 232. Here, the military judge’s instruction called for entirely circular reasoning, instructing the members to determine whether Appellant attempted to sexually assault Ms. ES when he carried out the act of attempting to sexually assault her. Moreover, in light of the requirement to prove Appellant specifically intended to sexually assault Ms. ES in the manner charged, it is entirely unclear how the members could follow the military judge’s instruction that they had to be convinced that Appellant attempted to sexually assault Ms. ES with the specific intent to commit sexual assault in the exact same manner he attempted to do so, and that the attempted sexual assault was a substantial step towards committing the same sexual assault. Compounding this issue, by defining the “certain act” as the charged offense, the military judge effectively

sounds inconsistent but I didn’t see anything—any legal authority to say otherwise. The act is actually the effort to penetrate the vagina with the penis. That’s the act.”

relieved the members of their obligation to identify a certain act committed by Appellant in furtherance of his alleged intentional attempt to sexually assault Ms. ES—essentially reading an element entirely out of the offense.³⁴

Finding error, we are confronted with the question of whether the error was harmless beyond a reasonable doubt. We conclude it was not. Unlike the situation in which a military judge omits an element which is fairly encompassed by the remainder of the instructions, the military judge here directed the members to an incorrect evidentiary burden. In instructing on the first element, the military judge identified the “certain act”—the predicate act for the attempt offense—as the ultimate offense. Significantly, each of the remaining three elements, as instructed by the military judge, related back to that certain act which the military judge had explicitly identified. For example, for the third element, the military judge told the members they must be convinced that the “certain act” amounted to a substantial step towards the commission of the intended offense. Because the intended offense was the same as the “certain act” under these instructions, the members were faced with either a tautology or an impossibility in evaluating this element. That is the case because a preparatory step is, by definition, an intermediate point along a path that terminates at the ultimate destination of the intended offense. Yet the

³⁴ To be clear, we do not hold military judges are required to identify particular overt acts in their instructions in every court-martial involving an offense alleged as an attempt. Rather, we hold that when a military judge elects to do so, he or she must ensure those instructions amount to an accurate, complete, and intelligible statement of law.

members here were told the preparatory step was the same as the intended offense, entirely eliminating the notion of a preparatory step. The same is true of the second element, in which the certain act must be accomplished with the specific intent to commit the intended offense, as well as the fourth element, in which the same certain act must tend to bring about the intended offense.

The Government asserts that the evidence against Appellant was overwhelming in support of its argument that we should find any instructional error harmless. We are not so convinced. The evidence was strong in terms of proving Appellant struggled with Ms. ES while she lay on the couch, but evidence that Appellant specifically intended to penetrate her vulva *without her consent* is far from conclusive. We are also mindful of the fact the members acquitted Appellant of committing abusive sexual contact during this episode. In any event, we presume the members followed—or at least attempted to follow—the military judge’s instructions. *See United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000). In doing so, if the members concluded Appellant committed the “certain act” of attempting to sexually assault Ms. ES, as the military judge explained was required for the first element, then the remainder of the elements would simply fall by the wayside as a result of their own internally circular reasoning. This would pave the way for a finding of guilty without careful analysis of each element.

We conclude the military judge’s instructions amounted to an erroneous statement of the law, and because we are not privy to what the members made of the instructions, we cannot be confident their verdict was not a product of this error. Therefore, we

cannot find the error harmless beyond a reasonable doubt. We will accordingly we will set aside Appellant's conviction on this specification and set aside his sentence.³⁵

E. Completeness of the Record of Trial

Appellant argues his record of trial is defective and incomplete based on a variety of alleged deficiencies discussed in greater detail below.

1. Additional Background

The court reporter detailed to Appellant's court-martial was removed from his court-reporter duties a few weeks after Appellant was sentenced. Presumably due to the court reporter's absence, the military judge certified the record of trial on 20 November 2019. On 7 January 2020, trial counsel certified the transcript stating he had reviewed the transcript in its entirety and that he determined "it is an accurate reflection of the proceeding of the court." The memorandum also notes what software the originally detailed court reporter had used.

³⁵ We recognize that, in at least two other cases reviewed by this court, military judges gave similar instructions on attempt offenses. *See United States v. Brown*, No. ACM 39728, 2021 CCA LEXIS 414, at *12 (A.F. Ct. Crim. App. 16 Aug. 2021) (unpub. op.); *United States v. Little*, No. ACM 38338, 2014 CCA LEXIS 689, at *10 (A.F. Ct. Crim. App. 19 Sep. 2014) (unpub. op.). Neither of those unpublished opinions addressed the propriety of the instructions' identifying the predicate act as the same as the target offense. We note that both cases involved convictions for attempt as a lesser-included offense of a charged offense. For these reasons, those two cases provide little guidance for our resolution of Appellant's case.

2. Law

Whether a record of trial is complete is a question of law we review de novo. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000).

Appellant's charges were referred to a general court-martial on 12 April 2019, which is after the 1 January 2019 effective date of the Military Justice Act of 2016. *See* Executive Order 13,825, § 5. This act, *inter alia*, made substantial changes to the post-trial processing of courts-martial. Prior to 2019, a verbatim transcript would be prepared in any case with a sentence including either a punitive discharge or at least 12 months of confinement, and a record of trial was incomplete without such a transcript. R.C.M. 1103(b)(2)(B), 1103(b)(2)(D) (2016 *MCM*). In the event a verbatim transcript could not be prepared due to loss of recordings or notes or for some other reason, a convening authority had the option of either ordering a rehearing or only approving a sentence which included neither a punitive discharge nor more than six months of confinement. R.C.M. 1103(f) (2016 *MCM*). Once the record—to include the transcript—was prepared, the military judge would authenticate the record prior to its service on the accused and transmission to the convening authority. R.C.M. 1104 (2016 *MCM*).

Under the rules which went into effect 1 January 2019, the contents of a record of trial initially compiled at the conclusion of a court-martial no longer include a transcript of the proceedings—instead, a “substantially verbatim *recording*” of the proceedings is called for, R.C.M. 1112(b)(1) (emphasis added), a copy of which the accused is entitled to, R.C.M. 1106(c). In addition to the recording, a complete record

of trial includes such matters as the charge sheet, exhibits, the statement of trial results, and the judgment entered by the military judge. R.C.M. 1112(b), 1112(d)(2). The court reporter certifies the contents of the record of trial, but the military judge may certify the record if the court reporter is unable to do so. Art. 54(a), UCMJ, 10 U.S.C. § 854(a); R.C.M. 1112(c). If the record is found to be incomplete or defective prior to certification, the matter may be raised to the military judge for correction; after certification, the record may be returned to the military judge for correction. R.C.M. 1112(d)(2). Once the record of trial is certified, a copy is provided to the accused; however, sealed exhibits and recordings of closed sessions are omitted. Art. 54(d), UCMJ; R.C.M. 1112(e).

Under the rules now in effect, a certified verbatim transcript of a record of trial shall be prepared in any court-martial in which a punitive discharge or confinement for more than six months is adjudged. R.C.M. 1114(a)(1). The transcript is attached to the record of trial. R.C.M. 1114(d). This transcript, however, is not part of the original record of trial the court reporter certifies—instead, the transcript is attached to the record before the record is forwarded for appellate review. R.C.M. 1112(f)(1)(8). When such a transcript is prepared, the accused and his or her counsel may be provided a copy upon request. R.C.M. 1114(b), Discussion. A copy of the entire record and attachments, which would include the transcript, “shall be forwarded to a civilian counsel provided by the accused” upon written request of an accused. R.C.M. 1116(b)(1)(B).

Unlike the rules in place prior to 1 January 2019, the current rules have no provision granting sentence

relief in the case of a defective record of trial. Moreover, these rules contain no provision regarding the correction of inaccurate or incomplete transcripts.

3. Analysis

Appellant points to a number of purported deficiencies with the record of trial which we will address in turn.

First, Appellant contends the record of trial fails to include a video file which was never marked as an appellate exhibit or reviewed by the military judge. This video is discussed in greater detail below in Section II.F., *infra*. In short, the Defense sought permission in a Mil. R. Evid. 412 hearing to question Ms. KT about the contents of a particular video. Trial defense counsel commented that the military judge did not have a copy of the video, and he asked the military judge: “Does the [c]ourt require that or is the [c]ourt willing to take the proffer[?]” The military judge said he did not need to see the video to rule on the motion and that the video would not be attached to the record as an appellate exhibit. The military judge then denied the Defense’s motion.

A record of trial includes “any evidence or exhibits considered by the court-martial in determining the findings or sentence.” R.C.M. 1112(b). Nothing in this rule requires inclusion of items never viewed or considered by a military judge on an interlocutory matter. We are aware of no rule, precedent, or other legal authority requiring the attachment of such items to a record, and Appellant cites none. Appellant’s claim on this point is without merit.

Second, Appellant notes there are several comments in the court reporter chronology—included in the record—suggesting “various instances of

problems encountered” in the preparation of the record.³⁶ He highlights four particular entries—two entries indicate trial counsel located missing audio; the third states the audio and the “Log Notes” did not match; and the fourth says two of the days of transcript were reviewed “due to significant amounts of missing transcription.” Appellant, who has access to the original audio recording of his trial, does not contend the transcript is inaccurate in any way or that the final transcript omits any portion of the trial. Appellant does not explain the relevance, if any, of the comment about the audio and the notes not matching, and we see nothing in the record illuminating the matter. Even if Appellant were to demonstrate the transcript is inaccurate, the current Rules for Courts-Martial afford him no relief because it is the audio recording that is a component of the certified record of trial; the transcript is a matter attached for appellate review under R.C.M. 1112(f). While we can envision a transcript so inaccurate as to amount to prejudicial error, Appellant has not approached that threshold, and he is not entitled to relief based upon the four comments he identified in the chronology.

³⁶ The Government’s answer and Appellant’s reply brief both reference chronologies which were included in the record of trial docketed with our court. The parties have not taken a position as to whether these chronologies are part of the “record” as defined in R.C.M. 1112(b), “attachments for appellate review” under R.C.M. 1112(f), matters that we may consider because both parties have referenced them in their briefs, without objection, or something we may not consider on appeal under *United States v. Jessie*, 79 M.J. 437, 440–41 (C.A.A.F. 2020). We assume without deciding that we may consider the chronologies, as neither party objected to them at any point. See *United States v. Stanton*, 80 M.J. 415, 417 n.2 (C.A.A.F. 2021).

Third, although the military judge ordered numerous documents to be sealed during Appellant's court-martial, many were not in fact sealed when the record of trial was assembled. We are aware of this error, as we ordered the documents to be sealed once we discovered them in our review. According to Appellant, he received these documents, unsealed, when he received his record of trial in January 2020. While this was unquestionably an error denoting a lack of diligence in the preparation of the record of trial, Appellant has identified no prejudice he has suffered, and we are aware of none. As such, Appellant is entitled to no relief. Although we grant no relief, we pause to note that it was the military judge who certified this record of trial as being "accurate and complete" on 20 November 2019. The fact that he apparently did not notice the matters he ordered sealed were not actually sealed indicates his review was less than thorough.³⁷

Fourth, Appellant states the second page of the Defense's written motion for a mistrial is missing, having been replaced with an email. The record filed with this court, however, suffers no such infirmity—the second page of the motion in that record is the second page of the Defense's motion. Without objection from Appellant, the Government has provided this court with a certificate of receipt in which Appellant's military appellate defense counsel signed for receipt of "disc(s)" containing three items,

³⁷ We remind all involved with the preparation and certification of records of trial to approach these duties with the careful attention to detail which is warranted by the gravity of military justice proceedings. When matters filed under seal are subsequently released with no protection, the important policy reasons for sealing them are entirely compromised.

one of which was the second page of the motion in question. The receipt is dated 13 April 2021, which was more than a month after Appellant filed his assignments of error. Appellant, however, submitted a reply brief on 27 April 2021 and did not revisit this asserted error, indicating to us a lack of prejudice. Having reviewed the page, we conclude Appellant was not prejudiced, especially since he possessed the transcript of the on-the-record discussion of the matter and the military judge's ruling. Although Appellant's copy of the record should have included the missing page, we are not inclined to find prejudicial error from a single errant page out of a ten-volume record, especially when his counsel had the ready ability to inspect the record filed with this court that included the correct page.

Fifth, Appellant states the first segment of a video file of Ms. KT's law enforcement interview "does not play." In response, the Government notes that in the court-martial transcript, trial defense counsel told the military judge which particular video program to use to play back the recording. The Government also avers it gave Appellant's appellate counsel a new copy of the first segment of the interview on 13 April 2021. As with the missing motion page, Appellant did not readdress or attempt to demonstrate prejudice in his reply brief. We note that the recording in the record of trial docketed with this court was readily viewable using the software trial defense counsel specified at trial. Based upon the matters before us, we are unable to determine if Appellant received a corrupted copy of the video file or if his counsel was utilizing incompatible software when attempting to view it. In any event, Appellant has not demonstrated prejudice to his case, and we will not strain to find any.

Sixth, Appellant alleges his copy of the record “does not contain any of the exhibits that were included in the [record] on disc.” He identifies one exhibit in particular: Appellate Exhibit XLII. This exhibit, however, is not an electronic exhibit at all; it is a paper copy of a single page of notes taken from the Air Force Office of Special Investigation’s report of investigation concerning Appellant’s charged offenses. The only electronic evidence in the record docketed with our court is the video recording of Ms. KT’s interview with law enforcement agents, and we know Appellant received that item, as he complained about his inability to play the first segment of it. Appellant identifies no exhibits he has not been provided on a disc or otherwise, and we are aware of none. To the extent Appellant is asserting he received copies of paper exhibits only in an electronic format, we would find no prejudice so long as he received the exhibits in either format.

Seventh, Appellant argues a court reporter was required “to attest to the accuracy and completeness of the record of trial.” He submits that trial counsel’s certification was insufficient because trial counsel “lacked personal knowledge of the specific equipment and versions of the software used” either by the originally detailed court reporter or the other court reporters involved in the transcription. We note as an initial matter Appellant has failed to demonstrate that trial counsel did not actually know what equipment or software the court reporters used. Appellant bases his argument that a court reporter, and not trial counsel, must certify the transcript, on a provision found in Air Force Manual (AFMAN) 51-203, *Records of Trial* (4 Sep. 2018, as amended by Air Force Guidance Memorandum 2019-01, 9 May

2019).³⁸ We assume, even though Appellant argues here that a court reporter must certify the record of trial, that he is actually referring to the transcript, as the provision he highlights calls upon the court reporters involved to “certify[] the quality, authenticity of the transcript or portion of the transcript, and method used to transcribe the proceeding.” AFMAN 51-203, ¶ 14.14. This AFMAN and the related Guidance Memorandum explain they were issued by order of the Secretary of the Air Force, and compliance with both is mandatory. Given that neither document purports to authorize trial counsel to certify a transcript of court-martial proceedings, trial counsel’s certification here arguably ran afoul of their requirements. Appellant has identified no prejudice from this error, and we perceive none—especially because Appellant has access to the recording of his court-martial and he has not identified any transcription errors, let alone demonstrated how any such errors might have prejudiced him.

Lastly, Appellant argues that because of the foregoing claimed errors, “the entire record has been called into question,” and we should reassesses his sentence “to a level not exceeding that permissible in a trial reported by a non-verbatim transcript.” Appellant relies on the rules in place before 1 January 2019 for this proposition, but as explained above, that sentence remedy for a non-verbatim transcript no longer exists. Our reading of the applicable rules is that the audio recording is now the primary record of

³⁸ This was the version of the manual in effect at the time of Appellant’s court-martial. It has since been replaced by Department of the Air Force Manual 51-203, *Records of Trial* (21 Apr. 2021).

the proceedings, and the written transcript of those proceedings is created to facilitate appellate review. A record of trial is complete if it includes the required items listed in R.C.M. 1112(b), and Appellant has not demonstrated any of those items are actually missing, with the exception of a single page of one motion in Appellant's copy of the record of trial—as opposed to the original record which contains no such omission—an error from which Appellant asserts no prejudice, and has, in any event, been remedied. Even if the record was incomplete or defective, the remedy would not be to grant Appellant sentencing relief, but rather, to return the record for correction. Because we *sua sponte* ordered the Government to seal the unsealed matters in the record, the sole remaining defect is the fact the transcript was certified by trial counsel rather than by the court reporters, as required by AFMAN 51-203. Finding no prejudice to Appellant flowing from this shortcoming, we grant no relief. *See* Article 59(a), UCMJ, 10 U.S.C. § 859(a).

F. Military Judge's Ruling on Explicit Videos

Appellant personally raises the claim that the military judge erred in ruling evidence regarding sexually explicit mobile phone videos was inadmissible under Mil. R. Evid. 412.³⁹

1. Additional Background

Prior to trial, the Defense sought permission, via written motion, to admit evidence that Appellant and Ms. KT had recorded their consensual sexual conduct

³⁹ This issue was raised during a closed hearing, the transcript of which was sealed by the military judge. We limit our discussion of sealed material to that which is necessary for our analysis.

the weekend of the charged assault.⁴⁰ The Defense offered four theories for the admissibility of the evidence. First, the Defense argued the fact Appellant and Ms. KT recorded their conduct—taken together with all other consensual conduct between the two—was evidence Ms. KT actually consented to the conduct forming the basis of the alleged assault, or that Appellant was reasonably mistaken as to whether she had consented or not. Second, the Defense postulated that one or more of the videos might be recordings of the alleged assault itself and would be evidence no assault occurred. However, pointing to the Government’s denial of the Defense expert computer assistance, trial defense counsel conceded they were unable to specifically determine when the recordings were made. Third, the Defense argued the videos would “serve two crucial impeachment functions” by demonstrating possible motives for Ms. KT to make a false allegation of sexual assault. In essence, the Defense suggested Ms. KT regretted participating in the recordings, and she might have accused Appellant of assaulting her in order to persuade Appellant to dispose of the recordings. The other theory advanced by the Defense was that one of the recordings depicted Ms. KT making a comment which could be interpreted as a desire to have unprotected sex with Appellant. Thus, the theory continued, when Ms. KT later came to regret having had unprotected sex with Appellant, and after she used an emergency contraceptive, she falsely accused him of sexually assaulting her.

⁴⁰ The parties alternated between referring to multiple videos and referring to just a single video. For purposes of our analysis, we will assume there was more than one video.

Finally, the Defense argued the recordings should be available to Appellant to confront Ms. KT by challenging her credibility with prior inconsistent statements. The Defense asserted that during the investigation, Ms. KT discussed the videos with investigators, and she told them she did not agree to or assist in making the recordings. The Defense further asserted Ms. KT told investigators she took the phone away from Appellant when she realized he was using it to record the two of them. The Defense claimed that one video showed Ms. KT actively participated in the filming and argued that Ms. KT's purportedly untruthful statements to the investigators implicated Appellant's constitutional confrontation rights, insofar as they implicated Ms. KT's credibility and the overall veracity of her allegations.

In their written motion, trial defense counsel offered conflicting statements about whether they wished to admit the videos themselves into evidence or to simply ask Ms. KT about them. At one point, the motion states, "To be clear . . . the Defense is not seeking to play this tape for members—but rather cross examine [Ms. KT] about its existence, content, and her state of mind when making it." In the very next paragraph, however, the Defense argued the members "would be lost in the dark as to the true nature of the quickly-escalating sexual relationship between [Ms. KT] and [Appellant] if they do not get to observe the actual sex between the two." In the next paragraph, the Defense stated, "at least cross examination about these videos should be permitted," and only "the video of the charged event" should be admitted as substantive evidence or impeachment. When discussing the admissibility of the recording

with the military judge, trial defense counsel said, “I apologize if I didn’t make that clear. I do not intend to play the video. We are asking for the [c]ourt’s permission to be able to ask questions about the video.”

Trial counsel objected to any discussion of the videos, arguing in their written response to the Defense’s motion that the fact Ms. KT and Appellant may have agreed to record sexual contact had “marginal probative value” but “an exceptionally strong risk of prejudice.”⁴¹ The Government did not specifically address the Defense’s theories of admissibility of the videos.

During the motions hearing on Friday, 23 August 2019, the military judge expressed skepticism that the Defense should be allowed to impeach Ms. KT with respect to what she told the investigators about the videos. He told trial defense counsel,

You can’t just simply ask someone a question about something that you know they’re going to say something about that—that opens the door to be able to bring in extrinsic evidence of the falsity. The purpose about asking about this particular instance in the first place would have to satisfy, at a minimum, the relevancy standards necessary before you can even ask about this. If this is

⁴¹ Ms. KT, through her special victims’ counsel, objected to admission of the videos, but did not object to being questioned about whether she made inconsistent statements with respect to them.

independently irrelevant, you don't necessarily get to talk about it.

The military judge did not view the videos or have them marked as appellate exhibits. Nonetheless, the military judge made findings of fact regarding the contents of one video in his written ruling on the Defense's motion. His description of the video's contents largely tracked the Defense's proffer of what the video depicted, thus indicating Ms. KT may not have been truthful to the investigators. He did not, however, make any findings of fact regarding Ms. KT's statements to the investigators. The military judge ruled evidence about the video was inadmissible under Mil. R. Evid. 412(b)(2) as it did not make it any more or less likely that Appellant had a reasonable mistake of fact as to Ms. KT's consent with respect to the charged assault. The military judge also ruled the evidence was not constitutionally required, but he did not explain his rationale for that conclusion. The military judge did not discuss at all trial defense counsel's desire to impeach Ms. KT with the purportedly false statement she made to the investigators about the recordings. Although the "law" section of the military judge's ruling set out the principles of impeachment by contradiction and an accused's constitutional right to confront witnesses, his "discussion" section did not address these matters with respect to the recordings.

2. Law

We review a military judge's ruling that excludes evidence under Mil. R. Evid. 412 for an abuse of discretion. *United States v. Erikson*, 76 M.J. 231, 234 (C.A.A.F. 2017) (citation omitted).

Under Mil. R. Evid. 412, evidence of an alleged victim's sexual predisposition and evidence that an alleged victim engaged in other sexual behavior is generally inadmissible. Mil. R. Evid. 412(a). The intent of the rule is to "shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to sexual offense prosecutions." *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011) (original alteration, internal quotation marks, and citations omitted). One exception to this rule is when evidence is offered to prove consent. Mil. R. Evid. 412(b)(2). A second exception is when exclusion of the evidence would violate an accused's constitutional rights. Mil. R. Evid. 412(b)(3). In order to show that the exclusion of evidence would violate an accused's constitutional rights, the accused must show that the evidence is relevant, material, and favorable to his defense, "and thus whether it is necessary." *United States v. Banker*, 60 M.J. 216, 222 (C.A.A.F. 2004) (internal quotation marks and citation omitted). The term "favorable" means the evidence is "vital." *United States v. Smith*, 68 M.J. 445, 448 (C.A.A.F. 2010) (citations omitted). It is the defense's burden to demonstrate an exception applies. *Banker*, 60 M.J. at 223.

Evidence which is relevant under Mil. R. Evid. 412(b)(2) may be admissible if the military judge determines the probative value of such evidence outweighs the danger of unfair prejudice to the victim's privacy and otherwise outweighs the dangers of unfair prejudice under a Mil. R. Evid. 403 analysis. Mil. R. Evid. 412(c)(3). Evidence falling under the Mil. R. Evid. 412(b)(3) exception is not weighed against a victim's privacy and is instead only analyzed under

Mil. R. Evid. 403. *Id.* Evidence challenging the credibility of key government witnesses may fall under this exception. See, e.g., *United States v. Williams*, 37 M.J. 352, 360–61 (C.M.A. 1993).

Under the Sixth Amendment, an accused has the right to confront the witnesses against him or her. This right necessarily includes the right to cross-examine those witnesses, which “is the principal means by which the believability of a witness and the truth of his testimony are tested.” *Davis v. Alaska*, 415 U.S. 308, 316 (1974). However, judges “retain wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness[s] safety, or interrogation that is repetitive or only marginally relevant.” *United States v. Gaddis*, 70 M.J. 248, 256 (C.A.A.F. 2011) (alteration in original) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). The test for determining whether an accused’s confrontation clause rights have been violated is whether a “reasonable jury might have received a significantly different impression of [the witness]’s credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination.” *Id.* (alterations in original) (quoting *Van Arsdall*, 475 U.S. at 680).

Military judges may permit counsel to inquire about specific instances of a witness’s conduct on cross-examination if they are probative of the witness’s character for truthfulness or untruthfulness. Mil. R. Evid. 608(b). Extrinsic evidence of such is generally inadmissible. *Id.* Military judge’s rulings which limit cross-examination under Mil. R. Evid. 608(b) are reviewed for an abuse of discretion. *United States v. Stavely*, 33 M.J. 92, 94

(C.M.A. 1991). However, when an error at trial is of constitutional dimensions, we assess de novo whether the error was harmless beyond a reasonable doubt. *United States v. Prasad*, 80 M.J. 23, 29 (C.A.A.F. 2020).

3. Analysis

On appeal, Appellant argues the military judge did “not consider and analyze the facts presented to him regarding [Ms. KT’s] claim to [investigators] about the nonconsensual nature of the recording,” and therefore abused his discretion. The Government contends that Ms. KT’s statement to investigators was more ambiguous than the Defense claims, that the matter was collateral, and that, in any event, the military judge’s ruling was correct under Mil. R. Evid. 412.

As the sole witness to the charged assault, Ms. KT’s credibility was a critical issue in Appellant’s court-martial. *See, e.g., United States v. Jasper*, 72 M.J. 276, 281 (C.A.A.F. 2013) (noting, in a child sexual assault case, “[t]here is little question that . . . the credibility of the putative victim is of paramount importance”). Indeed, we would think it the rare and unusual case where an accuser’s credibility is *not* an issue available for defense exploration at trial. We agree that to the extent Ms. KT made false statements to investigators in the midst of an interview about the charged offense, and about matters closely related to that offense, such would reflect poorly on her character for truthfulness. *See, e.g., United States v. Montgomery*, 56 M.J. 660, 667 (A. Ct. Crim. App. 2001) (“[W]hether or not an individual lies to a police officer is highly probative of that individual’s veracity.”). Given the significance of Ms. KT’s credibility, Appellant’s right to confront her by attacking that

credibility was impaired by the military judge's prohibition of the Defense's proposed cross-examination.

Ordinarily, we would grant military judges deference with respect to rulings on such evidence, but the military judge here did not analyze this proposed use of the evidence at all; instead, he focused on whether the evidence was admissible under a theory of consent under Mil. R. Evid. 412(b)(2). Although he found that the evidence was not "constitutionally required," this finding was made almost in passing in the middle of a longer discussion about whether the evidence related to consent or a mistaken belief of consent. The Defense, however, articulated that an alternate purpose of the evidence was to undermine Ms. KT's credibility by cross-examining her about purportedly false statements she made about the evidence. As explained above, one of the Defense's overarching theories was that Ms. KT fabricated the assault, and she possibly did so under the influence of her mother. Thus, the motive and desire to use the evidence to impeach Ms. KT's character for truthfulness or to establish a character of untruthfulness was plainly articulated by the Defense. Because the military judge's ruling did not address this theory of admissibility, the military judge likewise did not conduct a Mil. R. Evid. 403 analysis of the probative value of allowing the Defense's proposed cross-examination to undermine Ms. KT's credibility. Her credibility was a critical issue at trial, and upon our *de novo* review, we find the military judge erred in concluding the exclusion of apparently false statements made by Ms. KT during her interview with law enforcement would not violate Appellant's constitutional rights.

Having found error related to Appellant's constitutional right to confront one of the witnesses against him, we turn to our assessment of whether or not the error was harmless beyond a reasonable doubt. We conclude it was. For one, Ms. KT's testimony—while important—was not the sole source of the evidence against Appellant. Post-assault text messages between Appellant and Ms. KT were admitted in evidence at trial. As discussed in more detail in Section II.B.3.d., *supra*, in those messages, Appellant made significant admissions—such as, “I should have stopped and listened to you.”

We are also convinced that permitting Appellant to question Ms. KT about her statements to law enforcement regarding the recordings would not have meaningfully undermined her credibility. Ms. KT did not deny to the investigators that the recordings existed, but rather, denied she actively participated in their creation. This was a rather fleeting aspect of a lengthy interview and was not a subject either dwelled upon or returned to. Moreover, given the embarrassing nature of the topic, her apparent minimization of her role in recording sex acts between herself and Appellant does not render the remainder of her testimony any less believable. Thus, we conclude, a reasonable jury would not have received a significantly different impression of Ms. KT's credibility had the Defense been permitted to cross-examine her on this point. We further find, beyond a reasonable doubt, that the outcome of Appellant's trial with respect to the specification in which Ms. KT was a named victim would have been the same even with this cross-examination.

III. CONCLUSION

The finding of guilty as to Charge II and its Specification is **SET ASIDE** and **DISMISSED WITHOUT PREJUDICE**. The sentence is **SET ASIDE**. A rehearing is authorized with regard to the dismissed charge and specification and the sentence. The remaining findings are correct in law and fact, and are **AFFIRMED**. Article 66(d), UCMJ, 10 U.S.C. § 866(d). The record of trial is returned to The Judge Advocate General. Article 66(f), UCMJ, 10 U.S.C. § 866(f). Thereafter, Article 66(b), UCMJ, 10 U.S.C. § 866(b), will apply. The court's earlier opinion of *United States v. Martinez*, No. ACM 39903 (f rev), 2022 CCA LEXIS 202 (A.F. Ct. Crim. App. 31 Mar. 2022) (unpub. op.), is hereby withdrawn.



FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

330a

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

No. ACM 39903

UNITED STATES
Appellee

v.

Jesus MARTINEZ

Airman First Class (E-3), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial
Judiciary

Decided 21 May 2021

Military Judge: Christopher M. Schumann.

Sentence: Sentence adjudged on 30 August 2019 by GCM convened at Fairchild Air Force Base, Washington. Sentence entered by military judge on 18 October 2019: Dishonorable discharge, confinement for 6 years, forfeiture of all pay and allowances, and reduction to E-1.

For Appellant: Major Jenna M. Arroyo, USAF; Major Rodrigo M. Caruço, USAF; Allison R. Weber, Esquire.

For Appellee: Lieutenant Colonel Matthew J. Neil, USAF; Major Alex B. Coberly, USAF; Major Brian E. Flanagan, USAF; Major John P. Patera, USAF; Mary Ellen Payne, Esquire.

Before J. JOHNSON, KEY, and ANNEXSTAD,
Appellate Military Judges.

Judge KEY delivered the opinion of the court, in which Chief Judge J. JOHNSON joined. Judge ANNEXSTAD filed a separate dissenting opinion.

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

KEY, Judge:

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of sexual assault and one specification of attempted sexual assault in violation of Articles 120 and 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920, 880.^{1,2} The specifications pertained to offenses Appellant committed in 2018. The members sentenced Appellant to a dishonorable discharge, confinement for six years, forfeiture of all pay and allowances, and reduction to the grade of E-1.

On appeal, Appellant raises eleven assignments of error, the eighth of which we reach here: whether the convening authority erred by not taking action on Appellant's sentence as required by Executive Order 13,825, § 6(b), 83 Fed. Reg. 9889, 9890 (8 Mar. 2018),

¹ Unless otherwise noted, references to the UCMJ and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2016 ed.).

² Appellant was acquitted of one specification of abusive sexual contact in violation of Article 120, UCMJ, 10 U.S.C. § 920.

and Article 60, UCMJ, 10 U.S.C. § 860. Appellant proposes this court remand his case to the Chief Trial Judge, Air Force Trial Judiciary, to resolve this matter.

We agree with Appellant. As a result, we conclude remand to the Chief Trial Judge, Air Force Trial Judiciary, is appropriate, and we do not reach his other ten assignments of error. Considering our resolution of Appellant's eighth assignment of error, we will defer addressing the remainder of his assignments of error until the record is returned to this court for completion of our review under Article 66(d), UCMJ, 10 U.S.C. § 866(d) (*Manual for Courts-Martial, United States* (2019 ed.) (2019 MCM)).

I. BACKGROUND

The specifications in this case were referred on 12 April 2019, and Appellant was tried by members in August 2019. Afterwards, Appellant's trial defense counsel submitted a petition for clemency on 9 September 2019 in which he identified a number of alleged legal errors occurring during Appellant's court-martial and asked the convening authority to disapprove Appellant's adjudged reduction in grade. On 23 September 2019, the convening authority's staff judge advocate completed a written recommendation to the convening authority noting, *inter alia*, that he found the alleged legal errors to be without merit and that he recommended the convening authority "take no action on the findings or sentence in this case." Appellant did not submit additional matters in response.

On 11 October 2019, the convening authority signed a Decision on Action memorandum. In the

memorandum, the convening authority stated: “I take no action on the findings in this case.” He further wrote, “I take no action on the sentence in this case.” The Decision on Action memorandum also directed Appellant to “take leave pending completion of appellate review” upon release from confinement. The memorandum contained no further indication as to whether any element of Appellant’s sentence was approved, disapproved, commuted, or suspended. On 18 October 2019, the military judge signed the entry of judgment, setting out the adjudged sentence. He included the Decision on Action memorandum as an attachment.

II. DISCUSSION

Proper completion of post-trial processing is a question of law this court reviews de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citation omitted). Interpretation of a statute and a Rule for Courts-Martial (R.C.M.) are also questions of law we review de novo. *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008) (citation omitted); *United States v. Martinelli*, 62 M.J. 52, 56 (C.A.A.F. 2005) (citation omitted).

Executive Order 13,825, § 6(b), requires that the version of Article 60, UCMJ,

in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority . . . to the extent that Article 60: (1) requires action by the convening authority on the sentence; . . . or (5) authorizes the convening authority to

approve, disapprove, commute, or suspend a sentence in whole or in part.

See 2018 Amendments to the *Manual for Courts-Martial, United States*, 83 Fed. Reg. at 9890. The version of Article 60, UCMJ, in effect when Appellant’s offenses first occurred stated “[a]ction on the sentence of a court-martial *shall* be taken by the convening authority or by another person authorized to act under this section.” 10 U.S.C. § 860(c)(2)(A) (emphasis added); see also *United States v. Perez*, 66 M.J. 164, 165 (C.A.A.F. 2008) (per curiam) (“[T]he convening authority is required to take action on the sentence”). Article 60(c)(2)(B), UCMJ, further stated: “Except as [otherwise] provided . . . the convening authority . . . may approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part.” 10 U.S.C. § 860(c)(2)(B). The convening authority’s action is required to be “clear and unambiguous.” *United States v. Politte*, 63 M.J. 24, 26 (C.A.A.F. 2006) (citation omitted).

This court addressed a similar situation in its en banc decision in *United States v. Aumont*, No. ACM 39673, 2020 CCA LEXIS 416 (A.F. Ct. Crim. App. 20 Nov. 2020) (en banc) (unpub. op.), *rev. granted*, ___ M.J. ___, No. 21-0126, 2021 CAAF LEXIS 389 (C.A.A.F. 4 Mar. 2021). In *Aumont*, the convening authority signed a memorandum stating that he took “no action” on the findings or sentence in a case involving offenses occurring prior to 1 January 2019. *Id.* at *19. *Aumont* resulted in four separate opinions, reflecting four distinct positions among the judges on this court as to whether the convening authority’s statement that he took no action was erroneous and, if so, whether remand for correction was required. *Id.* (*passim*). A majority of the judges in *Aumont*—six of

the ten judges—concluded the convening authority erred; four of those six judges, including the majority of the panel in the instant case, found the error required remand for corrective action without testing for prejudice, *id.* at *89 (J. Johnson, C.J., concurring in part and dissenting in part).

We recognize that other panels of this court have applied different reasoning in cases decided before and after *Aumont*. See, e.g., *United States v. Cruspero*, No. ACM S32595, 2020 CCA LEXIS 427 (A.F. Ct. Crim. App. 24 Nov. 2020) (unpub. op.); *United States v. Barrick*, No. ACM S32579, 2020 CCA LEXIS 346 (A.F. Ct. Crim. App. 30 Sep. 2020) (unpub. op.); *United States v. Finco*, No. ACM S32603, 2020 CCA LEXIS 246 (A.F. Ct. Crim. App. 27 Jul. 2020) (unpub. op.); cf. *United States v. Coffman*, 79 M.J. 820, 824 (A. Ct. Crim. App. 2020) (wherein our sister-service court found the convening authority’s failure to take action was harmless error). Nevertheless, we continue to adhere to the view that—in situations where the convening authority fails to take action on the sentence as required by Executive Order 13,825 and the pre-1 January 2019 version of Article 60, UCMJ—the convening authority has erred.

In cases involving a conviction for an offense committed prior to 1 January 2019, the convening authority is required to explicitly state whether the sentence is approved. R.C.M. 1107(f)(4)(A) (implementing the version of Article 60, UCMJ, applicable to Appellant’s case). “If only part of the sentence is approved, the action shall state which parts are approved.” *Id.* In this case, the convening authority explicitly stated he did not take action on the sentence. He implicitly referenced the adjudged punitive discharge by mentioning appellate leave, but

he did not mention the confinement, reduction in grade, or forfeitures. The convening authority's action was incomplete and ambiguous, and therefore deficient. *See Politte*, 63 M.J. at 26. The convening authority's failure to take action on the entire sentence fails to satisfy the requirement of the applicable Article 60, UCMJ. *See United States v. Lopez*, No. ACM S32597, 2020 CCA LEXIS 439, at *11 (A.F. Ct. Crim. App. 8 Dec. 2020) (unpub. op.).

Our superior court has mandated that when a Court of Criminal Appeals identifies an ambiguity in an action, it must return the case to the convening authority. *Politte*, 63 M.J. at 25–26 (applying the earlier versions of Articles 60 and 66, UCMJ, 10 U.S.C. §§ 860, 866 (2000), reasoning which we find applicable here). In requiring the deficient action to be returned to the convening authority, our superior court did not evaluate the deficiency for prejudice; the deficiency in the action *ipso facto* required its return. *Id.*; *see also United States v. Scott*, 49 M.J. 160, 160 (C.A.A.F. 1998). For the reasons set forth in the dissenting opinion in *Aumont*, we remand the record to the Chief Trial Judge, Air Force Trial Judiciary, to resolve the error. Unpub. op. at *89 (J. Johnson, C.J., concurring in part and dissenting in part); *see* Article 66(f)(3), UCMJ, 10 U.S.C. § 866(f)(3) (2019 *MCM*).

III. CONCLUSION

The record is **REMANDED** to the Chief Trial Judge, Air Force Trial Judiciary, to resolve a substantial issue with the convening authority's decision memorandum, as the action taken on Appellant's adjudged sentence was ambiguous and incomplete.

Our remand returns jurisdiction over the case to a detailed military judge and dismisses this appellate proceeding consistent with Rule 29(b)(2) of the Joint Rules for Appellate Procedure for Courts of Criminal Appeals. JT. CT. CRIM. APP. R. 29(b)(2). A detailed military judge may:

- (1) Correct the Statement of Trial Results;³
- (2) Return the record of trial to the convening authority or his successor to take action on the sentence;
- (3) Conduct one or more Article 66(f)(3), UCMJ (2019 *MCM*), proceedings using the procedural rules for post-trial Article 39(a), UCMJ, 10 U.S.C. § 839, sessions; and/or
- (4) Correct or modify the entry of judgment.

Thereafter, the record of trial will be returned to the court for completion of appellate review under Article 66, UCMJ.

ANNEXSTAD, Judge (dissenting):

I respectfully disagree with my colleagues' conclusion remanding this case to the Chief Trial Judge, Air Force Trial Judiciary, because the convening authority's action was ambiguous and incomplete. Consistent with our court's decision in *United States v. Barrick*, No. ACM S32579, 2020 CCA

³ The Statement of Trial Results failed to include the command that convened the court-martial as required by R.C.M. 1101(a)(3) (2019 *MCM*). Appellant has not claimed prejudice, and we find none. See *United States v. Moody-Neukom*, No. ACM S32594, 2019 CCA LEXIS 521, at *2–3 (A.F. Ct. Crim. App. 16 Dec. 2019) (per curiam) (unpub. op.).

LEXIS 346, at *3 (A.F. Ct. Crim. App. 30 Sep. 2020) (unpub. op.), I would find the convening authority's decision to "take no action on the sentence" was the equivalent of action. In coming to this conclusion, I note, as our court did in *Barrick*, that:

Air Force Instruction 51-201, *Administration of Military Justice*, Section 13D (18 Jan. 2019), correctly advises convening authorities to grant relief as circumscribed by the applicable version of Article 60, UCMJ[, 10 U.S.C. § 860]. Additionally, it advises convening authorities to specify "no action" if not granting relief, which would include effecting "action" under the applicable version of Article 60, UCMJ.

Id. at *3–4.

I also recognize that we can use surrounding documentation to interpret an otherwise unclear convening authority action, including looking outside the four corners of the action's language. See *United States v. Politte*, 63 M.J. 24, 26 (C.A.A.F. 2006) (citing *United States v. Loft*, 10 M.J. 262, 268 (C.M.A. 1981)).

In this case, the record demonstrates that Appellant submitted clemency matters to the convening authority on 9 September 2019. In his matters, Appellant asked the convening authority to "disapprove reduction in grade to E-1." On 23 September 2019, the convening authority's staff judge advocate completed a written recommendation to the convening authority recommending that he "take no action on the findings or sentence in this case." On 11 October 2019, the convening authority memorialized

his decision to “take no action” on the findings and sentence in his Decision on Action memorandum to the military judge. Consistent with the advice from his staff judge advocate and Section 13D of Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, the convening authority expressed his decision to not grant relief as “no action.” See AFI 51-201, ¶ 13.23 (18 Jan. 2019). Additionally, the convening authority directed Appellant to “take leave” pending completion of appellate review upon release from confinement—an action only necessary when a convening authority cannot or chooses not to disturb an adjudged punitive discharge. On 18 October 2019, the military judge signed the entry of judgment (EoJ), reflecting the sentence as adjudged. The convening authority’s Decision on Action memorandum was attached to the EoJ.

I would find that the convening authority’s decision met the legacy requirements of Article 60, UCMJ, 10 U.S.C. § 860 (*Manual for Courts-Martial, United States* (2016 ed.)), requiring the convening authority to effectuate the sentence. I would also find the decision complied with the provisions of Rule for Courts-Martial (R.C.M.) 1109 of the *Manual for Courts-Martial, United States* (2019 ed.) (2019 MCM), requiring convening authority action only when affecting the sentence. In this case, the convening authority’s decision to provide no relief at action was a “clear and unambiguous” determination to effectuate the adjudged sentence without modification. See *Politte*, 63 M.J. at 25–26 (footnote omitted). The action was consistent with the legal advice he was provided and there is no indication in the record that the military judge or the parties were confused as to the convening authority’s decision to

grant no relief. The sentence memorialized in the EoJ was the same as the sentence adjudged at trial, and neither party moved for correction of the Decision on Action memorandum or the EoJ. *See* R.C.M. 1104(b)(2)(B), (C) (2019 *MCM*). For these reasons, I would find no error in the convening authority's action and would not delay our review under Article 66(d), UCMJ, 10 U.S.C. § 866(d) (2019 *MCM*), by remanding the case to the Chief Trial Judge, Air Force Trial Judiciary.



FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

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

V.

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

342a

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

No. ACM 40354 (rem)

UNITED STATES
Appellee

v.

Leo J. NAVARRO AGUIRRE
Airman First Class (E-3), U.S. Air Force, *Appellant*

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

Decided 25 November 2025

Military Judge: Elijah F. Brown.

Sentence: Sentence adjudged 26 March 2022 by GCM convened at Joint Base Lewis-McChord, Washington. Sentence entered by military judge on 12 May 2022: Bad-conduct discharge, confinement for 2 years and 2 months, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

For Appellant: Major Frederick J. Johnson, USAF.

For Appellee: Colonel G. Matt Osborn, USAF; Major Vanessa Bairos, USAF; Mary Ellen Payne, Esquire.

Before DOUGLAS, MASON, and KUBLER,
Appellate Military Judges.

Senior Judge DOUGLAS delivered the opinion of the court, in which Judge MASON and Judge KUBLER joined.

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

DOUGLAS, Senior Judge:

Appellant's case is before this court for a second time. In a general court-martial, Appellant entered mixed pleas. The trial judge accepted his pleas of guilty to one specification of failure to obey a lawful order (violating a no-contact order) and one specification of wrongful use of Oxycodone in violation of Articles 92 and 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 912a.¹ The trial judge also accepted Appellant's plea of guilty by exception to one specification of reckless driving, excepting the words "and aerosol inhalants," in violation of Article 113, UCMJ, 10 U.S.C. § 913.² The

¹ Unless otherwise indicated, all references to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.).

² Specifically, Appellant was charged with "physical[] control of [a] vehicle, to wit: a passenger car, in a reckless manner by causing the vehicle to block traffic and swerve on public roadways and by driving the vehicle after using Zolpidem (a

Government elected to go forward with the excepted language. A panel of officer and enlisted members found Appellant guilty of the specification of reckless driving, excepting the words “and aerosol inhalants.” Contrary to the remainder of Appellant’s pleas, the same panel of officer and enlisted members found Appellant guilty of one specification of wrongful use of Ambien³ in violation of Article 112a, UCMJ, one specification of assault consummated by a battery (unlawfully grabbing the arms and wrists of another with his hands), and one specification of aggravated assault with a loaded weapon (repeatedly pointing a loaded firearm at the head of another)—both assaults were committed against his spouse, and were in violation of Article 128, UCMJ, 10 U.S.C. § 928.⁴ The trial judge sentenced Appellant to a bad-conduct discharge, confinement for two years and two months,⁵ forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand. The convening authority took no action on the findings. The convening authority suspended the first six months of the adjudged forfeiture of total pay and

Schedule IV controlled substance commonly referred to as Ambien) and aerosol inhalants.”

³ Charged as “Zolpidem, commonly referred to as Ambien, a Schedule IV controlled substance.”

⁴ One specification of wrongful use of Benzodiazepine, a Schedule IV controlled substance, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, was withdrawn and dismissed by the convening authority. Appellant was acquitted of several additional specifications and charges.

⁵ The concurrent and consecutive segmented confinement lengths, for each conviction combined, totaled two years and two months. Appellant was credited with 114 days pretrial credit.

allowances, waived the automatic forfeitures for six months, and directed the total pay and allowances to be paid to Appellant's spouse for six months. Otherwise, the convening authority approved the remainder of the sentence and provided the language for the reprimand.

After this court affirmed the findings and sentence, *United States v. Navarro Aguirre*, No. ACM 40354, 2024 CCA LEXIS 103 (A.F. Ct. Crim. App. 11 Mar. 2024) (unpub. op.), the United States Court of Appeals for the Armed Forces (CAAF) granted Appellant's petition for review of two issues. *United States v. Navarro Aguirre*, 85 M.J. 200 (C.A.A.F. 2024). Ultimately, the CAAF found in Appellant's favor on one of those issues: whether Appellant's conviction for wrongful Ambien use is legally sufficient. *United States v. Navarro Aguirre*, __ M.J. __, No. 24-0146, 2025 CAAF LEXIS 614, at *19 (C.A.A.F. 24 Jul. 2025).

The CAAF disagreed with our opinion that Appellant's conviction for wrongful use of Ambien is legally sufficient concluding that "the inferences . . . are overly speculative and too attenuated from the evidence in the record." *Id.* Accordingly, the CAAF reversed our decision on Appellant's use of Ambien, and the sentence, but affirmed the decision with respect to the remainder of the findings. *Id.* at *27. The CAAF returned the record to The Judge Advocate General of the Air Force for remand to this court "for reassessment of the sentence or for a rehearing on the sentence, if necessary." *Id.* Thus, the affirmed findings of guilty in this case now are: violating a no contact order, wrongfully using Oxycodone, reckless driving after using Ambien, assault consummated by a battery, and aggravated assault. The trial judge

sentenced Appellant to a bad-conduct discharge, forfeiture of all pay and allowances, reduction to the grade of E-1, a reprimand, and segmented confinement lengths for each conviction. The trial judge grouped the terms of confinement with respect to the offenses against Appellant's spouse to be executed concurrently with each other. The trial judge grouped the confinement for the reckless driving with the wrongful use of Ambien and Oxycodone. These corresponding segmented sentences were to be executed concurrently with each other, and the two groups of concurrent sentences were to be executed consecutively.

The segmented sentences involving Appellant's spouse were as follows.

No contact order violation – two months.

Assault consummated by a battery – one month.

Aggravated assault – two years.

The segmented sentences for the remaining offenses were as follows.

Reckless driving after using Ambien – two months.

Wrongful use of Oxycodone – two months.

Wrongful use of Ambien – two months.

On remand, the parties submitted briefs addressing whether this court should reassess the sentence or order a rehearing on the sentence. Both argued in favor of reassessment. Appellant does not propose a particular reassessed sentence. The Government proposes reassessing the sentence originally imposed. We conclude reassessment is

appropriate, and except for the reprimand, we agree with the Government's proposal, and take corresponding action in our decretal paragraph.

I. DISCUSSION

A. Law

Under Article 59(a), UCMJ, 10 U.S.C. § 859(a), a court-martial sentence may not be held incorrect by virtue of legal error “unless the error materially prejudices the substantial rights of the accused.” If we can conclude that absent any error, an adjudged sentence would have been at least a certain severity, “then a sentence of that severity or less will be free of the prejudicial effects of error; and the demands of Article 59(a)[, UCMJ,] will be met.” *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986).

We have broad discretion first to decide whether to reassess a sentence, and then to arrive at a reassessed sentence. *United States v. Winckelmann*, 73 M.J. 11, 12 (C.A.A.F. 2013). In deciding whether to reassess a sentence or return a case for a rehearing, we consider the totality of the circumstances, and the following illustrative factors announced in *Winckelmann*: (1) “Dramatic changes in the penalty landscape and exposure;” (2) “Whether an appellant chose sentencing by members or a military judge alone;” (3) “Whether the nature of the remaining offenses capture[s] the gravamen of criminal conduct included within the original offenses and . . . whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses;” and (4) “Whether the remaining offenses are of the type that judges of the [C]ourts of [C]riminal [A]ppeals should have the experience and

familiarity with to reliably determine what sentence would have been imposed at trial.” *Id.* at 15–16 (citations omitted).

B. Analysis

First, there has not been a dramatic change in the penalty landscape or exposure. As Appellant explains in his brief, the dismissal of wrongful use of Ambien results in a two-year reduction in the total maximum confinement length, from 18 years to 16 years. Separate from maximum confinement length, the other sentence parameters remain the same. The confinement sentence imposed for the wrongful use of Ambien, two months, ran concurrently with the confinement sentences imposed for wrongful use of Oxycodone and reckless driving. This change is not dramatic and thus favors reassessment.

Second, Appellant was sentenced by the trial judge. This factor weighs in favor of reassessment.

Third, the remaining offenses capture the gravamen of Appellant’s criminal conduct from the original offenses. The use of Ambien, as charged by the Government, and litigated by the Government at trial, was a contributing factor to the reckless driving offense. Now, with the dismissal of the wrongful use of Ambien, the reckless driving offense, along with Appellant’s wrongful use of Oxycodone, remains. Appellant’s offenses against his spouse remain, which include violating a no contact order, assault consummated by a battery, and aggravated assault. These offenses against the spouse and in particular the aggravated assault were the most serious offenses as reflected by the weight given these offenses in the sentence originally adjudged and made up the gravamen of the offenses.

Fourth, the remaining specifications are for types of offenses with which the judges of this court have experience and familiarity.

We may reassess a sentence only if we are able to reliably determine that, absent the error, the sentence would have been “at least of a certain magnitude.” *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000) (citation omitted). Having applied the *Winckelmann* factors, we can reliably make such a determination. We are convinced the sentence, excepting the reprimand, would have been at least the same as originally imposed: a bad-conduct discharge, confinement for two years and two months, forfeiture of all pay and allowances, and reduction to the grade of E-1. We find the language of the reprimand addresses some aspect of the now set-aside specification and consider it no longer an appropriate punishment.

II. CONCLUSION

The findings of guilty as to Specification 2 of Charge I and Charge I, Specification 1 of Charge II and Charge II, the Specification of Charge III and Charge III, and Specifications 1 and 4 of Charge VI and Charge VI, were previously affirmed. We affirm only so much of the sentence as provides for a bad-conduct discharge, confinement for two years and two months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The sentence, as reassessed, is 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).

350a

The sentence, as reassessed, is **AFFIRMED**.



FOR THE COURT

A handwritten signature in blue ink, reading "Jacob B. Hoeferkamp", is written over the printed name.

JACOB B. HOEFERKAMP, Capt, USAF
Acting Clerk of the Court

351a

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

UNITED STATES
Appellee

v.

**Leo J. NAVARRO AGUIRRE, Airman First
Class**
United States Air Force, Appellant

No. 25-0146
Crim. App. No. 40352

Argued February 26, 2025—Decided July 24, 2025

Military Judge: Elijah F. Brown

For Appellant: *Major Frederick J. Johnson* (argued);
Lieutenant Colonel Allen S. Abrams and *Major*
Spencer R. Nelson.

For Appellee: *Major Vanessa Bairos* (argued); *Colonel*
Matthew D. Talcott, *Lieutenant Colonel Jenny A.*
Liabenow, and *Mary Ellen Payne, Esq.* (on brief).

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

Chief Judge OHLSON delivered the opinion of the Court.

Appellant received from his medical provider a valid prescription for the sleep medication commonly known as Ambien. At approximately 6:00 p.m. the next day, he was seen driving erratically near his apartment complex. During an encounter with the police, Appellant acknowledged that he had recently taken Ambien, and he also admitted to “huffing” an aerosol spray at some unspecified time. He later was charged with, among other offenses, wrongful use of the controlled substance zolpidem (Ambien’s chemical name), as well as reckless driving after using both zolpidem and aerosol inhalants. Appellant subsequently sought to plead guilty to the reckless driving specification. During the providence inquiry, Appellant stated that after he took his prescribed dose of Ambien, he fell asleep in his bed and the next thing he remembered was waking up behind the wheel of his car. The military judge accepted Appellant’s plea.¹ Separately, and contrary to his pleas, a panel of officer and enlisted members found Appellant guilty of, among other offenses, wrongful use of zolpidem (hereinafter referred to as Ambien).

We granted review of the following issues:

I. Whether Appellant’s conviction for wrongful Ambien use is legally sufficient when: (1) he had a valid prescription for Ambien, and (2) the basis for his conviction was a medically-known side effect.

¹ Appellant’s plea of guilty to the reckless driving specification excepted the language concerning aerosol inhalants.

II. Whether Appellant's guilty plea for reckless driving was provident when he took his prescribed dose of Ambien, fell asleep in his bed, and "the next thing [he] remembered is being behind the wheel of [his] car."

United States v. Navarro Aguirre, 85 M.J. 200 (C.A.A.F. 2024) (order granting review) (alterations in original).

For the reasons set forth below, we conclude that Appellant's conviction for wrongful use of Ambien was not legally sufficient, but his guilty plea to reckless driving was provident.

I. Background

Appellant was stationed at Joint Base Lewis-McChord, Washington. On September 30, 2021, he received a prescription for Ambien from his medical provider. The next day (a Friday), at approximately 6:00 p.m., a witness observed Appellant driving erratically. When Appellant's vehicle stopped for an extended period in a turn lane, the witness got out of his car to check on him. The witness saw Appellant dressed in his military uniform (although without the blouse), rocking back and forth with a can in his lap and what appeared to be a smile on his face. Appellant eventually turned into his apartment complex and bumped into a lamppost, which caused him to stop for several minutes before he drove off.

Local police officers soon responded to a report of a suspected case of "driving under the influence." When they discovered Appellant partially parked in a parking stall, they asked him if he had been drinking

or using drugs. Appellant responded that he had taken Ambien. One officer, who had seen aerosol cans in the back seat of Appellant's car, asked him their purpose. Appellant admitted to "huffing" them but did not say when he had done so.

A. Appellant's Guilty Plea

At his general court-martial, Appellant sought to plead guilty to reckless driving after taking Ambien. During the providence inquiry conducted in accordance with *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247 (1969), Appellant told the military judge that he had been prescribed Ambien the day before the incident to help him sleep. He further explained that on the day of the incident, he left work and arrived at his apartment around 2:30 p.m. He then took the "prescribed dose of one pill" of Ambien because he "hadn't slept in almost two days." Appellant stated that he then fell asleep in his bed and the next thing he remembered was being in the driver's seat of his car, parked in the wrong parking spot, with his foot on the gas pedal and "revving the engine." He said that a police car was behind him and that when he spoke to the officers, he told them that he was not drunk but that he had taken Ambien.

In the course of the *Care* inquiry, Appellant told the military judge that he did not remember driving his car but that he had reviewed the statements of witnesses and the police. Having done so, he acknowledged that his car had been seen "recklessly weaving and blocking traffic" and veering on and off roads, and "that the swerving is what eventually led [him] to swerve onto the sidewalk and hit [a] lamppost." Based on his review of this evidence, Appellant admitted that he had operated his car in a

reckless manner. During follow up questions from the military judge, Appellant also acknowledged that he had taken Ambien “after arriving home from work,” and he agreed with the military judge that the Ambien caused him to not remember being in control of the vehicle.

The military judge questioned Appellant about his mental state during the time of the offense. Appellant said that he “was not in complete control of [his] faculties” and acknowledged that he was driving recklessly because his actions of swerving on the road, blocking traffic, riding on top of a sidewalk, and hitting a lamppost were unsafe for himself and others. He also conceded that the Ambien could have affected his ability to safely control the vehicle. He told the military judge that when his “memory came to” he recalled feeling “dazed, groggy, slow, and having a hard time understanding the police officers.” Appellant specifically denied having a justification or excuse for driving his vehicle in the manner alleged, and he told the military judge that he was pleading guilty voluntarily and of his own free will.

The military judge accepted Appellant’s guilty plea to reckless driving in violation of Article 113, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 913 (2018).² However, the military judge told Appellant that he could seek to withdraw his plea of guilty at any time before his sentence was announced.

² Additionally, and consistent with Appellant’s pleas, the military judge found Appellant guilty of one specification of violating a lawful order (a no-contact order) in violation of Article 92, UCMJ, 10 U.S.C. § 892 (2018), and one specification of wrongful use of a controlled substance (oxycodone) in violation of Article 112a, UCMJ, 10 U.S.C. § 912a (2018).

B. The Contested Offenses

With regard to the contested offenses (as well as to the contested language of “and aerosol inhalants” in the reckless driving specification), Appellant elected trial by members with enlisted representation. In seeking to prove Appellant’s wrongful use of Ambien, the prosecution offered photos of the interior of Appellant’s car. These photos were taken from outside of the car more than two months after the charged incident. One of the photos of the front passenger seat showed what appeared to be pharmacy paperwork that had accompanied Appellant’s Ambien prescription. Another photo showed a small brown paper bag in the backseat.

The prosecution also offered the testimony of an expert witness in the field of forensic toxicology. He testified that a prescription for Ambien would have instructed the patient to take the medication “[j]ust before one desires to go to sleep.” He also testified, among other things, to the following facts: (a) Ambien is a medication that assists a person in getting a full night’s sleep, rather than sleep for a short period of time; (b) the purpose of Ambien is to put the user to sleep and to help the user stay asleep; (c) Ambien can be misused and abused if a user takes a higher dosage than prescribed or if the medication is taken with other intoxicants; and (d) Ambien is a senses suppressant which can “turn[] off pieces of your body that are quite important.”

Along with other evidence, the defense offered the Food and Drug Administration (FDA) data sheet for Ambien which states that “[c]omplex sleep behaviors including . . . sleep-driving, and engaging in other activities while not fully awake, may occur following

the first or any subsequent use of AMBIEN.” The defense also called as a witness the nurse practitioner who had prescribed Ambien to Appellant. She testified to the following facts: (a) she prescribed Appellant Ambien on September 30, 2021; (b) she would instruct patients to take Ambien thirty minutes before bedtime and about seven to eight hours before they planned to wake up; (c) Appellant had a medical purpose and authorization to use the medication on the charged date; (d) the use of Ambien an hour or two before bedtime does not invalidate the prescription or make it “illegal”; (e) users can abuse their prescriptions for Ambien by taking Ambien “at a time when they are not trying to go to sleep, but rather trying to have some other effect”; and (f) there is a “whole list” of different effects that people might experience after taking Ambien, such as “complex sleep behaviors,” but they are not common.

At the close of evidence, the defense moved for a finding of not guilty pursuant to Rule for Courts-Martial (R.C.M.) 917 (2019 ed.) on the wrongful use of Ambien specification. Defense counsel argued that the prosecution had failed to provide any evidence during its case-in-chief that Appellant had wrongfully used Ambien as he had a valid prescription for it. The military judge disagreed. He reasoned that when the evidence was viewed in the light most favorable to the prosecution, Appellant’s wrongful use could be inferred from the erratic way he had been driving, the time the offense occurred (i.e., Appellant took the Ambien late in the afternoon rather than at night), his attire when he was arrested (i.e., Appellant still was partially dressed in his military uniform rather than in sleepwear), and his work schedule (i.e., Appellant

was not taking the Ambien in the afternoon to accommodate “shift work”).

The military judge subsequently provided the panel members with findings instructions. In doing so, he took judicial notice that the incident occurred on a Friday. Contrary to Appellant’s pleas, the panel found Appellant guilty of wrongful use of Ambien in violation of Article 112a, UCMJ. However, the panel found Appellant not guilty of the language “and aerosol inhalants” in the reckless driving specification.³

After the members returned their findings, the defense asked the military judge to reconsider his prior R.C.M. 917 ruling. In arguing why reconsideration was warranted, the defense asked the military judge to consider Appellant’s statements during his *Care* inquiry. The military judge declined the defense’s invitation and denied the request for reconsideration. The military judge emphasized that “there was evidence Ambien should be taken exactly as prescribed” right before bedtime, and that a user should not take Ambien if they cannot get a full night’s sleep. The military judge concluded that “[the] manner in which [Appellant] was driving, the time of day it was, and what [Appellant] was wearing,” as well as other factors, supported the inference that

³ The panel also found Appellant guilty, contrary to his pleas, of one specification of assault consummated by a battery and one specification of aggravated assault with a loaded firearm—both committed against his wife—in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2018). However, the panel found Appellant not guilty of a specification of failing to obey a lawful general regulation that prohibited using an aerosol inhalant with the intent to alter mood or function, and two specifications of assault consummated by a battery.

Appellant had not taken Ambien for its prescribed purpose.

C. Appellant's Guilty Plea Revisited

Although the military judge denied the defense's request regarding the panel's findings, he found the "subject of the motion" raised "some concerns" about the providence of Appellant's earlier guilty plea to reckless driving. Specifically, the military judge observed that Ambien's FDA information sheet referenced "sleep driving" as a known side effect of the medication. He further noted that military law recognizes "something of a defense of automatism, so if someone has sort of an involuntary action, [like] a seizure or an involuntary act, then there's no reason for the law to criminalize that." Considering the foregoing, the military judge reopened the providence inquiry to explore whether Appellant had been "sleep driving" at the time of the incident and thus was not aware that he was operating a vehicle.

At the outset of the renewed providence inquiry, the military judge explained to Appellant that voluntarily taking a drug is not a defense to reckless driving. The military judge then asked Appellant, "Why do you think that your control of the vehicle was voluntary if you were under the influence of Ambien and have no memory of the driving?" Appellant replied with a variety of reasons. First, he said that even though he had no memory of driving, he obviously must have taken a number of actions to get into the car and then to drive it. ("I would have had to put some kind of shoes on, get my car keys, get in my car, start my car, turn music on . . . stop[] at stoplights . . . put my car in gear and pull[] out of the [parking] spot.") Second, Appellant told the military judge that

from listening to witness testimony he understood that he was driving the car “somewhat normal at some points.” Third, he said that when “[his] memory kick[ed] back in” it “didn’t feel like waking up from sleep” but felt more like a blackout from drinking alcohol. (“Like a slide show and there are just some slides missing.”) Fourth, Appellant agreed with the military judge that based on the complexity of his actions, he did not believe he was “asleep” while driving and that he believed that his actions were voluntary. Fifth, Appellant explained that “previously [he] was aware that Ambien was pretty potent stuff, and I know it . . . could have effects on your driving, operating machinery, whatnot.”⁴ Ultimately, Appellant agreed with the military judge that “the number of things [he] would have had to do and . . . their complexity” led him to believe that he was not truly “asleep” at the time that he was driving.

Later, when asked again by the military judge why he believed he was responsible for his actions, Appellant explained that on the day of the incident his car was running low on fuel and he had been thinking about getting gas. Thus, Appellant said, although he did not remember the facts, he believed his motivation to get behind the wheel was to go to the gas station. Appellant also told the military judge that he believed he was aware of what he had been doing while driving, despite not remembering those actions, because he was aware of where he was at the stoplights, he was aware of other vehicles honking, and he was able to

⁴ In response to a follow-up question from the military judge, Appellant explained that he learned this information “from [his] prescribing [nurse practitioner].”

drive back home. Appellant stated, “I believe those are voluntary actions.”

Based on Appellant’s statements, the military judge affirmed his acceptance of the guilty plea to this offense. However, he once again informed Appellant that he could ask to withdraw his plea of guilty at any time before the announcement of his sentence. Appellant did not do so.

At the sentencing phase of the trial, the military judge sentenced Appellant to a bad-conduct discharge, confinement for a total of two years and two months, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand. The convening authority took no action on the findings but suspended the first six months of the adjudged forfeitures, waived automatic forfeitures for six months, and directed that the total pay and allowances be paid to Appellant’s spouse for six months. Subsequently, the military judge entered judgment. The United States Air Force Court of Criminal Appeals affirmed the findings and the sentence.

II. The Legal Sufficiency of Appellant’s Conviction for Wrongful Use of Ambien

A. Standard of Review

We review issues of legal sufficiency *de novo*. *United States v. Harman*, 68 M.J. 325, 327 (C.A.A.F. 2010).

B. Applicable Law

The elements for Article 112a (wrongful use of a controlled substance) are as follows:

- (a) That the accused used a controlled substance; and

(b) That the use by the accused was wrongful.

Manual for Courts-Martial, United States pt. IV, para. 50.b.(2)(a)-(b) (2019 ed.) (*MCM*). The *MCM* defines wrongful use as “without legal justification or authorization.” *Id.* para. 50.c.(5).

A conviction is legally sufficient when “considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.” *United States v. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007) (internal quotation marks omitted) (citations omitted). Under this standard, a reviewing court must draw every reasonable inference from the evidence in favor of the prosecution. *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). The standard for legal sufficiency is “a very low threshold to sustain a conviction.” *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal quotation marks omitted) (citation omitted). However, if there is no rational basis for the factfinder to draw an inference from the evidence in favor of the prosecution, and if this results in a failure of proof of an essential element, this Court will set aside the corresponding conviction. *See United States v. Plant*, 74 M.J. 297, 299-300 (C.A.A.F. 2015) (setting aside findings of guilt for child endangerment where proof of the appellant’s drinking excessive amounts of alcohol while caring for his young child did not substantiate a reasonable probability that the child, who was placed in his crib during ordinary bedtime hours, would experience harm).

C. Discussion

As an initial matter, we note that contrary to Appellant’s argument, our legal sufficiency review of his conviction for wrongful use of Ambien is limited to the evidence that was presented to the trier of fact *during the trial*. *United States v. Bethea*, 22 C.M.A. 223, 225, 46 C.M.R. 223, 225 (1973); *see also United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007) (“In a succession of early cases, we established that the review of *findings*—of guilt and innocence—was limited to the evidence presented at trial.” (citations omitted)). Therefore, although we may consider all of the evidence that was admitted during the contested phase of this case (including those matters of which the military judge took judicial notice), in the course of deciding whether Appellant’s conviction for wrongful use of Ambien is legally sufficient, we may not reach beyond that evidence and look at the admissions or statements made by Appellant during his guilty plea *Care* inquiry.

We also acknowledge at the outset that the standard of review to be applied for legal sufficiency is a decidedly favorable one for the government. As noted above, this Court is required to view not only the evidence, but also all the reasonable inferences that can be drawn from that evidence, in the light most favorable to the prosecution. *Young*, 64 M.J. at 407; *Barner*, 56 M.J. at 134. Therefore, although the Government in the instant case can point to no direct evidence that Appellant engaged in the wrongful use of Ambien, it properly urges this Court to consider what it characterizes as “four key reasonable inferences” and then to affirm Appellant’s conviction for wrongful use of Ambien. We will review each of these proffered “reasonable inferences” directly below.

First, the Government argues that when we juxtapose (a) the trial evidence demonstrating that Appellant knew that Ambien should only be taken shortly before going to bed when the user can sleep solidly for seven to eight hours, with (b) the trial evidence demonstrating that Appellant took Ambien before 6:00 p.m. on the day of the incident, this Court should infer that Appellant was not using this sleep medication for its proper purpose but rather was using it “wrongfully.” However, we are not convinced of the reasonableness of this inference. In essence, the Government is asking this Court to conclude that Appellant’s conviction for wrongful use of Ambien is legally sufficient because he took his prescribed medication a few hours before the Government feels he should have taken it. This is a thin reed upon which to base a “reasonable” inference.⁵

Second, the Government argues that because the “Ambien prescription label”⁶ and a brown paper bag were observed in Appellant’s car two months after the incident, Appellant must have used the Ambien while still in his car rather than at home where he could be prepared to go to sleep. Again, we are not convinced of the reasonableness of this inference. We first note that there is no evidence in the record that the prescription *bottle* was found in Appellant’s vehicle. And second, as his counsel persuasively argues, there is no reason to

⁵ This is particularly so in light of the fact that Appellant could have specifically chosen to take the Ambien early on a weekend with the express hope that he would be able to go to bed and have uninterrupted sleep for *more than* seven-to-eight hours.

⁶ What the Government describes as the “prescription label” actually appears to be the paperwork that routinely accompanies any prescription.

conclude that Appellant was required to have the drug literature and brown paper bag with him in order for him to lawfully use the prescribed medication.⁷

Third, the Government argues that because Appellant was still partially in his duty uniform at the time of the police encounter, he must have taken the prescription before getting home and properly preparing for sleep. However, there is no evidence in the record that Appellant's blouse—which the Government concedes Appellant was not wearing—was anywhere in his vehicle at the time of the police encounter, thereby undermining the Government's factual predicate.⁸

And fourth, the Government argues that because Appellant did not need to fall asleep in the late afternoon or early evening in order to get up in time to work a night shift, this shows that he must have been misusing the Ambien when he took it during that time frame. However, just as with the first “key reasonable inference,” the Government's reliance on this timing is misplaced. A person who has been suffering from insomnia may certainly choose to properly take Ambien in the late afternoon or early

⁷ Further, the reasonableness of this inference is mitigated by the fact that Appellant could have merely opened and discarded the bag and the drug literature in his car while in the process of ensuring that the pharmacy had given him the correct prescription, and that he actually took the medication later in his apartment.

⁸ Further, the Government's position is counterbalanced by the reasonable inference that a person who is taking Ambien for the first time might not immediately and fully disrobe but rather would get comfortable and relax for a while in his apartment to see how quickly and effectively the medication really works before going through the whole process—in the late afternoon—of putting on some form of sleepwear.

evening on a Friday in order to get as much sleep as he or she possibly can during the weekend, completely unconnected to any need to get up to work a night shift.

In light of these points, we are compelled to conclude that what the Government cites as “four key reasonable inferences” would be better characterized as understandable—but not compelling—suspicions, speculations, and suppositions. And those types of considerations, standing alone, are not enough to sustain a conviction even though this Court remains fully committed to the “very low threshold” standard applicable during a legal sufficiency review. *King*, 78 M.J. at 221 (citation omitted).

This position is consistent with the views expressed by some federal circuit courts as laid out below.

“[W]e do not give the government the benefit of *every potential* inference but rather, only those inferences reasonably and logically flowing from the other evidence adduced at trial.” *United States v. Santistevan*, 39 F.3d 250, 258 (10th Cir. 1994). An inference is unreasonable if it requires the jury “to engage in a degree of speculation and conjecture that renders its findings a guess or mere possibility.” *United States v. Jones*, 44 F.3d 860, 865 (10th Cir. 1995) (internal quotation marks omitted) (citation omitted). After all, “[i]nferences must stop at some point.” *United States v. Crain*, 33 F.3d 480, 487 (5th Cir. 1994). To this end, at “some point along a rational continuum, inferences may become so attenuated from underlying evidence as to cast doubt on the trier of fact’s ultimate conclusion.” *United States v. Summers*, 414 F.3d 1287, 1295 (10th Cir.

2005); *Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 521 (10th Cir. 1987).

In applying these legal principles to the facts in this case—with special emphasis on the fact that Appellant’s medical provider prescribed this medication for Appellant to take—we conclude that the inferences the Government cites in support of a legal sufficiency determination are overly speculative and too attenuated from the evidence in the record. Therefore, we hold that Appellant’s conviction for wrongful use of Ambien is legally insufficient.

III. The Providence of Appellant’s Guilty Plea to Reckless Driving

A. Standard of Review

We review a military judge’s decision to accept a guilty plea for abuse of discretion. *United States v. Forbes*, 78 M.J. 279, 281 (C.A.A.F. 2019) (citation omitted). In reviewing the providence of a plea, a military judge abuses his or her discretion only where there is a substantial basis in law or fact for questioning the guilty plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). We “giv[e] broad discretion to military judges in accepting [guilty] pleas.” *United States v. Moratalla*, 82 M.J. 1, 4 (C.A.A.F. 2021) (alterations in original) (internal quotation marks omitted) (citation omitted). However, “the military judge’s determinations of questions of law arising during or after the plea inquiry are reviewed de novo.” *Inabinette*, 66 M.J. at 321. An appellant “bears the burden of establishing that the military judge abused his discretion, i.e., that the record shows a substantial basis in law or fact to question the plea.” *United States v. Phillips*, 74 M.J. 20, 21-22 (C.A.A.F. 2015) (citation omitted).

B. Applicable Law

The elements for Article 113 (reckless operation of a vehicle) as relevant to this case are as follows:

- (1) That the accused was operating or in physical control of a vehicle . . . ; and
- (2) That while operating or in physical control of a vehicle . . . the accused—
 - (a) did so in a wanton or reckless manner.

MCM pt. IV, para. 51.b.(1)-(2) (2019 ed.). With regard to this offense, the *MCM* defines “reckless” as “a culpable disregard of foreseeable consequences to others from the act or omission involved.” *Id.* para. 51.c.(7).

A providence inquiry into a guilty plea must establish that the accused himself believes he is guilty and “the factual circumstances as revealed by the accused himself objectively support that plea.” *United States v. Higgins*, 40 M.J. 67, 68 (C.M.A. 1994) (internal quotation marks omitted) (citation omitted). In reviewing the providence inquiry for a guilty plea, this Court considers an appellant’s colloquy with the military judge, as well as any inferences that may be reasonably drawn from it. *United States v. Carr*, 65 M.J. 39, 41 (C.A.A.F. 2007). An appellant’s inability to recall specific facts underlying his or her offense does not render the guilty plea improvident. *United States v. Jones*, 69 M.J. 294, 299 (C.A.A.F. 2011); *United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977). Although “personal awareness is not a prerequisite for a plea of guilty . . . an inquiry must be made to ascertain if an accused is convinced of his own guilt. Such a conviction . . . may be predicated on an

accused's assessment of the [g]overnment's evidence against him." *Moglia*, 3 M.J. at 218.

Article 45(a), UCMJ, 10 U.S.C. § 845(a) (2018), requires a guilty plea to be rejected when inconsistent matters arise that cannot be resolved. "[I]nconsistencies and apparent defenses must be resolved by the military judge or the guilty plea[] must be rejected." *United States v. Pinero*, 60 M.J. 31, 34 (C.A.A.F. 2004) (internal quotation marks omitted) (citation omitted). The "possible defense" standard is the threshold for a military judge to inquire into potential affirmative defenses during a plea colloquy. *United States v. Hayes*, 70 M.J. 454, 458 (C.A.A.F. 2012). This standard "is a lower threshold than a prima facie showing because it is intended as a trigger to prompt further inquiry pursuant to Article 45, UCMJ," and *Care. Id.* Moreover, the "possible defense" standard requires that "the acceptance of a guilty plea be accompanied by certain safeguards to [e]nsure the providence of the plea, including the delineation of the elements of the offense charged and admission of factual guilt on the record" are in line with Article 45. *Id.* (internal quotation marks omitted) (citation omitted).

Military law recognizes the affirmative defense of automatism, which is "[a]ction or conduct occurring without will, purpose, or reasoned intention," "behavior carried out in a state of unconsciousness or mental disassociation without full awareness," and "[t]he physical and mental state of a person, who though capable of action, is not conscious of his or her actions." *United States v. Torres*, 74 M.J. 154, 156 n.3 (C.A.A.F. 2015) (alterations in original) (internal quotation marks omitted) (citation omitted). An accused "cannot be held criminally liable in a case

where the actus reus is absent because the accused did not act voluntarily, or where the mens rea is absent because the accused did not possess the necessary state of mind when he committed the involuntary act.” *Id.* at 157.

In *Torres*, we observed that previously, “[n]either the UCMJ nor this Court’s precedent [had] provided definitive guidance regarding whether automatism should be viewed as negating the mens rea or the actus reus of a charged offense.” *Id.* Although in *Torres* we recognized that our “predecessor [court] indicated in dicta that the mens rea approach may be the most appropriate,” *Torres* conclusively resolved the issue when it held, “[i]n cases where the issue of automatism has been reasonably raised by the evidence, a military judge should instruct the panel that automatism may serve to negate the actus reus of a criminal offense.” *Id.* at 157-58.

And finally, “[i]n determining the providence of [an] appellant’s pleas, it is uncontroverted that an appellate court must consider the entire record in a case.” *United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995) (citations omitted).

C. Discussion

In resolving this issue, we do not discount Appellant’s argument that his reckless driving was the product of automatism. As discussed above, the FDA officially acknowledges that “sleep-driving” is a potential side effect of Ambien. However, in the course of reviewing the providence of Appellant’s guilty plea, we place great emphasis on the fact that when the military judge reopened the *Care* inquiry for Appellant’s guilty plea to this offense, he squarely

addressed the issue of automatism, and Appellant affirmatively declined to avail himself of this defense.

Specifically, the military judge informed Appellant that military law recognizes the defense of automatism. Consistent with our holding in *Torres*, the military judge also explained to Appellant that the defense of automatism pertains to the actus reus element of the offense (rather than to the mens rea element). See 74 M.J. at 157-58. And significantly, the military judge took a break in the proceedings to give Appellant the opportunity to discuss this issue with his defense counsel. Then, when the court-martial proceedings resumed, the military judge further explored the defense of automatism to see if Appellant wished to invoke it—and yet Appellant decided not to do so. To be sure, Appellant’s responses to questions posed by the military judge were not a model of clarity, but they also were not conclusory in nature or merely clipped responses to leading questions. Rather, Appellant provided moderately wellreasoned responses to the military judge’s renewed questions, and these responses drew from the observations of neutral observers, see *Moglia*, 3 M.J. at 218, his own (albeit disjointed and fragmentary) memories of the event, and his prior knowledge that Ambien could impair one’s ability to safely drive a vehicle.

And so, when it comes to the actus reus of the charged offense, Appellant stated that (a) he was convinced of his own guilt, and (b) he had reached this conclusion based—in large part—on the strength of the Government’s evidence against him. In regard to this second point, this basis for pleading guilty is admittedly unusual in the military justice system.

Further it has a bit of a *nolo contendere*⁹ air to it, and military law does not permit such pleas. *See United States v. Forester*, 48 M.J. 1, 3 n.2 (C.A.A.F. 1998) (“This is contrary to what can be done in the civilian federal courts, where a defendant may plead no contest, or *nolo contendere*, to an offense.”). However, our case law demonstrates that such guilty pleas where an accused primarily relies on the strength of the evidence against him rather than on his own independent recollections of his actions are permissible. In *Jones*, this Court held: “If an accused is personally convinced of his guilt based upon an assessment of the government’s evidence, his inability to recall the specific facts underlying his offense without assistance does not preclude his guilty plea from being provident.” 69 M.J. at 299.

Turning to the issue of the mens rea of the offense, things become less clear. However, the military judge correctly defined “recklessness” and Appellant said he understood that definition. The military judge then engaged in a colloquy with him about why he believed his conduct was “reckless.” To be sure, a review of the record demonstrates that Appellant’s responses were not neatly tailored to the mens rea issue. He talked more about his actions than what was going through his mind at the time of those actions. However, this Court is required to draw reasonable inferences in such instances. *See Carr*, 65 M.J. at 41. And a reasonable inference drawn from the facts elicited during the *Care* inquiry was that Appellant knew that taking Ambien would impair his ability to safely drive

⁹ “Nolo contendere” or “no contest” means “[a] criminal defendant’s plea that, while not admitting guilt, the defendant will not dispute the charge.” *No Contest*, Black’s Law Dictionary, (12th ed. 2024).

his car, and that he recognized, and culpably disregarded, the foreseeable consequences to others (i.e., putting them at risk of being physically harmed) when he drove his car in such a dangerous manner after taking the medication.

In light of the foregoing, we conclude that the military judge did not abuse his discretion when he accepted Appellant's guilty pleas at issue. See *Inabinette*, 66 M.J. at 322.

IV. Decision

The decision of the United States Air Force Court of Criminal Appeals is reversed as to Specification 2 of Charge II (wrongful use of zolpidem/Ambien) and sentence. The finding of guilty with respect to this specification is set aside, and Specification 2 of Charge II is dismissed. We affirm the lower court with respect to all other findings. The record of trial is returned to the Judge Advocate General of the Air Force for remand to the Court of Criminal Appeals for reassessment of the sentence or for a rehearing on the sentence, if necessary

Judge JOHNSON concurring in part and dissenting in part.

I join Part II of the Court's opinion in concluding Appellant's conviction for wrongful use of Ambien was legally insufficient. I part ways with the Court over its resolution of the providency of Appellant's guilty plea to reckless driving. Because I conclude the record does not support an inference Appellant acted with the requisite mens rea, I respectfully dissent from Part III of the Court's opinion.

The crux of my disagreement turns on the Court's treatment of Appellant's mens rea. The Court writes:

And a reasonable inference drawn from the facts elicited during the *Care* inquiry was that Appellant knew that taking Ambien would impair his ability to safely drive his car, and that he recognized, and culpably disregarded, the foreseeable consequences to others (i.e., putting them at risk of being physically harmed) when he drove his car in such a dangerous manner after taking the medication.

United States v. Navarro Aguirre, __ M.J. __ (18-19) (C.A.A.F. 2025). As the majority correctly notes, consuming a lawfully prescribed medication is not a defense if the user culpably disregards the foreseeable consequences to others. But in my view, we cannot reasonably infer that Appellant culpably disregarded the risk to others by using lawfully prescribed medication, at the correct dosage, immediately prior to sleeping, as it was intended.

We review a military judge's acceptance of a plea for abuse of discretion. *United States v. Inabinette*, 66

M.J. 320, 322 (C.A.A.F. 2008). A plea that departs from the requirements of Article 45(a), UCMJ, is harmless “if the variance does not materially prejudice the substantial rights of the accused.” Article 45(c), UCMJ, 10 U.S.C. § 845(c) (2018).

In assessing whether the military judge abused his discretion in accepting a plea, “[i]t is not enough to elicit legal conclusions. The military judge must elicit facts to support the plea of guilty.” *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002). “[A]n accused cannot be held criminally liable in a case where . . . mens rea is absent because the accused did not possess the necessary state of mind.” *United States v. Torres*, 74 M.J. 154, 157 (C.A.A.F. 2015). A conviction under Article 113, UCMJ, requires a mens rea of recklessness. *Manual for Courts-Martial, United States* pt. IV, para. 51.b.(2)(a). “Recklessness is not determined solely by . . . proof alone of excessive speed or erratic operation,” but by considering “all the circumstances.” *Id.* at para. 51.c.(7). It requires “a *culpable disregard* of foreseeable consequences to others.” *Id.* (emphasis added).

Concerning Appellant’s mens rea, although I agree with the Court “things become less clear,” *Navarro Aguirre*, __ M.J. at __ (18), in my view, the circumstances do not suggest a culpable disregard of foreseeable consequences to others. Appellant was prescribed Ambien on September 30th, the day before the events in question. There is no evidence he had ever taken Ambien before¹ or had any personal knowledge of how it would affect him. The prescribing

¹ That Appellant had not slept in two days supports the inference that he did not take any Ambien on the day he picked up his prescription.

nurse practitioner testified that people's reactions to Ambien use differ, so people "have to govern [their] response based on [their] own knowledge after taking [it] at least once or a few times to know" how it affects them. She never testified to informing Appellant of the possibility of sleep driving as a side effect. Nor is there evidence in the record to support that Appellant was aware that "complex sleep behaviors, including . . . sleep-driving," was a known side effect, or that he may be susceptible to it.

The next day, Appellant left work and arrived at his apartment around 2:30 p.m. and decided to sleep. After all, he "hadn't slept in almost two days," so, he took "the prescribed dose of one pill." Before his memory faded, he recalled lying in bed with his blouse and shoes off. "After a little while, [he] fell asleep in bed in [his] apartment."

Appellant admitted he "was aware that Ambien was pretty potent stuff, and [he knew] it [meant] sleeping could have effects on your driving, operating machinery and whatnot." However, knowing that a medication could cause drowsiness is different from knowing that a known side effect of the medication is that it can cause sleep driving.² Moreover, according to his admissions, Appellant did not take the Ambien until he got home. He did not take it while expecting to get behind the wheel. And he did not take it thinking he would go for a drive. In other words, he never describes his mental state as:

² I agree with the Court's decision that Appellant's actus reus was appropriately resolved by the military judge's questions. Although Appellant's automatism defense addresses the actus reus of a crime, *Torres*, 74 M.J. at 157-58, Appellant still needed to show he had the reckless mens rea for his plea to be provident.

[c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash. Reckless conduct is more than mere negligence: it is a gross deviation from what a reasonable person would do.

Reckless, *Black's Law Dictionary* (12th ed. 2024). In criminal trials, recklessness contains both an objective and subjective component. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 68 n.18 (2007). The creation of a substantial and unjustifiable risk is measured against an objective standard, *id.* at 68, while the conscious disregard reflects the need for “subjective knowledge on the part of the offender.” *Id.* at 68 n.18. While the Court speaks to the objective component—the nature of his driving—it does not address whether Appellant had the subjective understanding that he was culpably disregarding this risk.

Instead, the record reflects a man using his lawfully prescribed medication, at the correct dosage, immediately prior to sleeping, as it was intended. This conclusion is consistent with the Court’s conclusion that the Appellant did not wrongfully use his prescription. In my opinion, neither Appellant’s words nor actions demonstrate a *culpable* disregard for the foreseeable consequences.

The United States Court of Appeals for the Third Circuit came to a similar conclusion in *Government of Virgin Islands v. Smith*, concerning an appellant who was allegedly unconscious as the result of an epileptic seizure:

It has been held that the operator of an automobile who is suddenly stricken by an illness which he had no reason to anticipate but which renders it impossible for him to control the car is not chargeable with negligence. On the other hand it has also been held that an operator of a motor vehicle, unconscious from illness at the time of the accident, may nonetheless be found guilty of criminal negligence in having undertaken to drive the vehicle if he knew at the time that he might black out or lose consciousness while doing so.

278 F.2d 169, 174-75 (3d Cir. 1960) (listing cases) (cited with approval in *Torres*, 74 M.J. at 157). This case resembles the former situation, rather than the latter. Nothing in the record suggests Appellant knew or disregarded the chance he would be subject to a rare side effect of Ambien.

Of course, Appellant did admit his car “was seen recklessly weaving and blocking traffic.” He also agreed that he drove his vehicle voluntarily. But as the Court correctly describes, these solitary statements fail to touch on his mental state. Considering his driving “under all the circumstances” paints the picture of a man wanting to sleep, going to bed, and intending to sleep. *MCM* pt. IV, para. 51.c.(7). These statements should also be viewed in light of the military judge’s instructions. Upon reopening the guilty plea, the military judge gave Appellant the voluntary intoxication instruction,

saying “tak[ing] a drug voluntarily is not a defense.”³ Appellant, intending to sleep, did take Ambien voluntarily; so after being told that this could not be a defense to his conduct, Appellant naturally agreed with the military judge.

Appellant’s admissions fail to establish his actions were a result of a culpable disregard of any consequences. In light of this, his mental state does not rise to the reckless mens rea. Absent mens rea, I would hold Appellant was materially prejudiced by the military judge’s acceptance of his guilty plea and his plea should be held improvident.

.

³ Appellant did not raise instructional error on appeal, but his admissions raise the defense of *involuntary* intoxication. “[I]ntoxication is involuntary when an accused is unaware of the effect of a drug or substance on him.” *United States v. MacDonald*, 73 M.J. 426, 437-48 (C.A.A.F. 2014). “Among the circumstances of intoxication said to be involuntary is the circumstance in which, as a result of a genuine mistake as to the nature or character of the liquor or drug, the drunkenness has resulted from taking something not known to be capable of producing such a result.” *United States v. Ward*, 14 M.J. 950, 953 (A.C.M.R. 1982).

380a

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

No. ACM 40354

UNITED STATES
Appellee

v.

Leo J. NAVARRO AGUIRRE
Airman First Class (E-3), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial
Judiciary

Decided 11 March 2024

Military Judge: Elijah F. Brown.

Sentence: Sentence adjudged 26 March 2022 by GCM convened at Joint Base Lewis-McChord, Washington. Sentence entered by military judge on 12 May 2022: Bad-conduct discharge, confinement for 2 years and 2 months, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

For Appellant: Major Spencer R. Nelson, USAF.

For Appellee: Lieutenant Colonel J. Peter Ferrell, USAF; Major Vanessa N. Bairos, USAF; Major Olivia B. Hoff, USAF; and Mary Ellen Payne, Esquire.

Before RICHARDSON, DOUGLAS, and WARREN, *Appellate Military Judges*.

Judge DOUGLAS delivered the opinion of the court, in which Senior Judge RICHARDSON and Judge WARREN joined.

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

DOUGLAS, Judge:

In a general court-martial, Appellant entered mixed pleas. The trial judge accepted his pleas of guilty to one specification of failure to obey a lawful order (violating a no-contact order), and one specification of wrongful use of oxycodone in violation of Articles 92 and 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 912a.¹ The trial judge also accepted Appellant's plea of guilty by exception to one specification of reckless driving, excepting the words "and aerosol inhalants," in violation of Article 113, UCMJ, 10 U.S.C. § 913.² The Government elected to go forward with the excepted

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

² Specifically, Appellant was charged with "physical[] control of a vehicle, to wit: a passenger car, in a reckless manner by causing the vehicle to block traffic and swerve on public roadways and by driving the vehicle after using Zolpidem (a Schedule IV controlled substance commonly referred to as Ambien) and aerosol inhalants."

language in which a panel of officer and enlisted members found Appellant guilty of the specification of reckless driving, excepting the words “and aerosol inhalants.” Contrary to the remainder of his pleas, the same panel of officer and enlisted members found Appellant guilty of one specification of wrongful use of Ambien³ in violation of Article 112a, UCMJ, and one specification of assault consummated by a battery and one specification of aggravated assault—both against his spouse and both in violation of Article 128, UCMJ, 10 U.S.C. § 928.⁴ The trial judge sentenced Appellant to a bad-conduct discharge, confinement for two years and two months, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand.⁵ The convening authority took no action on the findings. The convening authority suspended the first six months of the adjudged forfeiture of total pay and allowances, waived the resulting automatic forfeitures for six months, and directed the total pay and allowances to be paid to Appellant’s spouse for six months. Otherwise, the convening authority approved the remainder of the sentence and provided the language for the reprimand.

³ Charged as “Zolpidem, commonly referred to as Ambien, a Schedule IV controlled substance.”

⁴ The convening authority withdrew and dismissed without prejudice one specification of wrongful use of benzodiazepine, a Schedule IV controlled substance, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Appellant was acquitted of several other specifications and charges.

⁵ The concurrent and consecutive segmented confinement lengths combined for a total of two years and two months. Appellant was credited with 108 days of pretrial confinement.

Appellant raises three issues on appeal which we have reordered and reworded: whether (1) Appellant's guilty plea for reckless driving was provident, (2) Appellant's conviction for wrongful use of Ambien is legally and factually sufficient, and (3) Appellant was entitled to a unanimous verdict. We have carefully considered issue (3) and determined it warrants no 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)). Key to the analysis of the claims on appeal is the distinction between what Appellant stated in his initial *Care*⁶ inquiry and the re-opened *Care* inquiry—the details of which were not before the factfinders—versus the information admitted as evidence before them. After considering the entire record and finding no error materially prejudicial to Appellant's substantial rights, we affirm the findings and sentence.

I. BACKGROUND

While addressed separately at trial, the facts of the reckless driving and wrongful use of Ambien convictions are related. Both involve a single use of Ambien, which was a contributing factor to Appellant's reckless driving and separately charged as a wrongful use of a controlled substance. The specification alleging reckless driving charged, *inter alia*, that Appellant drove “within the state of Washington, on or about 1 October 2021 . . . in a reckless manner . . . after using” Ambien. The specification alleging wrongful use charged that

⁶ *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

Appellant “did, in or around the state of Washington, on or about 1 October 2021, wrongfully use” Ambien.

Without a plea agreement, Appellant pleaded guilty to reckless driving (except the words “and aerosol inhalants”), admitting he was under the effects of his prescribed Ambien, but he pleaded not guilty to wrongfully using this prescription medication. Appellant elected to inform the panel of his guilty pleas prior to the Government proceeding on the merits; consequently, the members knew Appellant had pleaded guilty to reckless driving after using Ambien. However, the members did not know the underlying facts of the guilty plea because the details of his plea were not introduced as evidence before the factfinders. The Government proceeded on the excepted words of the reckless driving offense, as well as all charges to which Appellant had pleaded not guilty, including wrongful use of Ambien.

In closing, trial defense counsel argued that Appellant’s Ambien use was in accordance with his prescription, which was admitted into evidence. On appeal, Appellant’s counsel continues to argue the same.

As background for purposes of our opinion, the undisputed facts common to both offenses are that sometime after work on Friday, 1 October 2021, Appellant took Ambien, which he had been prescribed the previous day, and then drove his personal vehicle.

A. Not Admitted as Evidence: First Providence Inquiry

After pleading guilty and being placed under oath, Appellant explained the following to the trial judge during the *Care* inquiry:

On 1 October 2021, within the State of Washington, I drove my passenger car in a reckless manner after using Ambien. I was prescribed Ambien the day before on 30 September 2021. I got the prescription to help me sleep. On 1 October 2021, I took the prescribed dose of one pill. On 1 October 2021, I left work at Joint Base Lewis-McChord and went to my apartment in University Place, Washington. I got back around 1430, and I decided to take some Ambien and go to sleep, because I hadn't slept in almost two days. Earlier in the day I had been thinking that I needed to fill my car with gas. After a little while, I fell asleep in bed in my apartment. The next thing I remember is being behind the wheel of my car. My car was parked in the parking lot outside of my apartment. I remember noticing that I was in the wrong parking spot, the vehicle was running, and I had the foot on the gas pedal revving the engine, which caused the vehicle to overheat. A police car was behind me. The police officers talked with me. There were two officers there. They asked me if I was drunk and I told them no, but I said that I had taken Ambien. . . . I do not remember driving my car, but I have reviewed the statements of witnesses and police, and I am aware that my car was seen recklessly weaving and blocking traffic. I was discovered in my car with the car still running. When I woke up, the car

was in a different spot than where I had left when I got home from work. I was the only one who had keys to my car. The police told me a witness saw me hit a lamppost, and when I looked at my car, I noticed fresh damage to the front bumper of my vehicle that had not been there when I parked it. I believe that I did, in fact, drive my car in a reckless manner as the evidence I have reviewed says.

Following this explanation, the trial judge questioned Appellant. During that question-and-answer colloquy, Appellant re-affirmed to the trial judge the substance of Appellant's opening explanation, to wit: that Appellant operated his vehicle within hours of taking Ambien; that he had no independent recollection of his reckless operation of the vehicle (including swerving in traffic and hitting a lamppost), but that his review of the evidence gathered in the case, including the police report containing police and witness statements, convinced Appellant that he did in fact operate his vehicle recklessly as alleged. Appellant further conceded under oath that he felt "dazed, groggy, and slow" when police confronted Appellant in his apartment complex parking lot. The question-and-answer colloquy continued:

[Military Judge (MJ)]: The next part of the element [of physically controlling a vehicle] says that you caused the vehicle to swerve on public roadways. What do you know about, if anything, about swerving on public roadways?

[Appellant]: I believe it's unsafe, Your Honor.

MJ: And factually, what information do you have from your review of any of the witness statements or from what the police may have told you about any sort of swerving? Like what do you know or what do you believe you did based on that?

....

[Appellant]: Your Honor, one witness stated that I was swerving on and off roads, switching lanes, and that the swerving is what eventually led me to swerve onto the sidewalk and hit the lamppost, Your Honor.

....

MJ: The element continues by saying that this control of the vehicle was after using Zolpidem, a Schedule IV controlled substance commonly referred to as Ambien. Was this after using Ambien?

....

... What I am trying to determine is just temporally, like how long after using the Ambien could it have been when you were driving? And I understand you might not have any sort of specific timeline, but why do you think you were controlling your vehicle after -- well, in a reckless manner part of which was after using Ambien? And it looks like your counsel is ready to speak with you.

. . . .

[Appellant]: Your Honor, I believe it was after arriving home from work that day. I was still in the same clothes that I had been wearing at work minus the blouse. There was still light out and it was the same date. And when I woke up, I had the same clothes on.

MJ: Do you believe it was the Ambien that led to your not having a memory of being in control of the vehicle?

[Appellant]: Yes, Your Honor.

. . . .

MJ: So the second element is that, you know, by causing the vehicle to block traffic, swerving on public roadways, and then by driving the vehicle after using Zolpidem, you controlled the vehicle in a reckless manner. So why do you believe this was reckless? That your control of the vehicle, rather, was reckless?

[Appellant]: Because I was not in complete control of my faculties, Your Honor.

. . . .

Your Honor, it was reckless because I was swerving on the road, blocking traffic, riding up a sidewalk and hitting the lamppost, and that is unsafe for myself and others.

MJ: So the definition -- the legal definition of reckless is that the manner

of control of the vehicle was under all the circumstances of such a heedless nature that it made it actually or imminently dangerous to the occupant, so to you, or to the rights or safety of others or another. It further says that recklessness is not determined solely by reason of the happening of an injury or invading the rights of another nor solely by excessive speed or erratic operation, but these are relevant factors. So, how was it imminently -- actually imminently dangerous to yourself or to the rights or safety of others, would you say?

[Appellant]: I could have gotten into a car accident, Your Honor. Well, besides hitting the lamppost, hurting others and myself, Your Honor.

MJ: Do you think lack of memory as a result of taking Ambien, do you think the Ambien could have also impacted your ability to safely control the vehicle?

[Appellant]: Yes, Your Honor.

....

Your Honor --

....

-- in addition to when my memory came to, I remember feeling dazed, groggy, slow, and having a hard time understanding the police officers. I thought the same way I was driving that night, I could see how it could affect my ability to safely drive.

MJ: Do you believe that to be the case, that you would have been experiencing affects such as being dazed, groggy and slow while driving?

[Appellant]: Potentially, Your Honor.

MJ: Do you think you had any legal justification or excuse for operating the vehicle in the manner alleged while under -- or after taking Ambien?

[Appellant]: No, Your Honor.

Counsel for both sides responded in the negative when asked by the trial judge if they believed further inquiry was required. The trial judge found Appellant's pleas provident, accepted the pleas, and advised Appellant that he may "request to withdraw" the "guilty plea[s] at any time before sentence is announced," and the request would be granted if there was "a good reason" for the request.

B. Admitted as Evidence: Before the Court Members

After the members were impaneled, the Government presented evidence on the offenses to which Appellant pleaded not guilty. Specific to reckless driving, including the words "and aerosol inhalants," the Government called Specialist (SPC) MD. On the day in question, SPC MD was driving behind his wife, who was driving her own vehicle, and they were headed home in the same direction as Appellant. SPC MD testified that at about 1800 hours on 1 October 2021, he saw Appellant in his vehicle at a traffic light that turned green, but Appellant did not move his vehicle. As a result, "everybody started honking . . . because . . . everybody

gets aggravated.” He then witnessed Appellant “swerving in and out of lanes” and “slow down, speed up, slow down, and speed up again,” and SPC MD thought Appellant might be trying to race with him. At one point, while SPC MD and his wife were both traveling in the left lane of two lanes, SPC MD noticed Appellant attempted to pass his wife, on the left—crossing the center line and into a lane with oncoming vehicles. At that time, Appellant returned to the right lane and sped away. When SPC MD arrived at his apartment complex, which coincidentally was the same as Appellant’s, he saw Appellant’s vehicle stopped in the turning lane, not moving. At that time, SPC MD got out of his vehicle to check on Appellant. SPC MD saw Appellant in military uniform “without the top, just a shirt,” “rocking back and forth,” with “a can in his lap, and [Appellant] just had like a smile”—causing SPC MD to think “okay, well, he’s probably high.” SPC MD thought he might help by driving Appellant’s vehicle, but Appellant did not roll down his window. Appellant eventually turned into the apartment complex, but then “bumped into a lamppost,” causing Appellant to stop again for “like, five, ten minutes” before driving off. SPC MD did not see Appellant again.

Continuing its case-in-chief, the Government called Deputy MC, who was one of two responding local, civilian police officers. They had responded to a report of a traffic complaint with suspicions that the driver was “driving under the influence.” According to Deputy MC, “a vehicle was traveling . . . driving into oncoming traffic and possibly causing an accident,” and the complainant stated, “they had believed the vehicle had struck a pole, and the vehicle had left.” The police officers determined the residential address

from the license plate information provided by the complainant, but “could not find any damage to the pole,” so they proceeded to the residential address of the license plate registration. Deputy MC “saw a vehicle that was parked in a parking stall but was not completely in the stall. It was like halfway out.” Appellant was in the car at the time, and the officers “made contact.” Appellant stated that “his vehicle was now broken down” and he “could not get it into the stall completely.” Deputy MC continued,

I went through [a] series of questions. Explained what had occurred. What the report was. My partner and I, you know, established a rapport, and then the conversation led to alcohol, drugs. At the conclusion what we ended up finding out is the Airman spoke about how he had been on Ambien, had been taking Ambien. I assisted to try to get the vehicle into the driveway. There was some type of damage on the undercarriage or whatever. We could not get it to function at all, and we could not move it back into the parking stall.

According to Deputy MC, they did not have probable cause to arrest Appellant, so he “made notification to [Appellant’s] supervisor in the military and [Appellant] was sent on his way back to his residence.” Deputy MC further described Appellant as “cooperative,” “responsive,” “calm,” and “forthcoming.” Deputy MC recalled Appellant was “in uniform” and agreed he was “ambulatory.” Standardized field sobriety tests were not given because Deputy MC did not see any indications that would lead him or the

other responding officer to believe they were necessary.

The Government also called Airman First Class (A1C) ASM, a paralegal assigned to the legal office responsible for prosecuting the Government's case. On 15 December 2021, approximately 75 days after Appellant was seen driving recklessly, A1C ASM went to the last known address for Appellant, found Appellant's vehicle, and took photographs. Nine photographs were admitted as Prosecution Exhibit 5. They included pictures of the outside of Appellant's vehicle, as well as the inside of his vehicle. From the outside of his vehicle, through the windows, a written prescription for Ambien was visible; the pharmacy Appellant used was Walgreens. She agreed that at the time she took the photographs, Appellant's vehicle was "fully parked in the parking spot."

Further, the Government called Dr. CS, a forensic director for a regional clinical laboratory in Philadelphia, and qualified him as an expert in forensic toxicology and criminalistics. Through their cross-examination, the Defense asked a series of questions related to Ambien use and its effects on a person, eliciting concessions as to the amnesiac side effects of Ambien (*i.e.*, that after taking Ambien a person could be capable of performing complex tasks and yet not remember them).

Upon redirect examination, the Prosecution elicited testimony as to the duration of the physiological effects of Ambien on the central nervous system, including that Ambien is a "full night's rest kind of medication" designed to induce extended periods of sleep for the user.

The Government also called Master Sergeant (MSgt) EP, Appellant's first sergeant. MSgt EP explained that Appellant worked a standard day shift on 1 October 2021—that generally, he worked from approximately 0630 until 1630. MSgt EP confirmed Appellant worked on 1 October 2021.

After the Government rested, the Defense called Dr. BW, the psychiatric nurse practitioner who prescribed Appellant Ambien. Through her testimony, the Defense admitted Defense Exhibit B, a two-page document that reflected the prescription she wrote Appellant on 30 September 2021. She agreed that as of 1 October 2021, Appellant had an active prescription for Ambien, and would have had a medical purpose and authorization to use the medicine on that day. The Defense also admitted Defense Exhibit A, a 26-page document produced by the Food and Drug Administration (FDA) to inform providers of the risks and benefits of Ambien. On the front page, highlighted by a box outline, was an advisory that indicated a warning for "complex sleep behavior." Further, in the FDA advisory, one of the complex sleep behaviors listed was "sleep-driving." Trial defense counsel questioned Dr. BW about the advisory:

Q: All right. So[,] in the upper left-hand page -- I am sorry, the upper left-hand quadrant of the first page, it talks about complex sleep behaviors. Let's talk about complex sleep behaviors. And as the person providing the medication, what does the term complex sleep behavior mean to you as it relates to Ambien?

A: Well, in addition to, you know, providing -- since Ambien is a hypnotic in addition to providing sleep, it can also have other sorts of side effects that can occur when a person is going to sleep or when a person is using the medication. Sometimes the complex -- well, the complex sleep issues can be like a parasomnia, which is sort of an unusual reaction to the medication, which has a whole list of different things that people could experience potentially. Not commonly, but potentially.

During cross-examination of Dr. BW, trial government counsel extracted concessions on normal patterns of prescribed Ambien use, including the fact that the normal prescription instructions include a directive for the patient to take the medication “typically” 30 minutes prior to his intended bedtime and seven to eight hours before he intends to wake up. She did not state whether she recalled informing Appellant of this specific set of instructions.

When trial defense counsel additionally asked, “[i]f a particular person who has been prescribed Ambien takes it, say, an hour before going to bed, does that somehow invalidate the prescription, make their use illegal,” Dr. BW responded, “No.” Dr. BW answered the same when asked about two hours.

When asked by trial government counsel if people abuse Ambien prescriptions, Dr. BW responded, “Some people do. People have.” Dr. BW provided the following in response to follow-on questions by trial counsel:

Q: And could they do that by taking more than they should take?

A: They could do that.

Q: And could they do that by taking that at a time when they are not trying to go to sleep, but rather trying to have some other effect?

A: I mean, I have not seen that commonly, but I imagine that, yes, you could do that.

The Defense moved for a finding of not guilty under Rule for Courts-Martial (R.C.M.) 917, claiming the Government had failed to establish Appellant wrongfully used his Ambien prescription on 1 October 2021. While the Government disputed the motion, they admitted their case was based upon circumstantial evidence, rather than direct evidence. The trial judge denied the motion, finding the evidentiary standard had been met through the Government's admission of "some evidence," and cited this court's opinion in *United States v. Mull*, 76 M.J. 741, 746 (A.F. Ct. Crim. App. 2017) (en banc) (overruling a previous holding "that the use of a controlled prescription drug for an ailment other than the one for which the drug was prescribed cannot be punished under Article 112a, [UCMJ]").

In closing argument, trial government counsel theorized Appellant misused his Ambien prescription for its mood-altering effects when he stopped at Walgreens and took the medicine in his car after leaving work but before arriving home. Conversely, the Defense argued Appellant had a prescription for Ambien which he used in accordance with its intended purpose, but the medication caused him to be sleepy

while driving. They specifically argued Ambien did not cause him to be “passed out” while driving. According to the Defense, Appellant driving recklessly and while sleepy did not equate to misusing the prescription and the Government had “no proof” that Appellant took the Ambien for any other reason than to “go to sleep.”

The members found Appellant guilty of reckless driving, except the words “and aerosol inhalants,” as well as guilty of wrongful use of Ambien. After findings were announced, Appellant chose sentencing by the trial judge alone. The panel members were then permanently excused.

C. Not Admitted as Evidence: Second Providency Inquiry

At the beginning of the sentencing phase of the trial, the Defense moved for a finding of not guilty under R.C.M. 917 for a second time, claiming the Government had failed to prove Appellant wrongfully used his prescription Ambien on 1 October 2021. Further, the Defense argued the trial judge should consider the facts as explained by Appellant during his *Care* inquiry; specifically, that he took the Ambien after getting home because he “wanted a nap” and then “woke up in his car hours later.” The trial judge denied the motion again, specifying he did not consider the *Care* inquiry. However, because of trial defense counsel’s argument on this motion, and after an additional review of Defense Exhibit A (the FDA advisory), the trial judge reopened Appellant’s *Care* inquiry as to the reckless driving. The trial judge was concerned that trial defense counsel had raised the legal defense of an involuntary act, or “automatism.” He explained that while there was no requirement to

remember criminal conduct to plead guilty to it, the criminal act must have been voluntary. The following exchange occurred between the trial judge and Appellant during the re-opened *Care* inquiry:

MJ: . . . [O]ne thing I want to ask you about is, essentially, why you believe you are guilty of [the reckless driving] charge. Again, excepting the words “and aerosol inhalants,” and essentially, it’s the part of that charge that says you were in physical control of the vehicle. So I’ll inform you that voluntary intoxication, so if you voluntarily take, whether it’s alcohol or a drug, if you take a drug voluntarily is not a defense. That’s just what the law is. And the law also recognizes that just because you don’t remember something, doesn’t mean that you can’t plead guilty to doing something, provided you can articulate or explain why you think you are guilty.

. . . .

Why do you think that your control of the vehicle was voluntary if you were under the influence of Ambien and have no memory of the driving?

[Appellant]: Your Honor, before my memory blacks out, I was laying in bed in my apartment with my shoes off and my blouse off. To get to the point where I was at, I would have had to put some kind of shoes on, get my car keys, get in my car, start my car, turn music on, because there was music playing, which

doesn't automatically start, at least not from my phone. From witness testimony, I stopped at stoplights, right, I had to put my car in gear and pulled out of the spot. The car was also parked differently than how I left it when I got home from work. When I get home from work I usually pull in reverse to my parking spot. And when I come to with the conversation with the police officers, my car is just pulled in forward. Again, from witness testimony, I was driving somewhat normal at some points. Also, my feeling of when my memory kicks back in, it does [sic] didn't feel like waking up from sleep. It feels more like I just wasn't storing what was going on. Kind of feels like a blackout from drinking alcohol. Like a slide show and there are just some slides missing. Also, previously I was aware that Ambien was pretty potent stuff, and I know it made sleeping [—] could have effects on your driving, operating machinery and whatnot. I believe that's all, Your Honor.

....

MJ: ... Why do you believe you're responsible for your actions while driving after taking Ambien?

....

[Appellant]: Your Honor, um, previously before coming to, I do remember that my car was running low on gas, and I had been thinking about getting gas, so it's

possible that I went out and dr[o]ve voluntarily to prepare for the night to get gas. I think that was my motive behind driving voluntarily. I just don't remember the facts. And upon coming to, it didn't feel like I was asleep. Just felt more like my memory just kind of kicks back in for a period.

MJ: So, although you don't have a memory of driving, do you believe that during the time you don't have a memory, that you were aware of what you were doing?

[Appellant]: Yes, Your Honor.

MJ: And why do you believe that?

[Trial defense counsel]: May we have a moment, Your Honor?

MJ: You may.

....

[Appellant]: I believe that I was aware of where I was at stoplights. I was aware of the honking. I was able to get back home. I know music was playing. I believe those are voluntary actions. That's why, Your Honor.

Counsel for both sides responded in the negative when asked by the trial judge if they believed further inquiry was required. The trial judge again found Appellant's pleas provident, accepted the pleas, and advised Appellant that he may "request to withdraw" the "guilty plea at any time before sentence is

announced,” and the request would be granted if there was “a good reason” for the request.

Neither Appellant nor his trial defense counsel requested to withdraw the guilty plea prior to announcement of the sentence. After a presentencing hearing, the trial judge sentenced Appellant to a bad-conduct discharge, confinement for two years and two months, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand.

II. DISCUSSION

A. Providency of Reckless Driving Plea

1. Law

We review a military judge’s decision to accept the accused’s guilty plea for an abuse of discretion. *United States v. Riley*, 72 M.J. 115, 119 (C.A.A.F. 2013) (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)). “An abuse of discretion occurs when there is ‘something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant’s guilty plea.’” *Id.* (quoting *Inabinette*, 66 M.J. at 322). The military judge’s legal conclusion about the providency of the plea is reviewed de novo. *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005).

Appellate courts will not speculate on the existence of facts that might invalidate a plea especially where the matter raised post-trial contradicts an appellant’s express admission on the record. *See United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995). “[W]hen a plea of guilty is attacked for the first time on appeal, the facts will be viewed in the light most favorable to

the [G]overnment.” *United States v. Arnold*, 40 M.J. 744, 745 (A.F.C.M.R. 1994) (citation omitted).

“This court must find a substantial conflict between the plea and the accused’s statements or other evidence in order to set aside a guilty plea. The mere possibility of a conflict is not sufficient.” *United States v. Hines*, 73 M.J. 119, 124 (C.A.A.F. 2014) (quotation marks and citation omitted). We apply a “substantial basis” test by determining “whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant’s guilty plea.” *Inabinette*, 66 M.J. at 322.

In reviewing the providence of an appellant’s guilty pleas, “we consider his colloquy with the military judge, as well any inferences that may reasonably be drawn from it.” *United States v. Timsuren*, 72 M.J. 823, 828 (A.F. Ct. Crim. App. 2013) (quoting *United States v. Carr*, 65 M.J. 39, 41 (C.A.A.F. 2007)).

Appellant pleaded guilty to reckless driving, in violation of Article 113, UCMJ. To be found guilty, Appellant’s plea inquiry must provide factual support for each element of the offense: (1) that Appellant was in physical control of a passenger car; and (2) that Appellant physically controlled the car “in a reckless manner by causing the vehicle to block traffic and swerve on public roadways[,] and by driving the vehicle after using Zolpidem.” See *Manual for Courts-Martial, United States* (2019 ed.) (MCM), pt. IV, ¶ 51.b.

An Appellant “cannot be held criminally liable in a case where the actus reus is absent because [the appellant] did not act voluntarily, or where mens rea

is absent because [the appellant] did not possess the necessary state of mind when he committed the involuntary act.” *United States v. Torres*, 74 M.J. 154, 157 (C.A.A.F. 2015). “However, even if the military judge did not abuse his discretion in accepting the plea, we still may set aside the plea if we find a substantial conflict between the plea and [an appellant’s] statements or other evidence in the record.” *United States v. Rothenberg*, 53 M.J. 661, 662 (A.F. Ct. Crim. App. 2000) (citing *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996)).

2. Analysis

Appellate defense counsel asks us “whether [Appellant’s] guilty plea for reckless driving was provident when he took his prescribed dose of Ambien, fell asleep in his bed, and ‘the next thing [he] remember[ed] is being behind the wheel of [his] car.’” We answer in the affirmative.

This assignment of error questions whether, despite his plea at trial, Appellant committed an involuntary act when he drove his vehicle recklessly on 1 October 2021. Whether the Ambien caused involuntary “actus reus” on Appellant’s part was not raised by *evidence* introduced at trial and was explicitly denied by Appellant.

Appellant explained he was driving his vehicle after work, and before speaking with police officers. He had the keys, he was seated in the driver’s seat, and no one else was with him. These facts were not disputed or contradicted. Appellant explained he understood he was witnessed driving recklessly by causing his vehicle to block traffic at a stop light when the light turned green, and when he stopped his vehicle in a turning lane instead of turning into his

apartment complex, and by hitting a lamppost. Appellant explained that he understood he was seen swerving between lanes by at least one witness while on public roadways in the state of Washington. He had discussed his case with his trial defense counsel and had been told of the evidence gathered in this investigation. He admitted under oath that he took his prescription dose of Ambien and intended to “take a nap” but later found himself behind the wheel of his vehicle.

Appellant asserted to the trial judge that he acted voluntarily and had a lack of memory—not a lack of awareness of all his actions while driving. Appellant admitted that he heard “honking” from other vehicles while he was stopped, remembered hearing his music playing, and knew he must have put his “shoes” back on, procured his keys, and drove his vehicle most likely to “get gas for the evening.” Appellant believed his loss of memory, while attributed to the Ambien, did not “feel” like sleep. Comparing Appellant’s statements in his first *Care* inquiry to his statements in his second *Care* inquiry, we do not find conflicts, but additional details.

On appeal, Appellant highlights evidence presented in findings that is inconsistent with his guilty plea. The Defense admitted the FDA advisory on Ambien, which included a reference to sleep-driving. The Defense cross-examined the Government’s toxicologist who agreed Ambien could cause sleep-driving. The Defense called the provider who prescribed Appellant Ambien, who agreed involuntary acts while on Ambien were documented, though “not common.” What was not demonstrated at trial, however, was that *Appellant* was sleep-driving. The witness testimony strongly supported an

inference that Appellant was awake while driving. Moreover, during the *Care* inquiries, Appellant disavowed that he was asleep while driving. Appellant never withdrew his guilty plea, despite being specifically advised by the trial judge that he could do so before sentencing, twice.

We will not speculate on the existence of facts that might invalidate a plea especially where the matter raised post-trial contradicts an appellant's expressed admission on the record. *See Johnson*, 42 M.J. at 445. Further, we do not find a substantial conflict between Appellant's guilty plea and other evidence because the record lacks evidence Appellant was sleep-driving. *See Rothenberg*, 53 M.J. at 662. We find the trial judge did not abuse his discretion.

B. Sufficiency of Wrongful Use of Ambien Conviction

1. Law

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). "Our assessment of legal and factual sufficiency is limited to the evidence produced at trial." *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citation omitted).

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

(citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018). “[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution.” *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). 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 R.C.M. 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)). As a result, “the standard for legal sufficiency involves a very low threshold to sustain a conviction.” *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (alteration and citation omitted).

“The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are ourselves] convinced of the [appellant]’s guilt beyond a reasonable doubt.” *Rodella*, 82 M.J. at 525 (alterations in original) (quotation marks and citation omitted). “In conducting this unique appellate role, we take ‘a fresh, impartial look at the evidence,’ applying ‘neither a presumption of innocence nor a presumption of guilt’ to ‘make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.’” *Wheeler*, 76 M.J. at 568 (alteration in original) (quoting *Washington*, 57 M.J. at 399).

To convict Appellant of wrongful use of Zolpidem (Ambien), the Government was required to prove four elements beyond a reasonable doubt: (1) Appellant used Zolpidem, a Schedule IV controlled substance, in or around the state of Washington on or about 1 October 2021; (2) he actually knew he used the substance; (3) he actually knew that the substance he used was Zolpidem; and (4) Appellant's use was wrongful. *See MCM*, pt. IV, ¶ 50.b.(2).

Use of a controlled substance is wrongful if it is without legal justification or authorization. *See id.* Use of a controlled substance is not wrongful if the controlled substance is prescribed by a doctor and the use of the substance is for the medical purpose prescribed. *See id.* However, if a prescribed substance is used for a purpose other than that for which it is prescribed, it is wrongful. *Mull*, 76 M.J. at 746.

This court

may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as [this court] finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, [this court] may weigh the evidence, judge the credibility of witness[es], and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1).

“A guilty plea and related statements to one offense cannot be admitted to prove any element of a separate offense.” *United States v. Flores*, 69 M.J. 366, 369 (C.A.A.F. 2011) (footnote omitted). “A military

judge who advises [an appellant] that [he] is waiving [his] right against self-incrimination only to the offenses to which [he] is pleading guilty must not later rely on those statements as proof of a separate offense.” *Id.* at 369–70 (citing *United States v. Resch*, 65 M.J. 233, 237 (C.A.A.F. 2007)). However, in circumstances where an accused pleads guilty to a lesser included offense, that accused’s statements during his guilty plea may be used to establish facts and elements common to both the greater and lesser offense within the same specification. *See United States v. Grijalva*, 55 M.J. 223, 227–28 (C.A.A.F. 2001) (citations omitted).

2. Analysis

At trial, and on appeal, Appellant submits the Government could not, and did not, provide sufficient evidence to prove wrongful use of Ambien. We find the evidence presented on the merits supports a finding that Appellant used Ambien wrongfully, that is, not for the purpose of sleep.

Although Appellant chose to inform the members of his guilty pleas at the onset of the litigated findings, neither the Defense nor the Government admitted as evidence before the court the details described by Appellant of his Ambien use during his providency inquiries. Specifically, his explanation of taking the prescribed dose while in his apartment after arriving home from work, for the purposes of taking a nap, were facts not in evidence before the panel as to the offense of wrongful use of Ambien.

The facts that were admitted into evidence and before the court-martial members include that Appellant was prescribed Ambien on 30 September 2021. According to his first sergeant, Appellant

normally worked from 0630 to 1630. On 1 October 2021, a work day for Appellant, he was seen driving recklessly in his car, on the public roadways, driving in the direction leaving the base, after normal hours but before the sun went down, wearing his uniform (except for his outer blouse). In addition to being seen rocking back and forth in the driver's seat and appearing to have a smile on his face, he was observed swerving on the road, blocking traffic, driving up on a sidewalk, hitting a lamppost, and then attempting to park in a parking stall near his apartment building. When confronted by the police, Appellant told them that he had taken Ambien. A receipt from Walgreen's pharmacy filling Appellant's prescription was seen in his car, face up on the front passenger seat. In his interactions with the police, he was calm, responsive to their questions, cooperative, and ambulatory.

As to legal sufficiency of this specification, after a thorough review of the evidence and evaluating it in the light most favorable to the Prosecution, we find any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Robinson*, 77 M.J. at 297–98. While the evidence admitted is circumstantial, reasonable inferences drawn from it establish the trier-of-fact could find beyond a reasonable doubt that Appellant ingested the Ambien wrongfully. *See Barner*, 56 M.J. at 134.

As to factual sufficiency, we have taken “a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.” *Wheeler*, 76 M.J. at 568 (alteration in original)

(quotation marks and citation omitted). SPC MD witnessed Appellant driving his personal vehicle in the state of Washington, on 1 October 2021, and Appellant informed the responding police officers that he used Ambien (element one). One police officer testified Appellant stated he actually knew he used Ambien (element two). The prescription receipt was found in Appellant's vehicle, which demonstrates Appellant knew the substance he used was Ambien (element three). And Appellant took the Ambien sometime during the day, before driving home, while still in uniform, without preparing himself for a full seven to eight hours rest, which demonstrates that Appellant's use was not consistent with preparing for sleep within 30 minutes and for seven to eight hours, which was not in accord with his prescription and was therefore, wrongful (element four). *See MCM*, pt. IV, ¶ 50.b.(2).

Appellant would have us consider his statements during the *Care* inquiry to find his conviction for wrongful use of Ambien legally and factually insufficient. Appellant misapprehends the boundaries of the law. Consistent with the principles articulated in *Flores*, Appellant is not entitled to rely upon *Care* inquiry statements as substantive proof in an effort to refute the evidence actually admitted at findings. While the United States Court of Appeals for the Armed Forces in *Flores* found error in the Government's invocation of that appellant's *Care* inquiry statements to support proof of a separate offense, 69 M.J. at 370, the *Flores* opinion does not suggest an accused may use this "shield" as a "sword" and endeavor to use *Care* inquiry statements for his own purposes of challenging a separate offense.

We are convinced of Appellant's guilt beyond a reasonable doubt. *See Rodela*, 82 M.J. at 525. We find Appellant's conviction for wrongful use of Ambien is both legally and factually sufficient.

III. CONCLUSION

The findings and sentence as entered 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**.



FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

Constitutional, Statutory, and Regulatory Provisions Involved

1. Due Process Clause of the Fifth Amendment

The Due Process Clause of the Fifth Amendment provides: “No person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.

2. The Jury Trial Clause of the Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed” *Id.*, amend. VI.

3. Article 16 of the Uniform Code of Military Justice (UCMJ) provides:

§816. Art. 16. Courts-martial classified

(a) In General.-The three kinds of courts-martial in each of the armed forces are the following:

(1) General courts-martial, as described in subsection (b).

(2) Special courts-martial, as described in subsection (c).

(3) Summary courts-martial, as described in subsection (d).

(b) General Courts-martial.-General courts-martial are of the following three types:

(1) A general court-martial consisting of a military judge and eight members, subject to sections 825(e)(3) and 829 of this title (articles 25(e)(3) and 29).

(2) In a capital case, a general court-martial consisting of a military judge and the number of members determined under section 825a of this title (article 25a), subject to sections 825(e)(3) and 829 of this title (articles 25(e)(3) and 29).

(3) A general court-martial consisting of a military judge alone, if, before the court is assembled, the accused, knowing the identity of the military judge and after consultation with defense counsel, requests, orally on the record or in writing, a court composed of a military judge alone and the military judge approves the request.

(c) Special Courts-martial.-Special courts-martial are of the following two types:

(1) A special court-martial consisting of a military judge and four members, subject to sections 825(e)(3) and 829 of this title (articles 25(e)(3) and 29).

(2) A special court-martial consisting of a military judge alone-

(A) if the case is so referred, subject to section 819 of this title (article 19) and such limitations as the President may prescribe by regulation; or

(B) if the case is referred under paragraph (1) and, before the court is assembled, the accused, knowing the identity of the military judge and after consultation with defense counsel, requests, orally on the record or in writing, a court composed of a military judge alone and the military judge approves the request.

(d) Summary Court-martial.-A summary court-martial consists of one commissioned officer.

10 U.S.C. § 816.

4. Article 51(a) of the UCMJ provides:

(a) Voting by members of a general or special court-martial on the findings and on the sentence shall be by secret written ballot. The junior member of the court shall count the votes. The count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court.

10 U.S.C. § 851(a).

5. Article 52(a) of the UCMJ provides, in relevant part:

No person may be convicted of an offense in a general or special court-martial, other than . . . in a court-martial with members under section 816 of [title 10, U.S. Code] (article 16), by the concurrence of at least three-fourths of the members present when the vote is taken.

10 U.S.C. § 852(a).

6. Rule for Courts-Martial 501(a)(1)(A) is a presidentially prescribed procedural rule for general and special courts-martial. It provides:

(a) *Composition of courts-martial.*

(1) *General courts-martial.*

(A) Non-capital cases. In non-capital cases, a general court-martial shall consist of:

(i) A military judge and eight members;

(ii) A military judge, eight members, and any alternate members authorized by the convening authority;

(iii) A military judge alone if trial by a military judge is requested and approved under R.C.M. 903; or

(iv) A military judge and six or seven members, but only if, after impanelment, the panel is reduced below eight members as a result of challenges or excusals.

Rule for Courts-Martial 501(a)(1)(A), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2024 ed.).

7. Rule for Courts-Martial 921(c) is a presidentially prescribed procedural rule for general and special courts-martial. It provides, in relevant part:

(c) *Voting.*

(1) Secret ballot. Voting on the findings for each charge and specification shall be by secret written ballot. All members present shall vote.

(2) *Numbers of votes required to convict.* A finding of guilty results only if at least three-fourths of the members present vote for a finding of guilty.

(3) *Acquittal.* If fewer than three-fourths of the members present vote for a finding of guilty, a finding of not guilty has resulted as to the charge or specification on which the vote was taken.

Rule for Courts-Martial 921(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2024 ed.).