IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**BRIEF ON BEHALF OF APPELLANT**
v.	Docket No. ARMY 20200623
Private (E-2) **CAMERON M. MAYS,** United States Army, Appellant	Tried at Fort Drum, New York, on 19 June, and 8, 13, and 19-22 October 2020, before a general court-martial appointed by Commander, Headquarters, Fort Drum, Lieutenant Colonel Teresa L. Raymond and Lieutenant Colonel William C. Ramsey, military judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignment of Error[1]

WHETHER APPELLANT'S CONVICTION OF ATTEMPTED INDECENT VIEWING IS LEGALLY AND FACTUALLY SUFFICIENT WHEN THE GOVERNMENT ONLY PRESENTED EVIDENCE THAT APPELLANT ATTEMPTED TO VIEW A VISUAL RECORDING OF NAKED PEOPLE.

Statement of the Case

On 19 October 2020, a military judge sitting as a general court-martial convicted Private/E-2 (PV2) Cameron M. Mays, appellant, consistent with his pleas, of one specification of false official statement, one specification of wrongful

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant personally asserts those matters set forth in the Appendix.

PANEL 2

use of a controlled substance, one specification of wrongful possession of a controlled substance, one specification of wrongful introduction of a controlled substance, one specification of larceny, and one specification of assault upon a person in the execution of law enforcement duties, in violation of Articles 107, 112a, 121, 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 907, 912a, 921, 928. (R. at 298). The military judge also convicted appellant, contrary to his pleas, of two specifications of attempted indecent viewing, one specification of insubordinate conduct toward a non-commissioned officer, one specification of sexual assault, one specification of assault upon a commissioned officer, and one specification of assault upon a non-commissioned officer, in violation of Articles 80, 91, 120, 128, UCMJ. (R. at 236). The military judge sentenced appellant to be reduced to the grade of E-1, confined for forty-eight months, and discharged from the service with a dishonorable discharge. (R. at 1080). On 20 November 2020, the convening authority approved the sentence. (Action). On 23 November 2020, the military judge entered the Judgment. (Judgment).

Statement of Facts

In November of 2018, appellant's unit deployed to Kandahar Airfield, Afghanistan. (R. at 668). While deployed, soldiers in the unit lived in barracks called "MODS." (R. at 668). Each "MOD" had one bathroom attached to it. (R. at 669). The bathroom was rectangular in shape and contained four sinks, two

urinals, two toilet stalls, and three shower stalls. (Pros. Ex. 11). The four sinks and three shower stalls were located in a straight line along the north/top perimeter of the bathroom with the sinks on the left and the shower stalls on the right. (Pros. Ex. 11). The shower stalls had walls that were about six feet tall. (R. at 673).

A. Events on 8 November 2018 – Specification 1 of Charge III.

On 8 November 2018, one of the members of appellant's unit, Sergeant (SGT) [redacted], went to the bathroom to clean up and get ready for bed. (R. at 669). Sergeant [redacted] testified he entered the bathroom and proceeded to the "first" sink, which was the closest sink to the door and the furthest sink from the shower stalls. (R. at 669; Pros. Ex. 11). At the time, there were two soldiers in the shower stalls; Specialist (SPC) [redacted] was in the "first" shower stall, which was closest stall to the sinks and SPC [redacted] was in the second shower stall, directly adjacent to the first shower stall. (R. at 680). While brushing his teeth, SGT [redacted] saw appellant standing several feet away and thought he was looking for a signal on his cell phone. (R. at 669). According to SGT [redacted] appellant was standing between the "fourth sink" and the "first shower stall." (R. at 679; Pros. Ex. 11). Sergeant Witte stated appellant "was just kind of holding the phone up in the air." Initially, SGT [redacted] was not alarmed; however, after a few moments, he then claimed to remember there was no cell phone service available in Afghanistan. (R. at 670-

71). Sergeant [redacted] then turned around and claimed to see a "picture screen" from a camera "app" on appellant's phone. (R. at 671).

At trial, SGT [redacted] performed a demonstration of what he observed in the bathroom. (R. at 673-74). Sergeant [redacted] used a television in the courtroom as a prop to represent the shower wall. (R. at 673). As SGT [redacted] performed his demonstration, the trial counsel stated: "[t]he witness is standing up and is putting *his hand* over the television with his hand slightly bent in the forward position." (R. at 674) (emphasis added). On redirect, SGT [redacted] clearly reiterated what he observed:

> When I walked into the bathroom, plain and simple, I saw a guy with his cell phone in the air over the shower stall.

(R. at 695). When SGT [redacted] observed appellant placing his phone over the shower stall, he confronted him by saying "[h]ey man." (R. at 674). Appellant then started washing his hands and quickly exited the bathroom. (R. at 674-75).

At trial, SPC [redacted]. confirmed he took a shower in the "first" shower stall on 8 November 2018. (R. at 704-05). However, SPC [redacted] never saw appellant in the bathroom nor did he observe anyone with a phone. (R. at 706).

B. Events on 9 November 2018 – Specification 2 of Charge III.

On 9 November 2018, SPC [redacted], another member of appellant's unit, took a shower in the "third" shower stall, which was the stall furthest to the right. (R. at

725-26). While showering, SPC [redacted] noticed a cell phone appear over the shower stall:

> As I was washing my hair I was leaning back to rinse the soap out and as I was leaning back I looked out of the corner of my eye and I noticed that there was a cell phone approximately two or three inches of it was over in my shower stall.

(R. at 726). Specialist [redacted] stated the phone was in a case and had a "square camera." However, while SPC [redacted] was in the stall, he did not know who was holding the phone. (R. at 727). Specialist [redacted] shouted "what the fuck" and stepped out of the shower to see who was in the stall beside him. (R. at 728). When he stepped out, SPC [redacted] observed appellant in the "second" or middle shower stall with the curtain "slightly open." (R. at 728). Specialist [redacted] confronted appellant but appellant denied any wrongdoing and stated he did not have his phone. (R. at 728). Specialist [redacted] then reported the incident to a non-commissioned officer in his chain of command. (R. at 729-30).

C. Investigation and Trial.

On 10 November 2018, appellant's company commander seized his cell phone. (R. at 747). Special Agent (SA) [redacted], a digital forensic examiner (DFE) with Army Criminal Investigation Command (CID) performed a "live" and "logical" extraction of appellant's phone. (R. at 763). When SA [redacted] first examined the phone, he observed an error stating the phone had water damage;

however, that did not impede him from performing a logical extraction of the phone. (R. at 763-64). Special Agent [redacted] admitted he "did not find any photographs or videos or any other media associated with the offense during [his] investigation." (R. at 780).

At trial, defense counsel made a motion for a finding of not guilty under Rule for Courts-Martial (R.C.M.) 917 for both Specifications of Charge III (Attempted Indecent Viewing). (R. at 785). Regarding Specification 1 of Charge III, the military judge denied the motion because he believed the government presented evidence that the "named victims" did not consent to "any sort of visual conduct and/or viewing" and "there was eye witness testimony that places the accused in the shower area with his phone up above the shower stall." (R. at 796). Regarding Specification 2 of Charge III, the military judge denied the motion simply because "[t]he named victim and the complainant testified that he was in the shower area and did not consent at any time to any sort of allegations of viewing or conduct of this nature." (R. at 796).

Ultimately, the military judge acquitted appellant of both Specifications of Charge II, which alleged appellant "knowingly ma[de] a recording or photograph of the private area" of SPC [redacted] and SPC [redacted] (R. at 1029; Charge Sheet). The military judge convicted appellant of both Specifications of Charge III, which

alleged appellant attempted to "wrongfully and knowingly view the private area" of SPC [redacted] and SPC [redacted] (R. at 1029; Charge Sheet).

Standard of Review

Legal and factual sufficiency are questions of law that are reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Craion*, 64 M.J. 531, 534 (Army Ct. Crim. App. 2006).

Law

A. Legal and Factual Sufficiency.

The test for legal sufficiency is "whether, considering the evidence in a light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003); *United States v. Pabon*, 42 M.J. 404, 405 (C.A.A.F. 1995) (*quoting Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). 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 [appellant's] guilt beyond a reasonable doubt." *Walters*, 58 M.J. at 395.

The elements of attempted indecent viewing are: (1) the accused did a certain act; (2) the act was done with the specific intent to commit indecent viewing; (3) the act amounted to more than mere preparation; and (4) the act

apparently tended to effect the commission of indecent viewing. Article 80, 120c UCMJ.

The elements of indecent viewing are: (1) that the accused knowingly and wrongfully viewed the private area of another person; (2) that said viewing was without the other person's consent; and (3) that said viewing took place under circumstances in which the other person had a reasonable expectation of privacy. Article 120c(a)(1), UCMJ.

Congress enacted Article 120c, UCMJ on 31 December 2011, with an effective date of 28 June 2012. National Defense Authorization Act for Fiscal Year 2012 (NDAA 2012), Pub. L. No. 112-81, § 541c, 125 Stat. 1298, 1409 (2011). Congress has not made any amendments to Article 120c, UCMJ since the date of enactment. 10 U.S.C. § 920c.

B. Statutory Construction.

In all statutory construction cases, appellate courts begin—and most often end—with the language of the statute. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1749 (2020) ("This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end."); *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1724 (2020) ("This case begins, and pretty much ends, with the text of Section 1915(g)."); *United States v. McDonald*, 78 M.J. 376, 379 (C.A.A.F. 2018) (citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)).

This is so because "courts must give effect to the clear meaning of statutes as written and questions of statutory interpretation should begin and end with statutory text, giving each word its ordinary, contemporary, and common meaning." *United States v. Andrews*, 77 M.J. 393, 400 (C.A.A.F. 2018) (internal quotation marks omitted) (citing *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017)). "The plain language will control, unless use of the plain language would lead to an absurd result." *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007). Courts may not alter a statute's reach "by inserting words Congress chose to omit." *Lomax*, 140 S. Ct. at 1725 (citing *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1906 (2019)).

Argument

Appellant's conviction for attempted indecent viewing is legally and factually insufficient because the government failed to present any evidence that appellant had the intent or made efforts to view the *actual* private area of any person. No witness testified that appellant made any effort to peek into a shower stall with *his own eyes*. Instead, the government presented evidence that appellant attempted to view a visual depiction and/or make a visual recording of naked people by *reaching his hand and phone over a shower stall*. Even if appellant had been successful in viewing or creating the digital images on his phone, observing a *visual recording* of another person's private area does not satisfy the elements of

Article 120c(a)(1). The plain language of Article 120c(a)(1), UCMJ only criminalizes viewing another person's actual private area – not a visual depiction or recording of a private area. *See United States v. Quick*, 74 M.J. 517 (N.M. Ct. Crim. App. 2014) (specification alleging a wrongful viewing of an indecent recording failed to state an offense), *aff'd on other grounds*, 74 M.J. 332 (C.A.A.F. 2015); *see generally United States v. Williams*, 75 M.J. 663 (Army Ct. Crim. App. 2016) (conviction for indecent exposure legally insufficient where the appellant "exposed" himself by showing another person a digital image of his genitalia).

A. Appellant did not attempt to view the *actual* private area of any person.

This is not a typical "Peeping Tom" case where an individual looks through a window or uses other means, such as binoculars, to directly view a naked person[2] or that person's private areas. Indeed, the government focused its case on the offenses in Charge II, which alleged appellant made indecent recordings of the private areas of SPC [redacted] and SPC [redacted] This is not surprising – not a single witness

[2] Article 120c(d)(2) defines a person's "private area" as "the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple." The government presented no evidence that appellant attempted to view any person's "private area." Instead, the government simply presented evidence that appellant attempted to record naked people. As this court recognized in *United States v. Rice*, there is an important distinction between viewing a "naked person" and viewing a person's "private area" – "Congress could quite readily make peeping upon a naked person a violation of Article 120, UCMJ. It hasn't; rather, it made observation of particular naked parts as criminal under that statute." 71 M.J. 719, 726 (Army Ct. Crim. App. 2012). Accordingly, this court could find appellant's convictions for attempted indecent viewing legally insufficient on that ground alone.

testified they observed appellant peek his head over or around the shower stall in an attempt to view the actual private area of any person. All of the witnesses who testified regarding the events in the bathroom focused on appellant's operation of his cell phone and his alleged act of holding the phone over the shower stalls.

For example, SGT [redacted] testified his account of appellant's actions on 8 November 2018 was "plain and simple" – he saw appellant "with his cell phone in the air over the shower stall." (R. at 695). Similarly, SPC [redacted] testified he saw "a cell phone over the stall" – not a person's head, eyes, or even hair. Specialist [redacted] described the cell phone he observed in great detail, yet he had no clue who was holding it until he walked outside his shower stall and looked into the adjacent shower stall through the curtain. In fact, SPC [redacted] only observed "two or three inches" of the phone protruding over the wall of his shower stall. (R. at 726). Moreover, none of the witnesses testified they observed appellant take any act in furtherance of viewing the actual private area of SPC [redacted] or SPC [redacted]

Even if the testimony of every single government witness is to be believed and considered one-hundred percent accurate, appellant did nothing more than reach his cell phone over the wall of two shower stalls. Notably, the military judge did not convict appellant of attempted indecent recording as a lesser-included offense of the Specifications in Charge II. He completely acquitted appellant of those offenses and chose to convict him of attempted indecent viewing as charged

in Specifications 1 and 2 of Charge III. Put differently, even when the evidence is considered in a light most favorable to the government, it only had the *potential* to establish that appellant attempted to make a recording of the private areas SPC [redacted] and SPC [redacted]; however, the military judge foreclosed the possibility of a conviction under that theory by completely acquitting appellant of both Specifications of Charge II.

B. The plain language of Article 120c(a)(1), UCMJ only criminalizes the wrongful viewing of a person's actual private area – not a visual depiction or visual recording of a person's private area.

Both the Supreme Court and Court of Appeals for the Armed Forces have repeatedly rejected arguments that add or remove language from the text of an unambiguous rule or statute. *United States v. Bergdahl*, 80 M.J. 230, 235 (C.A.A.F. 2020) ("Any suggestion that we should interpose additional language into a rule that is anything but ambiguous is the antithesis of textualism."); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) ("If uncertainty does not exist, . . . [t]he regulation then just means what it means—and the court must give it effect, as the court would any law."); *Star Athletica*, 137 S. Ct. at 1010 (stating that it is a "basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written")). To do so runs afoul of the textualist approach to statutory interpretation and "the norm that courts adhere to the plain meaning of any text—statutory, regulatory, or otherwise." *Bergdahl*, 80 M.J. at 235; *NLRB v. SW Gen.,*

Inc., 137 S. Ct. 929, 942 (2017) ("The text is clear, so we need not consider this extra-textual evidence.").[3]

Here, the text of Article 120c(a)(1) is unambiguous. To sustain a conviction for attempted indecent viewing, the government must prove an accused attempted to knowingly and wrongfully view the "private area" of another person – not a visual depiction or recording of a person's private area. Article 120c(a)(1). The words "visual depiction" or "visual recording" are absent from the text of Article 120c(a)(1) and the statute's definition of the term "private area." Article 120c(d)(2). To find appellant's convictions for indecent viewing legally sufficient, this court would need embrace the "antithesis of textualism" by reading the words

[3] Both the Court of Appeals for the Armed Forces and the Supreme Court recognize that textualism is the proper method of statutory interpretation. Between January 31, 2006, and June 29, 2009, the majority of Supreme Court Justices "referenced text/plain meaning and Supreme Court precedent more frequently than any of the other interpretive tools." Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 251 (2010); *see also Bergdahl*, 80 M.J. at 235 (citing NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 132 (2019) ("The text of the statute and only the text becomes law. Not a legislator's unexpressed intentions, not nuggets buried in the legislative history, and certainly not a judge's personal policy preferences."); Brett M. Kavanaugh, Book Review, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) ("The text of the law is the law."); Elena Kagan, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes, at 8:28 (Nov. 17, 2015), http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation ("We're all textualists now.")).

"visual depiction" or "visual recording" into Article 120c(a)(1), UCMJ or the statute's the definition of "private area."[4] *Bergdahl*, 80 M.J. at 235.

It requires only a basic understanding of technology to recognize that when an individual observes an image on his phone (or any other digital device), he is not viewing that actual item. Instead, the phone displays a visual representation or depiction of that item. Thus, when the words of Article 120c, UCMJ are given their plain and ordinary meaning, it is clear the government must prove an accused viewed the "naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple" and not a visual depiction or recording of those body parts.

Faced with a similar issue in *Quick*, the Navy-Marine Court of Criminal Appeals (NMCCA) refused to read the words "visual recording" into any provision of Article 120c, UCMJ where those words did not already exist. 74 M.J. at 520-22. There, a panel convicted Sgt [redacted] of "wrongfully viewing an indecent recording." *Id.* at 519. Apparently, one of Sgt [redacted] friends showed him a surreptitiously recorded video of the two having sex with a third individual. *Id.* After examining the plain language of Article 120c, UCMJ, the court determined

[4] Moreover, although Article 120c, UCMJ does not define the term "view," to find appellant's convictions legally sufficient, this court would *also* have to speculate that Congress intended the term "view" to include both "direct" and "indirect" means. *But see United States v. Shea*, ACM S32220, 2015 CCA LEXIS 235 (A.F. Ct. Crim. App. 4 Jun. 2015) (unpub.) (stating in dicta that Congress "intended to proscribe the knowing and wrongful viewing, by direct or indirect means, of the private area of another person.").

"Congress used clear and unambiguous language to expressly proscribe the making and broadcasting of indecent visual recordings" and found "the absence of any similarly clear proscription on the viewing of indecent visual recordings" to be "significant." *Id.* at 520-21. Accordingly, the court found the specification alleging a wrongful "viewing" of an indecent recording failed to state an offense.[5] *Id.*

Similarly, in *Williams*, this court concluded "Congress did not intend to criminalize an 'exposure' through communication technology under Article 120c(c)." 75 M.J. 663, 668-69. There, SPC [redacted] "exposed his penis to his cell phone camera" and later "displayed those digital images of his penis to various persons." *Id.* at 666. This court found "as a matter of law, th[ose] displays [did] not constitute an exposure for the purposes of [Article 120(n), UCMJ (2006) or Article 120c(c), UCMJ (2012)] because appellant did not 'expose' his *actual live genitalia* for view by the victims." *Id.* (emphasis added). This court further explained that not only is there a "temporal and physical presence" aspect to

[5] "The specification at issue in *Quick* failed to state an offense because it expressly alleged that appellant violated the statute by 'view[ing] a visual recording of the private area of' the victim." *United States v. Uriostegui*, 75 M.J. 857, 866, n. 23 (N.M. Ct. Crim. App. 2016). In this case, the Specifications of Charge III do state an offense. However, "the analysis in *Quick* suggests that even if Quick had been charged with viewing the private area of the victim *herself*, evidence only showing that Quick had viewed a visual recording of the victim's private area would not have been sufficient to sustain a conviction for 'indecent viewing.'" *Id.*

Article 120c(c), "violations occur when a victim is present to view the *actual* body parts listed in the statutes, not images or likenesses of the listed parts." *Id.* (emphasis in original); *see also Uriostegui*, 75 M.J. at 865 (agreeing with this court's rationale in *Williams*); *but cf. United States v. Ferguson*, 68 M.J. 431 (C.A.A.F. 2010) (declining to find appellant's guilty plea to indecent exposure improvident when he admitted to sending six images of his erect penis to an individual over the internet).

The opinions in *Quick* and *Williams* correctly observe that Article 120c, UCMJ is not silent on the issue of visual depictions or recordings. The statute *explicitly* criminalizes conduct with respect to visual depictions or recordings in certain provisions but omits that language in other provisions. Specifically, neither Article 120c(a)(1), UCMJ – the offense of indecent viewing – nor Article 120c(d)(2), UCMJ – the definition of "private area" – contain the terms "recording, photograph, videotape, film, or visual image" even though those same terms are used throughout the rest of the statute. "[W]hen 'Congress includes particular language in one section of a statute but omits it in another'—let alone a closely related offense—we 'presume' that Congress intended a difference in meaning." *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). Consequently, to sustain a conviction for a violation of Article 120c(a)(1), or an attempt of the same, the government must

prove an accused viewed, or attempted to view, the *actual* private area of another person – not a visual depiction or visual recording.

Here, the government presented zero evidence that appellant attempted to view the actual private area of any person. Each of the witnesses who observed appellant in the bathroom only saw him place his *phone* over the wall of the shower stalls. Even if appellant successfully took a photograph of SPC [redacted] or SPC [redacted], or viewed naked depictions of them on his phone, that conduct does not constitute indecent viewing because Article 120c(a)(1) only criminalizes viewing the actual private area of another person. Accordingly, the convictions of both Specifications of Charge III are legally insufficient because no reasonable factfinder could find all the elements of indecent viewing beyond a reasonable doubt. For the same reasons, this court cannot be convinced of appellant's guilt beyond a reasonable doubt and both Specifications of Charge III are factually insufficient.

Conclusion

Based on the foregoing, appellant respectfully requests this court set aside the findings of guilty to Charge III and its Specifications and reassess the sentence.

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APPENDIX

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant, through appellate defense counsel, personally requests this Court consider the following:

I. THE RECORD OF TRIAL IS INCOMPLETE BECAUSE IT IS MISSING COURT MARTIAL CONVENING ORDER #1, DATED 19 AUGUST 2020.

Pursuant to Rule for Courts-Martial (R.C.M.) 1112(b)(1), the record of trial in every general and special court-martial *must* include "[a] copy of the convening order and any amending order[.]" Here, the charge sheet states the court-martial was convened by "Court-Martial Convening Order Number 1, dated 6 February 2020." (Charge Sheet). At an Article 39(a), UCMJ session on 19 October 2020, the trial counsel stated:

> So, the Court-Martial Convening Order Number 1, Headquarters, Fort Drum, New York, dated 6 February 2020 has been superseded by Court-Martial Convening Order Number 1, Headquarters, Fort Drum, Fort Drum, New York, dated 19 August 2020, copies of which have been furnished to the military judge, counsel, and the accused and which will be inserted at this point in the record.

(R. at 234). However, the second convening order was never inserted into the record. As such, the record is incomplete.

II. THE GOVERNMENT VIOLATED ARTICLE 55, UCMJ AND THE EIGHTH AMENDMENT BY FAILING TO PROTECT APPELLANT FROM BEING SEXUALLY ASSAULTED.

Appellant asserts he was sexually assaulted by another inmate while confined at the Joint Regional Correctional Facility (JRCF). The JRCF's failure to protect appellant from such an attack constitutes a violation of Article 55, UCMJ and the Eighth Amendment to the Constitution. In *Farmer v. Brennan*, the Supreme Court stated the Eighth Amendment "does not mandate comfortable prisons, but neither does it permit inhumane ones." 511 U.S. 825, 832 (1994). Moreover, it is "settled that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Id.* (citations omitted). Specifically, the Eighth Amendment imposes a duty to, *inter alia*, "take reasonable measures to guarantee the safety of inmates." *Id.* (citations omitted).

Here, the confinement facility failed to guarantee appellant's safety, and as a result, he suffered significant harm by being sexually assaulted. Confinement facilities are open environments with substantial security measures, such as cameras and roving guards. There is absolutely no excuse for the JRCF to allow the inmates it supposed to protect to be subject to any crime, much less a sexual assault. Consequently, the JRCF failed in its constitutional and statutory duties and appellant is entitled to relief.

III. APPELLANT'S CONVICTION FOR SEXUAL ASSAULT IS FACTUALLY AND LEGALLY INSUFFICIENT.

Assuming *arguendo* that any sexual act occurred, the government failed to prove beyond a reasonable doubt that PFC [redacted] did not consent. Private First Class [redacted] story is not believable. He claimed he was sleeping on a couch and woke up to his pants around his thighs and his penis sticking out of his compression shorts. (R. at 422). Although he was not under the influence of drugs or alcohol – and actually consumed an energy drink earlier that day – PFC [redacted] claimed he did not wake up to any of his clothing being removed or his genitalia being touched. (R. at 438-39, 442, 445).

Indeed, the government's sleep expert, Dr. [redacted], testified that it would be "completely implausible" for someone to sleep through those events without the influence of a drug or other sleep-inducing substance. (R. at 852). The military judge acquitted appellant of sexual assault under the theory that he "knew or reasonably should have known" PFC [redacted] was asleep. (R. at 1029). However, the problems with PFC [redacted] credibility extended beyond the question of whether he was asleep or not. Because PFC [redacted] story was *so* unbelievable, there is little reason to trust anything else he said and his motives should be questioned. Moreover, given that PFC [redacted] was not asleep, the government failed to present

any other reliable evidence that he did not consent. As such, appellant's conviction for sexual assault is both factually and legally insufficient.

Conclusion

WHEREFORE, appellant personally and respectfully requests this honorable court set aside the findings and sentence.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court and Government Appellate Division on 23 November 2021.

JOSEPH A. SEATON, JR.
CPT, JA
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