IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,	Appellee	**APPELLEE'S BRIEF ON SPECIFIED ISSUES**
v.		Docket No. ARMY 20170303
Master Sergeant (E-8) **Andrew D. Steele,** United States Army,	Appellant	Tried at Joint Base Lewis-McChord, Washington, on 2 March, 21 April, 16–19 May and 4 October 2017, 23 January, 3 April, 8 September, 25 September, 21-23 October 2020, before a general court-martial convened by Commander, 7th Infantry Division, Colonel Lanny Acosta, Lieutenant Colonel Sean Mangan, Colonel J. Harper Cook and Lieutenant Colonel Matthew Fitzgerald, Military Judges, presiding.

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

Specified Issue I

WHETHER THIS COURT HAS DISCRETION TO CONSIDER AN ASSIGNMENT OF ERROR CHALLENGING THE FINDINGS WHEN: (1) APPELLANT FAILED TO RAISE IT DURING HIS FIRST APPEAL BEFORE THIS COURT; AND (2) THIS COURT ONLY REMANDED APPELLANT'S CASE FOR A SENTENCE REHEARING.

Specified Issue II

WHETHER INDECENT EXPOSURE, ARTICLE 120c, UCMJ, IS UNCONSTITUTIONALLY VAGUE.

Statement of the Case

On 16 May 2017, a military judge sitting as a general court-martial convicted appellant, consistent with his pleas, of one specification of violating a lawful general order and one specification of fraternization in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934 (2012) [UCMJ]. (R. at 121). On 18 May 2017, the military judge convicted appellant, contrary to his pleas, of one specification of indecent exposure and one specification of disorderly conduct in violation of Articles 120c and 134, UCMJ, 10 U.S.C. §§ 920c and 934. (R. at 559). The military judge sentenced appellant to be reduced to the grade of E-3 and a bad-conduct discharge. (R. at 698). On 23 March 2018, the convening authority approved the sentence as adjudged. (Action (23 Mar. 2018)).

On 10 September 2018, appellant submitted a brief to this court alleging two assignments of error. (Appellant's Br. (10 Sep. 2018)). First, he alleged the convening authority improperly approved appellant's sentence without a substantially verbatim transcript; and second, appellant alleged that his conviction for indecent exposure was legally and factually insufficient. (Appellant's Br. 1 (8 Sep. 2018)). Appellant did not raise an assignment of error that indecent exposure, Article 120c, UCMJ, is unconstitutionally vague.

The government responded to appellant's assignments of error on 7 January 2019. (Appellee's Br. (7 Jan. 2019)). On 15 January 2019, appellant submitted a reply brief. (Appellant's Reply Br. (15 Jan. 2019)). On 12 February 2019, this court heard oral argument on all assignments of error. (Notice of Hearing). On 5 March 2019, this court issued an opinion affirming the findings, setting aside the sentence, and authorizing a sentence rehearing. *United States v. Steele*, ARMY 20170303, 2019 CCA LEXIS 95 (Army Ct. Crim. App. 5 Mar 2019) (mem. op.). The opinion addressed appellant's first assignment of error in detail and granted relief by setting aside the sentence and ordering a sentence rehearing. *Steele*, 2019 CCA LEXIS 95, at *10. This court addressed appellant's second assignment of error challenging the legal and factual sufficiency of his indecent exposure conviction in a footnote; this court did not grant relief and found "the record to be correct in fact." *Steele*, 2019 CCA LEXIS 95, at *3 n.4.

On 23 October 2020, at appellant's sentencing rehearing, an enlisted panel sentenced appellant to be reduced to the grade of E-5.[1] (R. at 1623). On 6 May

[1] Although appellant's new sentence is below the sentence requirements for an automatic review under Article 66(b)(3), UCMJ, this court has continuing jurisdiction to review cases "that are remanded for further proceedings notwithstanding any subsequent reduction of the sentence . . . ." Army Court of Criminal Appeals Rules of Practice and Procedure Rule [A.C.C.A. R.] 5.1. *See also United States v. Davis*, 63 M.J. 171, 177 (C.A.A.F. 2006) (holding that "[t]he power of the rehearing to adjudicate a new sentence derives from the initial court-martial and the appellate action of this court" and jurisdiction is "fixed for

2021, the convening authority approved the sentence as adjudged. (Action (6 May 2021)). On 12 October 2021, appellant filed a brief on the sentence rehearing with matters submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). (Appellant's Br. (12 Oct. 2021). Government appellate counsel elected not to file a brief in response to appellant's assignments of errors asserted in his *Grostefon* matters, submitting they lack merit. (Appellee's Br. (26 Oct. 2021). On 22 November 2021, this court ordered appellate government counsel to provide their response to the issues specified in the order. (Order (22 Nov. 2021).

Statement of Facts

At all relevant times, appellant was a married company First Sergeant and resided in, or had access to, an off-post apartment complex called Creekside Village Apartments, located in Dupont, Washington. (R. at 101, 106, 289; Pros. Ex. 14). On two occasions between February and April 2016, appellant invited underage, junior-enlisted soldiers from his company over to his apartment complex and provided them with alcohol. (R. at 101–02). Within appellant's apartment complex was a common area that included a hot tub and pool. (R. at 106). On both occasions, appellant and the group of junior-enlisted soldiers gathered at appellant's apartment complex, socialized in the outdoor common area, and sat

purposes of appeal, new trial, sentence rehearing, and new review and action by the convening authority").

together in the hot tub in various states of undress. (R. at 106, 154, 350–54, 356–57, 414; Pros. Ex. 22).

In April 2016, the Creekside Village Apartment complex housed between 100 and 150 residents. (R. at 496; Pros. Ex. 14). The complex contained several three-story apartment buildings. (R. at 289–90; Pros. Ex. 2). The complex's pool and hot tub area was available for use by the community's residents and guests. (R. at 289–90; Pros. Ex. 2). The apartment complex's community policies required appropriate swimwear attire at the swimming pool and hot tub and explicitly forbade "indecent exposure." (Pros. Ex. 16). A see-through gate enclosed the hot tub and pool area. (R. at 289–90; Pros. Exs. 2–4, 6–7). Residents accessed the area by entering a pin code into the lock on the gate. (R. at 290). The pool and hot tub area were adjacent to public roads and buildings within the larger apartment complex. (Pros. Ex. 5–6). The area was under video surveillance by the property manager. (R. at 292; Pros. Ex. 22).

On the evening of 29 April 2016 into the early morning of 30 April 2016, appellant and approximately seven other soldiers met at the Creekside Village Apartment complex to use the hot tub. (R. at 241, 387; Pros. Ex. 22). Appellant had moved out of his apartment earlier in the month, but the pin code to the hot tub area was changed seasonally rather than every time a resident moved out of the apartment complex. (R. at 244, 291). At various points in time, everyone in the

group was naked in the hot tub and while walking around the surrounding area. (R. at 414; Pros. Ex. 22). As witnesses testified and the surveillance footage confirmed, throughout the evening, appellant was fully nude both in the hot tub and while walking around the adjoining area. (R. at 414; Pros. Exs. 8, 22).

While nude in the hot tub, appellant began performing oral sex on Private First Class (PFC) LW, the only female present. (R. at 246, 367–68; Pros. Ex. 10). Once appellant finished performing oral sex on PFC LW, two other junior-enlisted male soldiers, Privates (PV1) MN and AS—also in the hot tub—moved toward PFC LW and performed oral sex on her in turn. (R. at 246–47, 368). Private AS testified appellant stated, "go for it," and encouraged the junior soldiers to perform oral sex on PFC LW. (R. at 247).

Specialists (SPC) JR and JG were also in the hot tub. Once appellant initiated sexual activity with PFC LW, both of them felt uncomfortable. (R. at 388, 424, 435). Specialist JG felt "it was wrong" for appellant to engage in the sexual act with PFC LW. (R. at 424). Specialist JR testified he and SPC JG were being "encouraged to join in" on the sexual acts but that neither wanted to participate. (R. at 388). Because of their discomfort with the situation, SPCs JG and JR decided to leave the apartment complex. (R. at 388). However, as he was walking away, SPC JR felt more concerned about PFC LW's safety. (R. at 389).

He felt "guilty" leaving her there on her own because he believed she might be "sexually assaulted." (R. at 389–90).

Based on his concerns, SPC JR decided to return to the hot tub area and confront appellant. (R. at 391). He recorded his conversation with appellant using SPC JG's cell phone. (Pros. Ex. 25). Appellant told SPC JR, "you're still not helping [PFC LW] just like I'm not helping her right now. So you're just with me. Well, actually you are standing beside me. You are doing the same damn thing, and we are a bystander." (R. at 394; Pros. Ex. 25).

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Appellant's brief on sentence rehearing contains no matters arising from the sentence rehearing. Instead, appellant presents to this court a matter submitted in accordance with *United States v. Grostefon*, 12 M.J. 431, 436 (C.M.A. 1982), which he could have raised during his first appeal, without showing good cause for the failure to raise it during that review. Because this court has already conducted a comprehensive review of the record of trial under Article 66, UMCJ, and has affirmed the findings, the doctrine of res judicata prevents this court from

considering an assignment of error challenging the findings absent a showing of good cause.

LAW AND ARGUMENT

A. Appellant is entitled to only one plenary review of the findings of his court-martial, which he received.

Under Article 66, UMCJ, a Court of Criminal Appeals (CCA) conducts a review of courts-martial that meet its jurisdictional criteria and "may affirm only such findings of guilty as the Court finds correct in law, and in fact . . . ." Article 66(d)(1)(A), UCMJ. The Court of Appeals for the Armed Forces (CAAF) detailed the scope of a CCA's Article 66 review in *United States v. Chin*, explaining that a complete Article 66 review encompasses a review of the entire record of trial, not only selected portions of a record or allegations of error alone. 75 M.J. 220, 222–23 (C.A.A.F. 2016) (citing first *United States v. Jenkins*, 60 M.J. 27, 30 (C.A.A.F. 2004); then *United States v. Adams*, 59 M.J. 367, 372 (C.A.A.F. 2004); and then *United States v. Roach*, 66 M.J. 410, 412 (C.A.A.F. 2008)).

The CAAF has recognized that "[w]hile [an] appellant is entitled to plenary review under Article 66, [UCMJ] he is only entitled to one such review." *United States v. Smith*, 41 M.J. 385, 386 (C.A.A.F. 1995). In *Smith*, the appellant found his case before a CCA for a second time because the CAAF ordered a *DuBay*

hearing[2] and remanded the case back to the CCA to consider specified issues after the hearing was complete. *Id*. *Smith* filed new assignments of error not previously raised during the CCA's first review, and the CCA declined to consider them. *Id.* at 385. The CAAF held the CCA did not err by refusing to consider new assignments of error because they were not expressly included in the scope of the CAAF's remand. *Id.* at 386.

As in *Smith*, this court would not err if it declined to hear this new assignment of error which is outside the scope of the sentence rehearing and which could have been raised during appellant's first plenary review. While the CAAF stopped short of considering whether the CCA would have discretion to consider new assignments of error and concluded that issue "[was] not before us," *id.*, the principle of res judicata precludes CCAs from considering new issues not previously raised without a showing of good cause.

B. Absent a showing of good cause, this court does not have discretion to disturb its previous holding to affirm the findings.

The common law doctrine of res judicata "provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound." *United States v. Cooper,* 80 M.J. 664, 671 (N.M. Ct. Crim. App. 2020) (quoting *Commissioner v.*

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

Sunnen, 333 U.S. 591, 597 (1948)) (internal citations committed). The rule "rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations."[3] *Id.*

Federal courts have traditionally adhered to the doctrine of res judicata and military courts, including CCAs, have recognized its applicability. *See Cooper*, 80 M.J. at 671–72 (recognizing that the doctrine of res judicata bound it to "complete acquiescence" to the CAAF's holding that there was waiver and its previous holdings on appeal, but did not prevent it from disregarding waiver under its Article 66, UCMJ, power).

Following Article 66, UCMJ, and *Chin*, this court has conducted "a complete appellate review" of appellant's case, which encompasses a review of the entire record of trial and is not limited solely to the assignments of error presented. *Chin,* 75 M.J. at 223. This court has already specifically considered appellant's challenge to the legal and factual sufficiency of his indecent exposure conviction under Article 120c, UCMJ—conducting an analysis strikingly similar to an as-

[3] Collateral estoppel is a related but distinct doctrine from res judicata. "Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." While "[u]nder res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (internal citations omitted).

applied vagueness challenge—and affirmed the findings as "correct in fact." *Steele*, 2019 CCA LEXIS 95, at *3 n.4.; *see, infra* pp. 17–20.

In *United States v. Chaffin*, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) declined to hear an untimely assignment of error alleging an improper spillover instruction in part because the court had already considered legal and factual sufficiency of the conviction and affirmed the findings, necessarily implying the appellant had not been materially prejudiced by improper evidentiary spillover. NMCCA 200500513, 2008 CCA LEXIS 94, at *8–11 (N.M. Ct. Crim. App. 20 Mar 2008) (unpub.). Likewise, this court has already implicitly considered whether indecent exposure under Article 120c, UCMJ, is unconstitutionally vague when it reviewed appellant's conviction for legal and factual sufficiency and affirmed the findings as "correct in fact." *Steele*, 2019 CCA LEXIS 95, at *3 n.4.

To allow appellant a second review by this court would disturb the certainty of this court's previous holding, which was based on a comprehensive review of the record of trial and implicitly included a review of this new assignment of error. Applying res judicata, this court is bound by its holding on direct appeal to affirm the findings, and it may only consider any new issues raised by the sentence rehearing.

C. Appellant has not shown good cause for his failure to raise this assignment of error during his first plenary review.

Both the Air Force Court of Criminal Appeals (AFCCA) and the NMCCA have required appellants to show good cause when new issues are untimely raised after a first review. *See United States v. Smith*, 39 M.J. 587, 591–92 (A.F.C.M.R. 1994) (declining to hear issues raised after the court's first review because appellant failed to show good cause why the court should review new issues out of time); *Chaffin*, 2008 CCA LEXIS 94, at *8 (declining to consider a newly raised and untimely issue because "[t]he facts and law necessary to raise [the issue] were known when this case first came before the court, yet it was not assigned as an error"); *United States v. Arnold*, No. ACM 394792021, 2021 CCA LEXIS 119, at *5 (A.F. Ct. Crim. App. 18 Mar. 2021) (unpub.) (Posch, S.J., concurring) (noting the appellant had waived an issue he failed to raise previously because he "failed to demonstrate either good cause for his failure to raise this issue previously, or that manifest injustice would result if we did not now consider it"). Similarly, this court requires appellants to show good cause for an extension of time to file a brief, delayed filing of supplemental briefs, and motions for reconsideration. *See* A.C.C.A. R. 17.1(e), 24.1, and 31(d).[4]

[4] *But see* C.A.A.F. R. 19(a)(5)(C) (allowing *Grostefon* issues to be presented to the CAAF even if they had not been presented earlier).

Though appellant defense counsel is required to, "at a minimum, invite the attention" of a CCA to an appellant's specified error, the fact that this issue was raised pursuant to *Grostefon* does not excuse appellant's untimely filing two years after this court has reviewed his case. *United States v. Grostefon*, 12 M.J. 431, 436 (C.M.A. 1982); *see United States v. Gray*, 51 M.J. 1, 63-64 (C.A.A.F. 1999) ("We note that *Grostefon* does not permit an appellant to raise such issues in an untimely manner without good cause"); *United States v. Sumpter*, 22 M.J. 33, 33 (C.M.A. 1986) (noting "*Grostefon* provides no special basis for noncompliance with the rules of this Court"); A.C.C.A. R. 18.2(c) ("*Grostefon* issues shall be submitted at the same time as appellant's brief"); *cf. United States v. Mitchell*, 20 M.J. 350, 351 (C.M.A. 1985) (remanding a case back for review due to the lower court's refusal to consider *Grostefon* matters without explanation, but noting the appellant is not "entitled as a matter of legal right to bypass time limits that would apply to a motion by his counsel to raise additional issues").

In *United States v. Bridges*, the Coast Guard Court of Criminal Appeals (CGCCA) declined to hear new issues raised pursuant to *Grostefon* because they did not concern the sentence rehearing. 61 M.J. 645, 647 (C.G. Ct. Crim. App. 2005). Mirroring the facts of this case, the CGCCA affirmed the findings of guilty and remanded the case for a sentence rehearing. *Bridges*, 61 M.J. at 646. When the appellant raised new issues after the sentence rehearing that had nothing to do

with the hearing, the court rejected them as untimely, noting the appellant provided no cause for the failure to raise the issues earlier, and that "[a]ppellant's rights under *Grostefon* provide no special basis for his noncompliance with the rules of this Court." *Id.* at 647 (internal citations omitted).

This court should decline to hear this untimely, newly-raised issue because there is no good cause for why appellant did not raise it on his first review. This practice of piecemeal litigation impedes this court's ability to "effectively carry out its . . . review of . . . cases unless all issues known to or reasonably discoverable by appellant are litigated before that court in its initial review of the case." *Murphy v. Judges of United States Army Court of Military Review*, 34 M.J. 310, 311 (C.A.A.F. 1992). As this court has already completed a comprehensive review under Article 66, UMCJ, and affirmed the findings, this court should decline to conduct any further review of the findings absent a showing of good cause.

Assignment of Error II

WHETHER INDECENT EXPOSURE, ARTICLE 120c, UCMJ, IS UNCONSTITUTIONALLY VAGUE.

Standard of Review

The constitutionality of a statute is a question of law reviewed de novo. *United States v. Disney*, 62 M.J. 46, 48 (C.A.A.F. 2005).

Law and Argument

The Due Process Clause of the Fifth Amendment "requires 'fair notice' that an act is forbidden and subject to criminal sanction" before a person can be prosecuted for committing that act. *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003) (quoting *United States v. Bivins*, 49 M.J. 328, 330 (C.A.A.F. 1998)). It "also requires fair notice as to the standard applicable to the forbidden conduct." *Id.* (citing *Parker v. Levy*, 417 U.S. 733, 755 (1974)).

"Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his or her contemplated conduct is proscribed." *Levy*, 417 U.S. at 757 (citation and internal quotation marks omitted). A court may invalidate a law for vagueness if it fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly" or is so standardless that it authorizes or encourages seriously discriminatory enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Rockford*, 408 U.S. at 109. "In short, a void for vagueness challenge requires inquiry into whether a reasonable person in Appellant's position would have known that the conduct at issue was criminal." *United States v. Williams*, No.

ACM 38677, 2016 CCA LEXIS 149, at *23 (A.F. Ct. Crim. App. 7 Mar. 2016) (unpub.). Sources of notice include: "the [*Manual for Courts-Martial, United States*], federal law, state law, military case law, military custom and usage, and military regulations." *Vaughan*, 58 M.J. at 31 (addressing notice in the context of Article 134, UCMJ).

The constitutional vagueness analysis does not treat statutory text as a closed universe. Enough clarity to defeat a vagueness challenge "'may be supplied by judicial gloss on an otherwise uncertain statute.'" *Skilling v. United States*, 561 U.S. 358, 412 (2010) (quoting *United States v. Lanier*, 520 U.S. 259, 266 (1997)). In assessing a vagueness challenge, "a statute must of necessity be examined in light of the conduct with which the defendant is charged." *Levy*, 417 U.S. at 757 (citation and internal quotation marks omitted). "Criminal statutes are presumed constitutionally valid, and the party attacking the constitutionality of a statute has the burden of proving otherwise." *United States v. Mansfield*, 33 M.J. 972, 989 (A.F.C.M.R. 1991) (citation omitted), *aff'd*, 38 M.J. 415 (C.M.A. 1993). If appellant's "conduct [under the] statute clearly applies [he] may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756 (1974); *see also United States v. McGuinness*, 35 M.J. 149, 152 (C.M.A. 1992) ("If appellant is . . . one to whom the statute clearly applies, he has no standing to challenge

successfully the statute under which he is charged") (citations and internal quotation marks omitted).

A. Indecent exposure under Article 120c, UCMJ, is not unconstitutionally vague on its face.

The text of indecent exposure under Article 120c, UCMJ, clearly provides notice of what conduct is proscribed and does not encourage arbitrary enforcement. The statute provides a thorough definition of "indecent manner" which reflects the widely understood meaning of this term as including "conduct that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." Article 120c(d)(6), UCMJ.

A reference to "common propriety" does not render the statute vulnerable to arbitrary enforcement, nor does it provide "no reliable way to determine which acts qualify as crimes other than a 'prosecutor' charged it." (Appellant's Br. 7). Instead, it reflects what a person of ordinary intelligence would understand to be indecent in the general public's view—an objective concept that has been cemented over centuries in the common law and seventy years of military justice case law. *See Instructions for Courts-Martial, United States* (1891 ed.) p. 63 (an early version of the Manual for Courts-Martial specifying maximum punishment for "[l]ewd or indecent exposure of person"); *United States v. Royston*, 4 C.M.R. 263, 265 (A.C.M.R. 1952) (one of the earliest military justice cases considering an

indecent exposure conviction); *cf. United States v. Scoby*, 5 M.J. 160, 164 (C.M.A. 1978) (finding the phrase "crimes against nature" has been in use for centuries and is "no more vague than many other terms used to describe criminal offenses at common law and now codified in state and federal penal codes"); *United States v. Myer*, ARMY 20160490, 2019 CCA LEXIS 13, at *11 (Army Ct. Crim. App. 10 Jan 2019) (mem. op.) (finding that military justice courts have held incest to be unbecoming conduct for twenty years with no court holding otherwise as support that sexual activity between a father and a daughter "is without question unbecoming an officer and gentleman").

Under the Due Process Clause, indecent exposure under Article 120c, UCMJ, does not criminalize private behavior or violate a liberty right. The 2012 version of indecent exposure in Article 120c, UCMJ, eliminated the element requiring that the exposure occur "in any place where the conduct involved may reasonably be expected to be viewed by people other than the actor's family or household." Article 120(n), Uniform Code of Military Justice, 10 U.S.C. § 920 (2008) [UCMJ, 2008]. This change recognizes that a person is not insulated from criminal liability because the crime is committed in their own home. For example, a person of ordinary intelligence would understand that it is indecent to expose his genitalia in front of a houseguest who is uninterested in any form of a sexual relationship, even in that person's own home. *See, e.g.*, *United States v. Graham*,

56 M.J. 266, 270 (C.A.A.F. 2002) (affirming conviction of indecent exposure under Article 134, UCMJ, when a service member intentionally allowed a towel that was wrapped around his waist to drop to the floor in his own home, thus exposing his penis to his child's babysitter).

Similarly, a person of common intelligence understands that exposing one's genitalia in a private bedroom to a partner who consents to sexual activity is not indecent, but the same act between consenting partners would be indecent if it occurred in a public park. *See, e.g. United States v. Goings*, 72 M.J. 202, 205 (C.A.A.F. 2013) (finding that it is well established that private consensual sexual activity may be punishable when sexual activity is 'open and notorious') (quoting *United States v. Izguierdo*, 51 M.J. 421, 422 (C.A.A.F. 1999)); *United States v. Scoby*, 5 M.J. 160, 164 (C.M.A. 1978) (finding that "the right of consenting adults to engage in sexual activity free from Government imposed limitations . . . extends no further than to conduct committed in private") (internal citations omitted). The mere inclusion of conduct that may occur in the home or between consenting partners simply does not amount to an unconstitutional criminalization of private behavior or a violation of a liberty right.

Further, indecent exposure under Article 120c, UCMJ, is not unconstitutionally vague because the statute lacks a definition for "exposure." (Appellant's Br. 7). *Cf. United States v. Solis*, 75 M.J. 759, 763 (N.M. Ct. Crim.

App. 2016) (finding Article 120(b)(3) to not be unconstitutionally vague despite the word "incapable" not being defined by statute because a person of ordinary intelligence would understand the term's plain meaning, and case law has further provided guidance) (citing *United States v. Pease*, 74 M.J. 763, 770 (N.M. Ct. Crim. App. 2015), *aff'd* 75 M.J. 180 (C.A.A.F. 2016)).

When a word is not explicitly defined and appears ambiguous, courts engage in statutory construction, starting with a plain language analysis by applying the common and ordinary understanding of the word. *United States v. Tucker*, 76 M.J. 257, 258 (C.A.A.F. 2017); *United States v. Phillips*, 70 M.J. 161, 165 (C.A.A.F. 2011); *United States v. Andrews,* 77 M.J. 393, 400 (C.A.A.F. 2018). Military courts have analyzed the plain meaning of "exposure" and have clarified that a "live display" is required based on the common and ordinary understanding of the word "expose." *See United States v. Williams*, 75 M.J. 663 (Army Ct. Crim. App. 2016) (finding digital displays of on a cell phone did not constitute an exposure for purposes of the statute as the servicemember did not expose his actual live genitalia for view); *United States v. Bragan*, ARMY 20160124, 2017 CCA LEXIS 146 (A.C.C.A. 15 Mar. 2017) (mem. op.) (finding appellant's actions of digitally sending a photograph of his erect penis to another person did not constitute the offense of indecent exposure); *United States v. Ferguson*, 68 M.J. 431 (C.A.A.F. 2010) (affirming appellant's guilty plea, finding no inconsistency in the record that

the live transmission of appellant's conduct to an audience on the internet constituted an exposure). "Judicial gloss" on the meaning of the word "exposure," based on its common and ordinary meaning, thus provides notice to a reasonable person of what acts would constitute a criminal exposure. *See Skilling*, 561 U.S. at 412 (quoting *Lanier*, 520 U.S. at 266).

B. Indecent exposure under Article 120c, UCMJ, is not unconstitutionally vague as applied to the facts of this case.

The record of trial indicates that appellant indecently exposed his genitalia and buttocks. The apartment complex's pool where appellant exposed himself is accessible to apartment residents and their guests—members of the public. (R. at 289–90; Pros. Ex. 2). Whether this area was public or "quasi-public" as appellant alleges, (Appellant's Br. 10), is a distinction without a difference—appellant's exposure at this place, which an unsuspecting member of the public could have accessed, constitutes "a form of immorality, relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." Article 120c(d)(6), UCMJ. Not only did the military judge find that appellant's exposure at this location was indecent, (R. at 559), but this court also found "the record to be correct in fact" when considering the legal and factual sufficiency of appellant's indecent exposure conviction during its first review of the entire record of trial. *Steele*, 2019 CCA LEXIS 95, at *3 n.4.

By affirming the findings after appellant raised the issue of legal and factual sufficiency, this court has already rejected appellant's argument that his exposure was not indecent because the other individuals who witnessed it were also nude. (Appellant's Br. 10). Contrary to appellant's claim, this court does not "impose[] a temporal and presence requirement that violations occur when a victim may be present to view the actual body parts listed in the statutes." (Appellant's. Br. 7) (citing *United States v. Bragan*, ARMY 20160124, 2017 CCA LEXIS 146 (A.C.C.A. 15 Mar. 2017) (mem. op.)). *Bragan* is distinguishable because this court's focus was on the definition of "exposure," and it found that the appellant's act of sending a still picture of his genitalia was not an exposure because a digital image was not a live display. *Bragan*, 2017 CCA LEXIS 146, at *4. This court has never concluded that indecent exposure under Article 120c, UCMJ, requires a victim to actually view a live display of genitalia.

Moreover, the statute's plain language does not require that an accused's exposure be actually viewed by an offended party—only that the exposure be committed intentionally and indecently. Article 120c(c), UCMJ. Neither the statute nor the model specification requires a named victim of an accused's exposure. *See* Article 120c(c), UCMJ; Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 3–45C–3 (29 Feb. 2020) [Benchbook]; *United States v. Cornelison*, 78 M.J. 739, 745 (A. Ct. Crim. App. 2019) ("The Benchbook

is not a source of law, but represents a snapshot of the prevailing understanding of the law, among the trial judiciary, as it relates to trial procedure."). If Congress wanted to require a named victim for this offense, it would have done so.

Finally, appellant was on notice that his conduct of exposing his genitalia and buttocks at a publicly-accessible pool was criminal. Not only would a reasonable person of ordinary intelligence understand this type of exposure to be "grossly vulgar, obscene, and repugnant to common propriety," Article 120c(d)(6), UCMJ, but appellant was further on notice because the apartment complex's community standards explicitly required appropriate swimwear attire and prohibited "indecent exposure." (Pros. Ex. 16). While it is axiomatic that ignorance of the law is no excuse, appellant actually lived in this apartment complex, and so, at the very least, had constructive notice that his conduct was forbidden. (R. at 101, 106, 289; Pros. Ex. 14). Regardless, it is inescapable that a person of ordinary intelligence would understand that intentionally being naked at an apartment complex's publicly-accessible pool would constitute indecent exposure.

Conclusion

WHEREFORE, the government respectfully requests this honorable court decline to review the findings a second time and affirm the sentence as approved by the convening authority.

JENNIFER A. SUNDOOK
CPT, JA
Appellate Attorney, Government Appellate Division

MARK T. ROBINSON
MAJ, JA
Branch Chief, Government Appellate Division

CRAIG J. SCHAPIRA
LTC, JA
Deputy Chief, Government Appellate Division

CHRISTOPHER B. BURGESS
COL, JA
Chief, Government Appellate Division

APPENDIX

United States v. Arnold

United States Air Force Court of Criminal Appeals

March 18, 2021, Decided

No. ACM 39479 (f rev)

Reporter
2021 CCA LEXIS 119 *; 2021 WL 1117759

UNITED STATES, Appellee v. Brian S. ARNOLD, Master Sergeant (E-7), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by *United States v. Arnold, 2021 CAAF LEXIS 729 (C.A.A.F., Aug. 10, 2021)*

Prior History: **[*1]** Appeal from the United States Air Force Trial Judiciary, Upon further review. Military Judge: Christina M. Jimenez. Approved sentence: Bad-conduct discharge, confinement for 20 months, and reduction to E-1. Sentence adjudged 20 March 2018 by GCM con-vened at Joint Base Charleston, South Carolina.

United States v. Arnold, 2019 CCA LEXIS 458, 2019 WL 6130828 (A.F.C.C.A., Nov. 18, 2019)

Counsel: For Appellant: Major David A Schiavone, USAF.

For Appellee: Lieutenant Colonel Brian C. Mason, USAF; Lieutenant Colonel Matthew J. Neil, USAF; Major Brian E. Flanagan, USAF; Mary Ellen Payne, Esquire.

Judges: Before J. JOHNSON, POSCH, and KEY, Appellate Military Judges. POSCH, Senior Judge (concurring in the result).

Opinion by: J. JOHNSON

Opinion

J. JOHNSON, Chief Judge:

Appellant's case is before this court for the second time. A general court-martial composed of a military judge alone convicted Appellant, in accordance with his pleas pursuant to a pretrial agreement, of one specification of wrongful possession of child pornography in violation of *Article 134*, Uniform Code of Military Justice (UCMJ), *10 U.S.C. § 934*.[1] The military judge sentenced Appellant to a bad-conduct discharge, confinement for 20 months, and reduction to the grade of E-1. The convening authority approved the adjudged sentence.

Upon our initial review, Appellant—a reservist—raised three issues: (1) whether the court-martial lacked jurisdiction to impose confinement on Appellant because his recall to active duty for trial was not properly authorized by the Secretary of the Air Force; (2) whether

[1] All references in this opinion to the Uniform Code of Military Justice and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* ***[*2]*** (2016 ed.).

Appellant's conviction violated the *Fifth Amendment's*[2] *Double Jeopardy Clause*; and (3) whether Appellant was entitled to new post-trial processing due to errors in the post-trial process. We resolved the first two issues against Appellant, but we found that post-trial errors required new post-trial processing and action. *United States v. Arnold, No. ACM 39479, 2019 CCA LEXIS 458* (A.F. Ct. Crim. App. 18 Nov. 2019) (unpub. op.). Accordingly, we set aside the convening authority's action and re-turned the record of trial to The Judge Advocate General for remand to the convening authority. *Id. at *26-27*. On remand, after receiving a new clemency submission from Appellant, the convening authority again approved the adjudged sentence.

Upon further review by this court, Appellant raises a single issue pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*: whether the convening authority erred when he approved Appellant's sentence to confinement when Appellant was improperly recalled to active duty for his court-martial and was never placed on active duty orders to serve his **[*3]** confinement. In our prior opinion, we determined that any noncompliance with Air Force Instruction (AFI) 51-201, *Administration of Military Justice* (6 Jun. 2013, as amended by AFGM 2016-01, 3 Aug. 2016), in Appellant's recall to active duty for purposes of his trial by general court-martial was without jurisdictional effect, and we find no cause to revisit those determinations. *See Arnold*, unpub. op. at *11-17. However, the essence of Appellant's present argument is that the order recalling him to active duty for his trial effective 16 March 2018 specified "[t]he duration of this period of active duty is not to exceed 21 March 2018," and Appellant has asserted "to [his] knowledge [he] was never put on active duty orders for the duration of his confinement." *See* R.C.M. 204(b)(1). Therefore, he reasons, the convening authority lacked jurisdiction to approve his sentence to confinement.

However, whatever the merits of Appellant's legal reasoning, the factual premise for Appellant's argument is flawed. As the Government observes, the record of trial contains an additional order by direction of the Secretary of the Air Force and the convening authority, effective 21 March 2018, documenting Appellant's recall **[*4]** to active duty for a period not to extend past 16 November 2019 for the purpose of serving military confinement. *See 10 U.S.C. §§ 802(a)(7)*, *(d)(5)*. This period reflects the 20 months of confinement to which Appellant was sentenced, less the four days of confinement credit the military judge awarded him for illegal pretrial confinement. Appellant has not challenged the authenticity of this order or otherwise replied to the Government's answer which specifically highlighted this order and its effect. Therefore, we conclude Appellant's contention is without foundation or merit.

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

Concur by: POSCH

Concur

POSCH, Senior Judge (concurring in the result):

Appellant maintains the argument from his first appeal that the court-martial lacked jurisdiction to sentence him to confinement. Because the Secretary of the Air Force approved Appellant's recall, the jurisdictional

[2] U.S. Const. amend. V.

requirements of *Article 2(d), UCMJ, 10 U.S.C. § 802(d)*, were met, and we resolved that Appellant could be lawfully sentenced to confinement. *United States v. Arnold, No. ACM 39479, 2019 CCA LEXIS 458, at *17* (A.F. Ct. Crim. **[*5]** App. 18 Nov. 2019) (unpub. op.).

Appellant again complains he was improperly recalled to active duty for his court-martial, and for the first time claims he was not placed on active duty orders to serve his confinement. Because Appellant has failed to demonstrate either good cause for his failure to raise this issue previously, or that manifest injustice would result if we did not now consider it, I adopt the reasoning of the United States Navy-Marine Corps Court of Criminal Appeals in *United States v. Chaffin, No. 200500513, 2008 CCA LEXIS 94, at *3-9* (N.M. Ct. Crim. App. 20 Mar. 2008) (unpub. op.), and find Appellant has waived this issue.

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1. *United States v. Bragan, 2017 CCA LEXIS 146*

Client/Matter: -None-
Search Terms: ARMY 20160124
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	-None-

United States v. Bragan

United States Army Court of Criminal Appeals

March 15, 2017, Decided

ARMY 20160124

Reporter
2017 CCA LEXIS 146 *

UNITED STATES, Appellee v. Specialist DAKOTA A. BRAGAN United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by *United States v. Bragan, 76 M.J. 349, 2017 CAAF LEXIS 473 (C.A.A.F., May 16, 2017)*

Motion granted by *United States v. Bragan, 2017 CAAF LEXIS 613 (C.A.A.F., June 9, 2017)*

Review denied by *United States v. Bragan, 2017 CAAF LEXIS 668 (C.A.A.F., July 5, 2017)*

Prior History: **[*1]** Headquarters, 82nd Airborne Division. Richard J. Henry, Military Judge. Lieutenant Colonel Susan K. McConnell, Staff Judge Advocate.

Counsel: For Appellant: Lieutenant Colonel Melissa R. Covolesky, JA; Major Andres Vazquez, Jr., JA; Lieutenant Colonel Christopher Daniel Carrier, JA (on brief).

For Appellee: Colonel Mark H. Sydenham, JA; Lieutenant Colonel A.G. Courie, III, JA; Captain Tara O'Brien Goble, JA; Captain Jonathan S. Reiner, JA (on brief).

Judges: Before CAMPANELLA, HERRING, and PENLAND Appellate Military Judges. Judge HERRING and Judge PENLAND concur.

Opinion by: CAMPANELLA

Opinion

MEMORANDUM OPINION

CAMPANELLA, Senior Judge:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of indecent exposure, possessing child pornography, receiving child pornography, viewing child pornography, and communicating indecent language, in violation of *Articles 120c* and *134, Uniform Code of Military Justice*, *10 U.S.C. §§ 920c*, *934 (2012)* [hereinafter UCMJ]. The convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for ninety days, and reduction to the grade of E-1.

This case is before us for review pursuant to *Article 66, UCMJ*. Appellant raises two assignments of error. **[*2]** Both warrant discussion and one merits relief. We also find the matters raised by appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)* to be meritless.

BACKGROUND

Appellant pleaded guilty to indecent exposure by taking photographs of his erect penis and sending them to a pair of sixteen-year-old high school cheerleaders.

During the plea inquiry, the military judge went through each element of the offense of indecent exposure and reviewed the basis for the charge—namely, that appellant had intentionally exposed his genitalia in an indecent manner between 1 January 2014 and 30 November 2014.

Appellant admitted he took photographs of his penis and sent them to others, knowing the pictures were indecent. He further expounded upon the indecency element of the charge in that he photographed his penis next to a water bottle to illustrate its size—and then sent the photographs via social media to persons under the age of 18.

Although appellant did not mention it during the providence inquiry, appellant also sent videos of himself unclothed, masturbating, and ejaculating to the same two underage girls on different occasions during the same timeframe as the charged indecent exposure. The two girls reciprocated by sending appellant **[*3]** similar videos of themselves unclothed and masturbating. Appellant admits this information to be true through the stipulation of fact.

LAW AND DISCUSSION

Appellant now argues the military judge abused his discretion by accepting appellant's guilty plea for indecent exposure in light of *United States v. Williams, 75 M.J. 663 (Army Ct. Crim. App. 2016)*.

The government urges this court to distinguish this case from *Williams* and affirm the indecent exposure charge arguing that because appellant sent videos, not just still photographs, this case falls outside the holding in *Williams*.

Standard of Review

We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Schell, 72 M.J. 339, 345 (C.A.A.F. 2013)* (citing *United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008)*). Although the standard for this case is "abuse of discretion," when the law changes due to a case decided while an appellant's case is on direct appeal, appellant is entitled to avail himself of the new rule, even though the military judge did not err at the time. *United States v. Harcrow, 66 M.J. 154, 160 (C.A.A.F. 2008) (Ryan, J. concurring)*. A guilty plea will only be set aside if we find a substantial basis in law or fact to question the plea. *Id.* (citing *Inabinette, 66 M.J. at 322*). The court applies this "substantial basis" test by determining whether the record raises a substantial question about the factual basis of appellant's guilty **[*4]** plea or the law underpinning the plea. *Inabinette, 66 M.J. at 322*.

Whether Article *120c(c), UCMJ*, proscribes the appellant's electronic transmission of a photograph of his penis is a de novo question of statutory interpretation. *United States v. Entzminger, 76 M.J. 518, 2017 CCA LEXIS 20, at *4 (Army Ct. Crim. App. 11 Jan. 2017)*; *Williams, 75 M.J. at 665*.

Acceptance of Plea to Indecent Exposure

After appellant's court-martial, but *before* the convening authority took action, this court decided *United States v. Williams, 75 M.J. 663 (Army Ct. Crim. App. 2016)* and considered whether *Article 120c(c), UCMJ*, applied to an appellant sending a still "digital image" of his penis via text message to a victim. We determined it did not. We held the term "exposed" under *Article 120c(c), UCMJ*, did not encompass showing a person a photograph or digital image of one's genitalia because there was no *live display of actual genitalia*. *Id. at 667*. Finally, we concluded Congress did not intend to criminalize an "exposure" through communication

technology under *Article 120c(c), UCMJ*. *Id. at 669*.

In other words, after appellant's trial, this court definitively determined appellant's actions of digitally sending a photograph of his exposed erect penis to another person did not constitute the offense of indecent exposure. We find appellant's plea and the providence inquiry to be on all fours with this conclusion.

The government **[*5]** argues that "although appellant did not mention it during the providence inquiry, he also sent videos of himself unclothed, masturbating, and ejaculating to both of those young girls on different occasions during the same time frame." Accordingly, the government asserts that appellant's actions went beyond the appellant's actions in *Williams*, citing *United States v. Ferguson, 68 M.J. 431 (C.A.A.F. 2013)*, a pre-*Williams* case.

This argument falls flat. There was no indication during the plea inquiry that the basis for the indecent exposure charge was connected to appellant transmitting *videos* of himself masturbating and ejaculating. The government invites this court to flout the providence inquiry and inappropriately incorporate by reference the video-related information from the stipulation of fact. The law does not permit us to do so.

Even if we were to ignore the providence inquiry and assume incorporation by reference of the information in the stipulation of fact, the government's argument still comes to naught. The upshot of *Williams* was that there was no *live display of actual genitalia* in the electronic transmission. *Also see, United States v. Uriostegui, 75 M.J. 857, 864-65 (N.M. Ct. Crim. App. 2016)* ("We agree with the holding in *Williams* that this conduct is not indecent exposure under *Article 120c(c), **[*6]** UCMJ*, because indecent exposure has 'a temporal and physical presence aspect . . . [and] violations occur when a victim [may be] present to view the *actual* body parts listed in the statutes, not images or likenesses of the listed parts.'"). While transmitting a previously recorded video is factually different, as the government asserts, it is without legal distinction under these facts.

As in *Williams*, here the record establishes no legally sufficient theory of how appellant committed indecent exposure under *Article 120c(c), UCMJ*. As such, we hold there is a substantial basis in law to question the providence of appellant's plea and will take appropriate action in our decretal paragraph and set aside and dismiss Charge I.

Post-Trial Delay

It took 106 days after action for the government to get appellant's record of trial to our court. The government explains this delay as a mailroom issue related to the record being "returned to sender without notice to the local office." We do not find this explanation reasonable. It is incumbent upon the government to track and account for mailed records of trial. That said, here, appellant has not demonstrated prejudice or a due process violation. **[*7]** *See United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006)*. Additionally, considering the facts and circumstances of this case, the approved sentence, and post-trial delay, we find the approved sentence not inappropriately severe. As such, we award no relief. *UCMJ, art. 66(c)*. While we grant appellant no relief on this issue, we, nonetheless, invite the government's attention to Army Reg. 27-26, Legal Services: Rule for Professional Conduct for Lawyers, Appx. B, R.1.1 (Competence), R.1.3 (Diligence) (1 May 1992) ("A lawyer shall act with reasonable diligence and promptness in representing a client and in every case.").

Reassessment

In determining whether we can reassess the sentence,

we apply several non-exhaustive factors from *United States v. Winckelmann, 73 M.J. 11, 15-16 (C.A.A.F. 2013)*. First, appellant faced a maximum punishment of a dishonorable discharge, thirty-one years and six months confinement, total forfeiture of pay and allowances, and reduction to E-1 prior to the reversal of his conviction for indecent exposure. Appellant still faces a maximum punishment of a dishonorable discharge, thirty years and six months confinement, total forfeiture of pay and allowances, and reduction to E-1. This does not constitute a dramatic change in the penalty landscape. Second, appellant was sentenced **[*8]** by a military judge and we are more likely to be certain of what a military judge would have done. Third, appellant's criminal conduct remains significant: he is convicted of three child pornography offenses and one specification of indecent language. Fourth, we have familiarity and experience with the remaining offenses to reliably determine what sentence would have been imposed at trial. After weighing these factors, we are confident we can reassess the sentence in this case.

CONCLUSION

On consideration of the entire record, the findings of guilty of the Specification of Charge I and Charge I are set aside and dismissed. The remaining findings of guilty are AFFIRMED.

Reassessing the sentence on the basis of the errors noted, the entire record, and in accordance with the principles of *Winckelmann, 73 M.J. at 15-16*, we affirm the sentence as adjudged. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of his sentence set aside by this decision, are ordered restored. *See* *UCMJ arts. 58b(c)* and *75(a)*.

Judge HERRING and Judge PENLAND concur.

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United States v. Chaffin

United States Navy-Marine Corps Court of Criminal Appeals

March 20, 2008, Decided

NMCCA 200500513 GENERAL COURT-MARTIAL

Reporter

2008 CCA LEXIS 94 *; 2008 WL 746812

UNITED STATES OF AMERICA v. CLAYTON A. CHAFFIN, CORPORAL (E-4), U.S. MARINE CORPS

Notice: AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Subsequent History: Review denied by *United States v. Chaffin, 2008 CAAF LEXIS 1244 (C.A.A.F., Nov. 13, 2008)*

Prior History: **[*1]** Sentence Adjudged: 08 April 2004. Military Judge: LtCol Jeffrey Colwell, USMC. Convening Authority: Commanding General, 2d FSSG, U.S. Marine Forces, Atlantic, Camp Lejeune, NC. Staff Judge Advocate's Recommendation: LtCol A.G. Peterson, USMC; Addendum: LtCol J.L. Gruter, USMC.

United States v. Chaffin, 2007 CCA LEXIS 47 (N-M.C.C.A., Feb. 22, 2007)

Case Summary

Procedural Posture

Appellant servicemember was convicted of offenses by a general court-martial. After the instant court set aside findings of guilty to wrongful use of marijuana and distribution of cocaine, the convening authority (CA) dismissed the affected charge and specifications, and reassessed the sentence. The case was before the court a second time, following the remand for a rehearing or sentence reassessment.

Overview

The servicemember assigned four supplemental errors. He asked the court to set aside the remaining findings of guilty, arguing those convictions were influenced by "spillover." The court found that he had waived this issue; alternatively, this issue was necessarily decided against him when the court previously affirmed the remaining findings of guilty. In his second and third supplemental assignments of error, he alleged the delay in completing appellate review denied him due process and affected the sentence that should be affirmed under Unif. Code Mil. Justice art. 66, *10 U.S.C.S. § 866*. The court concluded any denial of due process was harmless beyond a reasonable doubt. Further, it found the delay in the case was not so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system. The court declined to reduce the sentence pursuant to its authority under Unif. Code Mil. Justice art. 66, *10 U.S.C.S. § 866*. Finally, the court found that the sentence to 18 months' confinement was not inappropriately severe.

Outcome

The court had previously affirmed the findings of guilty.

It now affirmed the sentence, as approved by the convening authority on 8 June 2007.

Counsel: For Appellant: LT Kathleen Kadlec, JAGC, USN.

For Appellee: CDR M.G. Miller, JAGC, USN; LT Craig Poulson, JAGC, USN.

Judges: Before E.S. WHITE, D.E. O'TOOLE, R.E. VINCENT, Appellate Military Judges. Judge O'TOOLE and Judge VINCENT concur.

Opinion by: E.S. WHITE

Opinion

OPINION OF THE COURT

WHITE, Senior Judge:

This case is before us a second time, following remand for a rehearing or sentence reassessment.

Previously, this court set aside findings of guilty to wrongful use of marijuana and distribution of cocaine (Specifications 1 and 3 of Charge III), and affirmed the remaining findings of guilty. [1] We set aside the sentence, and returned the case to the Judge Advocate General for remand to an appropriate convening authority. The convening authority was authorized to order a rehearing on the affected specifications and the sentence, to dismiss the affected specifications and order a rehearing on sentence alone, or to dismiss the affected specifications **[*2]** and reassess the sentence. *United States v. Chaffin, No. 200500512, 2007 CCA LEXIS 47*, unpublished op. (N.M.Ct.Crim.App. 22 Feb 2007).

On 7 June 2007, the convening authority dismissed the affected charge and specifications, and reassessed the sentence. He approved only so much of the sentence as extended to 18 months confinement, total forfeiture of pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant now assigns four supplemental errors. [2] First, he contends he was prejudiced **[*3]** by "spill over" from improper comments by the trial counsel during opening statement, [3] from the testimony of a witness [4] on Specification 11 of Charge V, which specification the convening authority later dismissed, and from Prosecution Exhibits 5 and 6, which this court ruled inadmissible in its prior decision. Second, he argues post-trial delay has denied him due process. Third, he asserts the post-trial delay affects the sentence that should be affirmed under *Article 66*, UCMJ, and asks

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[1] The court affirmed the findings of guilty to Specifications 10, 12, and 13 of Charge V and to Charge V, and to Additional Charge II and the sole specification thereunder. The appellant was acquitted of Charge I and the specifications thereunder, Charge II and the sole specification thereunder, Specification 5 of Charge III, Charge IV and the specifications thereunder, Specifications 1-9 and 14 of Charge V, Additional Charge I and the sole specification thereunder, and Additional Charge III and the sole specification thereunder. The convening authority set aside the findings of guilty to, and dismissed, Specifications 2 and 4 of Charge III and Specification 11 of Charge V.

[2] The appellant originally assigned four errors, all of which were resolved by the court's earlier decision.

[3] The appellant cites a statement by the trial counsel that the Government's evidence would show the appellant had used and distributed illegal drugs during a break in service between enlistments. The judge permitted the trial counsel to make the objected-to statement, but later ruled evidence of that fact inadmissible.

[4] Mr. William **[*4]** Wallace.

this court not to affirm the bad-conduct discharge. Fourth, the appellant contends the reassessed sentence is inappropriately severe, and more severe than that which would have been imposed if the erroneous admission of Prosecution Exhibits 5 and 6 had not occurred.

We have examined the record of trial, the appellant's four supplemental assignments of error and brief, and the Government's answer. We have previously affirmed the findings. We now find the sentence is correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant occurred. *See* Arts. 59(a) and 66(c), UCMJ.

Spillover

The appellant asks this court to set aside the remaining findings of guilty, arguing those convictions were influenced by "spillover." Although he could have, the appellant did not raise this issue as a separate assignment of error when his case first came before this court. [5] Because the appellant has failed to demonstrate either good cause for his failure to raise this issue previously, or that manifest injustice would result if we did not now consider this issue, we hold the appellant has waived this issue. Alternatively, this issue was necessarily decided against the appellant when this court previously affirmed the remaining findings of guilty.

Piecemeal litigation is "counterproductive to the fair, orderly judicial process created by Congress in Articles 66 and 67, UCMJ." Murphy v. Judges of United States Army Court of Military Review, 34 M.J. 310, 311 (C.M.A. 1992). It can undermine the finality of judgments, needlessly extend resolution of the case, and burden scarce judicial resources. *See* McCleskey v. Zant, 499 U.S. 467, 491-92, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991)(citations omitted). Further, a service court of criminal appeals "cannot effectively carry out its . . . review of . . . cases unless all issues known to or reasonably discoverable by appellant are litigated before that court in its initial review of the case." Murphy, 34 M.J. at 311.

Principles of waiver and forfeiture provide the necessary incentive to litigants and counsel to raise issues in a timely fashion **[*6]** and to avoid piecemeal litigation. *See* Freytag v. Commissioner, 501 U.S. 868, 895, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991)(Scalia, J., concurring in part and in the judgment); United States v. Frady, 456 U.S. 152, 163, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982); United States v. Causey, 37 M.J. 308, 311 (C.M.A. 1993); United States v. Shavrnoch, 47 M.J. 564, 566-68 (A.F.Ct.Crim.App. 1997), *aff'd in part &; set aside in part on other grounds*, 49 M.J. 334 (C.A.A.F. 1998). Such principles are routinely applied at the trial level, and are familiar to appellate counsel reviewing records of trial. [6] As well, such principles are implicit in

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[5] The appellant did, however, partially argue spillover in support of his third original assignment of error. At that time, he asked the court to dismiss Specifications 1 and **[*5]** 3 of Charge III, Specification 10 of Charge V, and Additional Charge II, due to the trial counsel's improper remarks during opening statement, the improper admission of Prosecution Exhibits 5 and 6, and the insufficiency of the evidence. He did not raise the allegedly prejudicial effect of Mr. Wallace's testimony, nor did he argue for dismissal of Specifications 12 and 13 of Charge V.

[6] *See, e.g.* Rule for Courts-Martial 912(f)(4), Manual for Courts-Martial, United States (2005 ed.)(challenge for cause), R.C.M. 910(j)(factual issues waived by guilty plea); R.C.M. 405(k)(objection to pretrial investigation); R.C.M. 707(e)(speedy trial); R.C.M. 801(g)(failure to timely raise defenses, objections &; motions); Military Rule of Evidence 103(a) Manual **[*7]** For Courts-Martial, United States (2005 ed.)(evidentiary errors only preserved by objection); Mil. R.

the Courts of Criminal Appeals Rules of Practice and Procedure, 44 M.J. LXIII, 32 C.F.R. Part 150 (2007). Those rules establish deadlines for the submission of assignments of error, and require leave of court to file briefs and motions out of time. CCA Rules 15 and 23.

On the other hand, just as the Plain Error Doctrine permits the court to address evidentiary errors not objected to at trial, the interests of justice and the dictates of *Article 66*, UCMJ, require that any forfeiture rule for issues not timely raised on appeal must also have exceptions. *Article 66*, UCMJ, commands us to affirm only such findings and sentence as we find correct in law and fact, and determine, on the basis of the entire record, should be approved. That mandate requires this court to look beyond those issues raised by the appellant, and ensure justice is done. The appellate court rules, likewise, permit the court to grant enlargements and leave to file out of time, as well as to suspend the rules. CCA Rules 23, 24 and 25.

The avoidance of piecemeal litigation and our Article 66 mandate are easily reconciled by adopting, as the standard for determining when not to apply forfeiture, the "cause and prejudice" standard used by the United States Supreme Court in its procedural default and habeas corpus jurisprudence. *See McCleskey, 499 U.S. at 493*; **[*8]** *United States v. Simoy, No. 30496, 2000 CCA LEXIS 183*, unpublished op. (A.F.Ct.Crim.App. 7 Jul 2000), *aff'd, 54 M.J. 407 (C.A.A.F. 2001)*.

The cause and prejudice standard requires a litigant to show "'some objective factor external to the defense impeded counsel's efforts'" to raise the claim in a timely manner. *McCleskey, 499 U.S. at 493* (quoting *Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)*). Cause can be established by showing, *inter alia*, official interference preventing compliance with procedural rules, that "'the factual or legal basis for a claim was not reasonably available to counsel,'" or that counsel was constitutionally ineffective. *Id. at 494* (quoting *Carrier*). In addition to showing cause, the appellant must also show actual prejudice resulting from the error. *Id.* (quoting *Frady, 456 U.S. at 168* (internal quotations omitted)). Alternatively, a litigant may show that a constitutional violation probably caused an innocent person to be convicted, resulting in a fundamental miscarriage of justice. *Id.* (citing *Carrier, 477 U.S. at 485*). [7]

In this case, the appellant has shown neither cause and prejudice nor that manifest injustice would result if the court does not consider his first supplemental assignment of error. The facts and law necessary to raise prejudicial spillover were known when this case first came before the court, yet it was not assigned as an error. Even if it were not until after the court had ruled Prosecution Exhibits 5 and 6 erroneously admitted that the spillover argument first crystallized for the appellant -- which is clearly not the case, since he alluded to spillover in his argument on the third original assignment of error -- the appellant could have then sought reconsideration of our decision affirming the remaining findings. He did not. Nor has the appellant clearly shown he was prejudiced by spillover, where the military judge correctly instructed the members on spillover, [8] the members acquitted the appellant on a

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Evid. 311(i)(guilty plea waives *4th Amendment* errors).

[7] Former Chief Judge Crawford of our superior court has referred to this showing as one of "manifest injustice." *United States v. Johnson, 42 M.J. 443, 447 (C.A.A.F. 1995)*(Crawford, **[*9]** J. concurring in the result).

[8] Record at 1018; Appellate Exhibit LXXIII at 23-25. Absent evidence to the contrary, we presume members follow the **[*10]** military judge's instructions, *United States v. Loving, 41 M.J. 213, 235 (C.A.A.F. 1994)*; *United States v. Holt, 33 M.J. 400, 408 (C.M.A. 1991)*. "[P]roperly drafted and delivered

number of specifications, [9] and there was adequate independent evidence to find the appellant guilty of the remaining specifications.

Alternatively, we conclude the court has already decided the question presented by the appellant's first supplemental assignment of error. The court's earlier decision specifically stated the court was satisfied the appellant had not been harmed by the trial counsel's comments during opening statement. *Chaffin*, unpublished op., at 5 n.7. Further, in previously contending there was insufficient evidence on specification 10 of Charge V and Additional Charge II, the appellant argued that the erroneously-admitted Prosecution Exhibits 5 and 6 had **[*11]** contributed to his conviction. Nevertheless, the court held the evidence was legally and factually sufficient. *Id.* at 5. Finally, the court's decision affirming the findings of guilty to the remaining charges and specifications necessarily implied the conclusion that the appellant had not been materially prejudiced by improper evidentiary spillover. We decline to revisit them.

Post-Trial Review

In his second and third supplemental assignments of error, the appellant alleges the delay in completing appellate review has denied him due process and affects the sentence that should be affirmed under *Article 66*, UCMJ. [10] He specifically points to the 154 days between adjournment of the court-martial and authentication of the record of trial, and to the 681 days between the original docketing of the case with this court and our earlier decision. [11]

"[I]n cases involving claims that an appellant has been denied his due process right to speedy post-trial review and appeal, we may look initially to whether the denial of due process, if any, is harmless beyond a reasonable doubt." *United States v. Allison, 63 M.J. 365, 370-71 (C.A.A.F. 2006)*. **[*13]** The appellant here has not identified any specific harm from the delay, nor do we find any. He has not suffered oppressive incarceration pending the resolution of his appeal. [12] He has not

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instructions are sufficient to prevent juries from cumulating evidence, thus avoiding improper spill-over." *United States v. Myers, 51 M.J.570, 579 (N.M.Ct.Crim.App. 1999)*(citing *United States v. Duncan, 48 M.J. 797, 803 (N.M.Ct.Crim.App. 1998)*.

[9] Although charged with 31 separate specifications under eight separate charges, the members convicted the appellant on only nine specifications. Of the 12 drug-related specifications, the members acquitted the appellant of three.

[10] Although the appellant did not raise post-trial delay in his initial assignments of error, we will nonetheless consider these two supplemental assignments on their merits. First, relevant facts have changed; the post-trial delay is now greater than it was when the appellant filed his original assignments of error. Second, had it been raised originally, **[*12]** the court would have declined to decide the issue at that time as unripe, given the decision the case needed to be returned to the convening authority for either rehearing or sentence reassessment.

[11] The latter delay, the appellant says, is "unreasonable, unexplained and can only be attributed to gross negligence." Appellant's Supplemental Brief and Assignment of Errors of 20 Jul 2007 at 14. Examination of the record, however, reveals that 517 of those 681 days were spent waiting for the appellant to file his initial brief and assignment of errors. Once the appellant filed his brief and assignment of errors, this court issued its decision in 164 days. While, in hindsight, it may not have been prudent to have accommodated the appellant's counsel by granting their nine requests for enlargement of time, we cannot agree with the appellant that doing so was grossly negligent, or that the length of time his case was pending before the court is unexplained.

[12] According to the appellant's clemency submission of 16 May 2007, he was released from confinement on 3 March 2005,

alleged any anxiety or concern beyond that normal for people awaiting appellate decisions. As the convening authority dismissed Specifications 1 and 3 of Charge III and we affirmed the remaining findings of guilt, there is no danger his defense has been impaired by the delay.

Accordingly, we conclude any denial of due process was harmless beyond a reasonable doubt. Further, we find the delay in this case is not so egregious that tolerating it would adversely affect the public's perception of the fairness **[*14]** and integrity of the military justice system. *See* United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006).

Finally, having considered the factors set out in United States v. Brown, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc), we decline to reduce the sentence pursuant to our authority under Article 66, UCMJ. *See* Toohey, 63 M.J. at 363; Toohey v. United States, 60 M.J. 100, 102 (C.A.A.F. 2004); United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002).

Sentence Appropriateness

In his fourth supplemental assignment of error, the appellant asserts his sentence to 18 months confinement is inappropriately severe, and argues a sentence of 10 months confinement is more appropriate. We disagree.

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982)(quoting United States v. Mamaluy, 10 C.M.A. 102, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

In this case, **[*15]** the appellant, a noncommissioned officer, was found guilty of repeatedly soliciting junior Marines to use and possess drugs. The specifications of which the appellant now stands convicted carry a maximum punishment of 14 years confinement. They are offenses with serious ramifications for military good order, discipline and readiness. Based on the entire record, we find the appellant's sentence is not inappropriately severe, and conclude it is appropriate for this offender and his offenses. United States v. Baier, 60 M.J. 382 (C.A.A.F. 2005); Snelling, 14 M.J. at 268; *see* Art. 66(c), UCMJ.

Further, we conclude that, absent the prejudicial error necessitating the sentence reassessment, the sentence would have been at least as severe as that approved by the convening authority on 8 June 2007. *See* United States v. Harris, 53 M.J. 86, 88 (C.A.A.F. 2000); United States v. Sales, 22 M.J. 305, 307-08 (C.M.A. 1986); R.C.M. 1107(e)(1)(B)(iv).

Conclusion

We have previously affirmed the findings of guilty. We now affirm the sentence, as approved by the convening authority on 8 June 2007.

Judge O'TOOLE and Judge VINCENT concur.

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329 days after conclusion of his trial. LT A. Souders Ltr of 16 May 07 at 1. Even if this case had proceeded in strict accordance with the timelines established in United States v. Moreno, 63 M.J. 129, 142 (C.A.A.F. 2006), it is highly doubtful our initial decision, or the convening authority's sentence reassessment, would have taken place before the appellant was released from confinement.

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1. *United States v. Myer, 2019 CCA LEXIS 13*
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Cases	-None-

United States v. Myer

United States Army Court of Criminal Appeals

January 10, 2019, Decided

ARMY 20160490

Reporter

2019 CCA LEXIS 13 *; 2019 WL 194633

UNITED STATES, Appellee v. Captain ADAM J. MYER, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by *United States v. Myer, 2019 CAAF LEXIS 210 (C.A.A.F., Apr. 3, 2019)*

Review denied by *United States v. Myer, 2019 CAAF LEXIS 382 (C.A.A.F., May 29, 2019)*

Prior History: **[*1]** Headquarters, Fort Campbell. Matthew A. Calarco, Military Judge. Lieutenant Colonel Robert C. Insani, Staff Judge Advocate.

Counsel: For Appellant: Captain Augustus Turner, JA (argued); Lieutenant Colonel Tiffany Chapman, JA; Captain Joshua B. Fix, JA; Captain Augustus Turner, JA (on brief); Lieutenant Colonel Tiffany D. Pond, JA; Major Todd W. Simpson, JA; Captain Augustus Turner, JA (on reply brief).

For Appellee: Captain Brian Jones, JA (argued); Lieutenant Colonel Eric K. Stafford, JA; Major Pamela Perillo, JA (on brief).

Judges: Before WOLFE, SALUSSOLIA, and ALDYKIEWICZ, Appellate Military Judges. Judge SALUSSOLIA concurs. WOLFE, Senior Judge, concurring.

Opinion by: ALDYKIEWICZ

Opinion

MEMORANDUM OPINION

ALDYKIEWICZ, Judge:

Appellant, a married chaplain, alleges that his conviction for conduct unbecoming an officer and gentleman for engaging in incest with his legally adopted, eighteen-year-old daughter is "unconstitutionally vague" as applied to him. We disagree. Appellant further alleges he was denied effective assistance of counsel "where defense counsel failed to reasonably investigate, present crucial evidence, and cross examine witnesses." We likewise find this allegation to be without merit. Both are addressed below. **[*2]** [1]

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault, two specifications of assault consummated by a battery, two specifications of assault consummated by a battery on a child under the age of sixteen, and two specifications of conduct unbecoming an officer and gentleman in violation of

[1] After due consideration of appellant's third assignment of error, dilatory post-trial delay in violation of *United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006)*, as well as those matters personally raised by appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, we have determined they warrant neither discussion nor relief.

Articles 120, *128*, and *133*, Uniform Code of Military Justice, *10 U.S.C. §§ 920*, *928*, and *933 (2012)* [UCMJ]. The convening authority approved the adjudged sentence of a dismissal and eight years confinement.

BACKGROUND

Appellant's assaults all involve family members as victims. He was convicted of multiple batteries against his adopted son, NM; multiple batteries against his wife, MM; and, sexual assault against his adopted daughter, EM. The non-assault convictions, that is, his conduct unbecoming an officer and gentleman, involves one specification of incest with EM, and one specification of wrongfully and dishonorably attempting to influence MM and EM from being cooperative and truthful during the law enforcement investigation into appellant's misconduct.

Appellant and MM, his wife of twenty-one years at the time of trial, legally adopted NM **[*3]** and EM when they were two and five respectively. From approximately age two-and-a-half until adopted, EM was in appellant's and MM's care and custody as foster parents.

Assaults Against Son

Between on or about 6 December 2012 and on or about 1 March 2013, appellant assaulted NM twice in the family home in Clarksville, Tennessee.[2] On one occasion, appellant saw NM "upset," and told him to leave the room.[3] As NM attempted to leave, he inadvertently bumped appellant's leg causing appellant to "[throw NM] across the room." Sometime thereafter, NM once again found himself "upset." As NM attempted to go upstairs to see his mother, something he often did when upset, appellant tackled him from behind on the stairs, pushed him into the staircase, and "sat" on his back.

Assaults Against Wife

The next victim of appellant's anger was his wife, MM, who refused appellant's demand on Mother's Day 2015 that she discipline NM for simply sitting in the kitchen and "doing nothing at the table." Her refusal to acquiesce to appellant's demand coupled with her apparent focus on her cell phone, rather than appellant, resulted in appellant grabbing her arm. Nearly four months later, appellant, again, assaulted **[*4]** MM, this time holding her down as he grabbed her arms. This second assault occurred as MM held their one-and-a-half year old son.

Sexual Assault of Daughter and Incestuous Unbecoming Conduct

The last of appellant's victims was his daughter, EM. In approximately the beginning of July 2015, appellant and EM travelled from their home in Clarksville, Tennessee to Fayetteville, North Carolina to work on appellant's rental property. During the trip, appellant and EM stayed in several hotels. One night, after falling asleep fully clothed, EM awoke with her pants and underwear pulled down below her knees and appellant, her father, digitally penetrating her vagina. Crying, EM asked appellant to stop, which he did.

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[2] NM was thirteen years-old at the time of both assaults, and seventeen at the time of trial.

[3] MM's undisputed testimony was that NM, at the times relevant to the charged offenses, "has a low [intelligence quotient] and emotional age of a six-year-old. So, he tends to have tantrums like a six-year-old would." When asked how he acted during the tantrums, MM responded, "[h]e yells or cries." Both MM and EM confirmed that NM was prone to anger and outbursts that included violence.

About one week later, after returning to Clarksville, Tennessee, appellant and EM, unbeknownst to appellant's wife, engaged in a sexual relationship.[4] Appellant's sexual relationship with his daughter lasted approximately four weeks and included appellant, again, digitally penetrating EM, and each performing oral sex on the other. These sexual acts occurred either on the couch in the family home, as MM and the family slept upstairs, or in appellant's car.

Appellant's Admissions

On or about **[*5]** 2 August 2015, appellant entered the marital bedroom and told his wife, "I am taking my wife. I have chosen you. I am ready to be your husband again." He then proceeded to make varied admissions to MM about his relationship with EM. He admitted to kissing EM, touching her over her clothes, digitally penetrating her, and engaging in oral sex with her.

LAW AND DISCUSSION

A. Conduct Unbecoming an Officer and Gentleman

1. Notice of Criminality

Appellant challenges his conviction for conduct unbecoming an officer and gentleman by engaging in incest with EM as being "void for vagueness" as applied to him. In short, he argues that he lacked sufficient notice that his sexual activity with his adopted daughter, EM, was proscribed.[5]

In support of his argument, appellant notes: incest "is exclusively a state crime [with] fifty unique legal definitions, defenses, and penalties across the country," and "engaging in consensual sexual activity with an adult, adopted child [ ] is not illegal in all states." In his "supplemental citation of authority," appellant points this court to seventeen states and the District of Columbia where appellant's sexual activity would not violate the relevant statute **[*6]** criminalizing incest.[6]

Appellant's "supplemental citation of authority" is noticeably silent with respect to the fourteen states and one territory where appellant's actions would, in fact, be criminal and would have been so in July of 2015. Of note, Tennessee, appellant's domicile, place of physical residence, and situs of the incest at issue, is among the states criminalizing digital penetration with an adopted child. *See* Tenn. Code. Ann. § 39-15-302.

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[4] EM testified that she thought the sexual activity with appellant after Fayetteville was "consensual" because she did not tell appellant to stop. She explained she did not tell appellant to stop because she was scared and did not know what he would do.

[5] Appellant does not challenge the sufficiency of the pleadings specifically. At trial, defense counsel acknowledged he understood which elements appellant had to defend against. *See, e.g.,* United States v. Saunders, 59 M.J. 1 (C.A.A.F. 2003) (military judge did not err in denying motion to dismiss Article 134 offense alleging stalking in Germany that was modeled after the Georgia stalking statute because it provided "fair notice" to the accused that his actions were criminal and was sufficiently specific to state an offense).

[6] *See, e.g.*, Ala. Code § 13A-13-3 (vaginal intercourse required); Alaska Stat. § 11.41.450 (blood relationship required); N.C. Gen. Stat. § 14-178 (carnal intercourse required); N.Y. Penal Law § 255.25 (blood relationship required). Additionally, appellant points to the government's dismissal of Specification 1 of Charge II, which alleged a violation of North Carolina's incest statute, a statute requiring "carnal intercourse," as further proof that appellant lacked the requisite notice that his actions with EM were criminal.

"'Void for vagueness' [ ] 'means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed.'" *United States v. Vaughan, 58 M.J. 29, 31 (C.A.A.F. 2003)* (quoting *Parker v. Levy, 417 U.S. 733, 757, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974)*). "Due process requires 'fair notice' that an act is forbidden and subject to criminal sanction. *United States v. Bivins, 49 M.J. 328, 330 (C.A.A.F. 1998)*. It also requires fair notice as to the standard applicable to the forbidden conduct. *See Parker, 417 U.S. at 755 (1974)*; *Vaughan, 58 M.J. at 31*. Sources of notice include: "the [*Manual for Courts-Martial, United States*], federal law, state law, military case law, military custom and usage, and military regulations." *Vaughan, 58 M.J. at 31* (addressing notice in the *Article 134, UCMJ* context). The aforementioned list is not exhaustive. As Judge Sullivan noted in his *Boyett* concurrence, notice is also by "any other circumstance which would establish that a servicemember **[*7]** would have no reasonable doubt that his conduct was unbecoming an officer." *United States v. Boyett, 42 M.J. 150, 161 (C.A.A.F. 1995)*.

2. What constitutes conduct unbecoming an officer and gentleman?

Appellant argues there must be a custom of the service prohibiting incest in order for him to have been on notice that his conduct was criminal under the UCMJ. We disagree.

Conduct unbecoming an officer and gentleman has two elements: (1) that the accused did or omitted to do certain acts; and (2) that, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman. *Manual for Courts-Martial, United States* (2012 ed.) [*MCM*], pt. IV, ¶ 59.b(1) - (2). "The focus of *Article 133, UCMJ*, is the effect of the accused's conduct on his status as an officer." *United States v. Diaz, 69 M.J. 127, 135 (C.A.A.F. 2010)* (citing *United States v. Conliffe, 67 M.J. 127, 132 (C.A.A.F. 2009)*). "The test for a violation of *Article 133, UCMJ*, is "'whether the conduct has fallen below the standards established for officers.'" *United States v. Conliffe, 67 M.J. 127, 132 (C.A.A.F. 2009)* (quoting *United States v. Taylor, 23 M.J. 314, 318 (C.M.A. 1987)*).[7]

When an appellant argues that a statute is "unconstitutional as applied," we conduct a "fact specific inquiry." *United States v. Ali, 71 M.J. 256, 265 (C.A.A.F. 2012)*; s*ee also, United States v. Amazaki, 67 M.J. 666, 671 (Army Ct. Crim. App. 2010)* ("'Each case must

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[7] In describing the nature of the offense and examples thereof, the MCM states, in part:

> (2) *Nature of offense*. Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or **[*8]** disgracing the officer personally, seriously compromises the person's standing as an officer. . . . This article prohibits conduct by a commissioned officer, cadet, or midshipman which, taking all the circumstances into consideration, is thus compromising.
>
> (3) *Examples of offenses*. Instances of violation of this article include knowingly making a false official statement; dishonorable failure to pay a debt; cheating on an exam; opening and reading a letter of another without authority; using insulting or defamatory language to another officer in that officer's presence or about that officer to other military persons; being drunk and disorderly in a public place; public association with known prostitutes; committing or attempting to commit a crime involving moral turpitude; and failing without good cause to support the officer's family.

MCM pt. IV, ¶ 59.c(2) - (3) (2012 ed.).

necessarily be decided on its own merit.'" (citations omitted)).

The military, unlike civilian society, is a unique society. "In military life there is a higher code termed honor, which holds its society to stricter **[*9]** accountability." *Fletcher v. United States, 26 Ct. Cl. 541, 563 (U.S. Ct. Claims 1891)*. That officers play a unique and vital role in that specialized society is without question. *See, e.g., United States v. Pitasi, 20 C.M.A. 601, 44 C.M.R. 31, 37-38 (C.M.A. 1971)* (affirming officer's conviction for fraternization under *Article 134, UCMJ*). Only three years later, in affirming the constitutionality of both *Article 133* and *134, UCMJ*, the Supreme Court noted:

> This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." . . . "[T]he military constitutes a specialized community governed by a separate discipline from that of the civilian," and that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . . ." We have also recognized that a military officer holds a particular position of responsibility and command in the Armed Forces.

Parker, 417 U.S. at 743-44 (citations omitted).

"[O]ne critically **[*10]** important responsibility of a military officer is to inspire the trust and respect of the enlisted soldiers who must obey his orders and follow his leadership." *United States v. Frazier, 34 M.J. 194, 198 (C.M.A. 1992)* (officer who resides with an enlisted Soldier's wife is guilty of conduct unbecoming an officer and gentleman notwithstanding the absence of any custom, regulation, UCMJ provision, or express statute prohibiting the relationship or activity).

Contrary to appellant's assertion before this court, the absence of a "custom of the service" or promulgated prohibition, such as a UCMJ provision, regulation, or express statute, prohibiting incest is not dispositive of whether appellant was on sufficient notice that sexual activity with his eighteen-year-old daughter was unbecoming conduct. As our Superior Court noted in *United States v. Rogers*, "proof of a service custom or regulation [ ] 'has not commanded a majority of this Court' with the possible exception of officer-enlisted 'fraternization' cases charged under *Article 133*, instead of *Article 134*." *54 M.J. 244, 256 (C.A.A.F. 2000)* (citation omitted); s*ee also United States v. Hartwig, 39 M.J. 125, 130 (C.M.A. 1994)* (purely private letter containing sexual overtures from Army Captain to fourteen-year-old girl constitutes conduct unbecoming an officer and gentleman **[*11]** notwithstanding absence of any "custom," regulation, or express prohibition prohibiting conduct); *Boyett, 42 M.J. at 160-61* (custom or regulation not constitutionally required for a valid prosecution under *Article 133, UCMJ*).[8]

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[8] *See generally United States v. Maderia, 38 M.J. 494 (C.M.A. 1994)* (publicly associating with known drug smuggler was conduct unbecoming an officer); *United States v. Frazier, 34 M.J. 194 (C.M.A. 1992)* (living with enlisted subordinate's spouse under circumstances falling short of adultery or wrongful cohabitation substantially denigrates marital relationship to constitute conduct unbecoming); *United States v. Lewis, 28 M.J. 179 (C.M.A. 1989)* (officer convicted of charging fellow officer $2,000 for tutoring him in leadership skills constitutes unbecoming conduct, characterized by the court as "corrupt and demoralizing"); *United States v. Giordano, 15 U.S.C.M.A. 163, 35 C.M.R. 135 (1964)* (charging enlisted service members exorbitant interest rates on loan unbecoming conduct).

Unfortunately, appellant is not the first officer to be convicted at a general court-martial for incest. In 1994, the Air Force Court of Criminal Appeals affirmed an officer's incest conviction for engaging in consensual sexual intercourse with his natural daughter, a decision reviewed and affirmed by our superior court. *See* United States v. Hutchens, 1994 CMR LEXIS 30 (A.F. Ct. Crim. App. 1994), aff'd, 43 M.J. 177 (C.A.A.F. 1995) (consensual sexual intercourse between forty-six-year-old officer and natural born twenty-four-year-old daughter constitutes conduct unbecoming an officer and gentleman).[9]

For over twenty years, our superior court and sister courts have held incest to be unbecoming conduct. No military decision has held otherwise. While distinguishable from non-intercourse cases, we read *Hutchens* broadly as a commentary on the inappropriateness of sexual activity between father and daughter, activity that is without question unbecoming an officer and gentleman.

3. Appellant's Conduct

On the facts before us, we have no reasonable doubt that a forty-year-old **[*12]** Army officer, chaplain, husband of twenty years, and father of eleven children, who engages in sexual activity with his eighteen-year-old daughter, has engaged in conduct unbecoming an officer and gentleman. That the daughter is adopted is a distinction without a difference. That appellant's incestuous acts stopped short of "carnal intercourse," making it non-criminal in some states, is unpersuasive.

Equally unpersuasive is that appellant's actions would not be criminal in seventeen states and the District of Columbia. To be criminal under *Article 133, UCMJ*, the conduct at issue need not be criminal in all fifty states and five U.S. territories. That state laws vary in scope and applicability is no surprise. Appellant cites no authority requiring applicability or uniformity of state laws in order to punish conduct under *Article 133, UCMJ*.

Finally, appellant was not charged with or convicted of violating a "custom of the military service."[10] Appellant was convicted of conduct unbecoming an officer and gentleman by engaging in incest with his eighteen-year-old daughter, a person who has called him father since the age of approximately two-and-a-half, a legal obligation appellant assumed **[*13]** when his daughter was five. Any reasonable officer would recognize that engaging in sexual activity with his adopted daughter, under the circumstances of this case, would risk bringing disrepute upon himself and his profession, seriously compromising his standing as an officer. *See, e.g.*, United States v. Hartwig, 39 M.J. 125, 130 (C.M.A. 1994).[11]

B. Ineffective Assistance of Counsel

Appellant's allegation of ineffective assistance of counsel is an attempt to re-litigate his court-martial with a shotgun blast of alleged errors referencing affidavits which provide information that is largely irrelevant,

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[9] That *Hutchens* involved intercourse with the officer's natural daughter instead of sodomy and digital penetration with the officer's adopted daughter are distinctions noted by this Court, but insignificant when considering whether appellant was on notice that his actions were proscribed.

[10] Put differently, having sexual intercourse with one's daughter is so grossly and obviously wrong that there has never been the need to declare it prohibited by Army custom. But if such a declaration is required, we would easily make it.

[11] While we need not give it any weight, appellant's marital status at the time and military occupational specialty of chaplain would appear to further undermine his argument.

inadmissible, or both. Our review of the record, appellate pleadings, and all accompanying post-trial affidavits and their enclosures[12] reveal that appellant was neither deprived of a fair trial nor was the trial outcome unreliable. *See* Strickland v. Washington, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In other words, appellant fails to establish that he was prejudiced by his counsels' performance. Considering everything before us, appellant's trial defense counsel were not ordered to provide responsive affidavits nor was a *DuBay* hearing deemed necessary. *See* United States v. Melson, 66 M.J. 346, 350-51 (C.A.A.F. 2008) (requiring affidavit from defense counsel before finding IAC); United States v. DuBay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967) (fact-finding hearing necessary if appellate court is unable to resolve conflicting affidavits). **[*14]**

Ineffective assistance of counsel claims are reviewed de novo. United States v. Akbar, 74 M.J. 364, 379 (C.A.A.F. 2015); United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012). "To prevail on an ineffective assistance claim, the appellant bears the burden of proving that the performance of defense counsel was deficient and that the appellant was prejudiced by the error." United States v. Captain, 75 M.J. 99, 103 (C.A.A.F. 2016) (citing Strickland, 466 U.S. at 698 (1984)).

To meet his burden regarding deficiency, appellant must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. In other words, does counsel's performance meet an objective standard of reasonableness or was it beyond the "wide range of professionally competent assistance" counsel are presumed and expected to provide. Id. at 690. In evaluating performance, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. This presumption can be rebutted by "showing specific errors [made by defense counsel] that were unreasonable under prevailing professional norms." United States v. McConnell, 55 M.J. 479, 482 (C.A.A.F. 2001).

Prejudice is established by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. Appellant must show "'a reasonable probability that, but for counsel's **[*15]** [deficient performance] the result of the proceedings would have been different.'" Captain, 75 M.J. at 103 (quoting Strickland, 466 U.S. at 694). "'[T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" Captain, 75 M.J. at 103 (quoting Strickland, 466 U.S. at 695). "'It is not enough to show that the errors had some conceivable effect on the outcome . . . .'" Captain, 75 M.J. at 103 (citations omitted).

"An appellant must establish a factual foundation for a claim of ineffectiveness; second-guessing, sweeping generalizations, and hindsight will not suffice." United States v. Davis, 60 M.J. 469, 473 (C.A.A.F. 2005) (citing United States v. Key, 57 M.J. 246, 249 (C.A.A.F. 2002)); United States v. Alves, 53 M.J. 286, 289 (C.A.A.F. 2000); United States v. Gray, 51 M.J. 1, 19 (C.A.A.F. 1999). In assessing an appellant's IAC claim, the performance and prejudice prongs of *Strickland* can be

[12] Appellant's written pleadings before this court refer to "[Defense] Appellate Exhibit A [AE A aka DAE A]" with varied page citations. A review of the Record of Trial, to include all appellate filings, reveals the absence of any Defense Appellate Exhibit [DAE] A. Defense appellate counsel confirmed that this was a scrivener's error and that [DAE] A should be [DAE] B.

analyzed independently and if appellant fails either prong, his IAC claim fails. *Strickland, 466 U.S. at 697*.

Appellant's IAC blast covers the traditional court-martial processing continuum: pretrial, trial, and post-trial, culminating with an alleged self-assessment by civilian counsel who, when asked by appellant why he did not present certain evidence, allegedly responded by stating that he "just spaced it."

1. Pretrial Effectiveness of Counsel

Appellant alleges that his defense counsel were ineffective because they failed to contact three potential witnesses: CR, BEM, **[*16]** and Dr. KC. In addition to appellant's affidavit, appellant submitted affidavits from CR, BEM, and CPT MB.[13]

a. Failure to Contact CR

A review of CR's affidavit reveals this witness lacked any first-hand knowledge of appellant's crimes. His affidavit focuses on his personal and sexual relationship with EM, his "suspicions" and speculation regarding EM's relationship with appellant, and his belief regarding EM's sexual maturity, noting "she is far too sexually advanced to be taken advantage of by [appellant]." Application of Military Rule of Evidence [Mil. R. Evid.] 401, 402, and 403, defining relevant evidence, its admissibility, and the exclusion of otherwise relevant evidence for "prejudice, confusion, waste of time, or other reasons," respectively, Mil. R. Evid. 412, prohibiting evidence of "other sexual behavior" and a "victim's sexual predisposition," and Mil. R. Evid. 802, "[t]he rule against hearsay" result in an affidavit of marginal value at best.

It is appellant's burden to establish prejudice. When appellant pursues a claim of IAC under a theory that certain other evidence should have been admitted, then appellant must at least demonstrate the evidence was admissible. At no point in the pleadings before this court does appellant provide **[*17]** his theory of admissibility for the information contained in CR's affidavit. For example, CR discusses, in rather graphic detail, his sexual encounters with EM. Appellant fails to articulate how this evidence is logically relevant to any of the charged offenses under Mil. R. Evid. 401 or admissible when considering Mil. R. Evid. 412.

Appellant has failed to meet his burden to establish prejudice by defense counsel's alleged failure to contact CR.[14]

b. Failure to Contact BEM

A review of BEM's affidavit reveals, with the exception of character evidence regarding appellant's character for peacefulness, evidence that is largely inadmissible after application of Mil. R. Evid. 401, 402, 403, 412, and 802. With regard to the potentially admissible character evidence, appellant fails to establish any prejudice by its absence.

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[13] Captain MB wrote an affidavit stating he witnessed a phone conversation between appellate defense counsel and Dr. KC. Captain MB relates in the affidavit a summary of the conversation.

[14] We also conclude that the failure to call CR would have been objectively reasonable. Government appellate counsel makes an excellent point in their brief before this court, one that would, in fact, support a trial defense counsel's tactical decision not to call CR as a witness. "[C]ross-examination of Mr. [R] could have been harmful to appellant's case because [CR] stated the victim had confided in him that appellant raped her, was stalking her, and tried to run her off the road." In other words, CR would expose appellant to evidence corroborating, not rebutting, EM's allegation of sexual assault.

The first two paragraphs of BEM's affidavit address how EM allegedly sexually assaulted her and then her brother, NM, the victim of two of appellant's *Article 128, UCMJ*, convictions. Appellant fails to articulate how this evidence is logically relevant or admissible. BEM goes on to state she was eventually estranged from her parents and no longer resides in the home. Although her date of departure from the family home is unstated, it is **[*18]** clear from the affidavit that BEM was not residing at home at the time of the sexual activity between appellant and EM. In other words, she has no personal knowledge regarding the sexual assault or incest. Thus, the only information she can offer on the *Article 120* and *Article 133* convictions is both speculative and based on inadmissible hearsay.

The only evidence in BEM's affidavit that appears to be admissible is her opinion that appellant was a peaceful person toward his family, having "never known or observed [appellant] to be cross, harsh, abusive, or belittling to anyone." She adds, "[Appellant] was generally a very conservative and straight-laced guy."

Assuming without deciding that BEM could have provided character or reputation evidence regarding appellant's character for peacefulness consistent with Mil. R. Evid. 404 and 405, appellant fails to establish how the failure to introduce this evidence resulted in material prejudice to appellant. Having considered the omitted character evidence as well as the remainder of BEM's proffered testimony, we find appellant has failed to meet his burden to establish prejudice by defense counsel's alleged failure to contact BEM.

c. Failure to Contact Dr. KC

Unlike CR and BEM, Dr. KC's **[*19]** proffered testimony comes to us not via an affidavit, but via affidavit from an individual who "witnessed a phone conversation" between Dr. KC and appellate defense counsel. Thus, the affiant has no personal knowledge of the matters (e.g., NM's violent tendencies) that we are being asked to credit. These facts are not properly before us. *See United States v. Cade, 75 M.J. 923 (Army Ct. Crim. App. 2016)*.

Assuming arguendo we were to consider the affidavit, Dr. KC would have corroborated that NM was prone to violence, sometimes involving weapons, that law enforcement was called to deal with his outbursts, and that MM was scared of NM. This information, however, was already before the court and was uncontested.

NM testified that when he gets upset and is unable to calm down via his coping mechanisms, he will "yell," "scream," and "punch walls." He admitted to hitting his sister. He testified he was going to counseling because "I threatened to kill my mom." EM testified to NM's anger and violence, testifying that NM has hit her. She also testified that appellant has had to discipline him when he had his outbursts. MM testified that NM has hit his brothers and sisters. She also testified to "problems downtown in Montgomery County as far as the juvenile **[*20]** court;" NM was "angry" and made a "verbal threat [to kill MM]."

Following the cross-examination of NM, EM, and MM, it was clear that appellant had to legitimately use force, at times, to restrain NM during his outbursts. In other words, the defense of parental discipline was clearly in play regarding both assaults of NM. *See, e.g., United States v. Rivera, 54 M.J. 489, 491 (C.A.A.F. 2001)*; *see also*, Dep't of the Army, Pam. 27-9, Legal Services: Military Judges' Benchbook [Benchbook], para. 5-16 (10 September 2014).

Appellant fails to show, however, how failing to call Dr. KC, a witness whose testimony would have been cumulative, would have had any impact on the evidence

already before the court. We find appellant has failed to meet his burden to establish prejudice by defense counsel's alleged failure to contact Dr. KC.

2. Effectiveness of Counsel at Trial

a. Failure to call Captain KW

Appellant alleges that CPT KW should have been called to testify to appellant's character for peacefulness towards his wife and children as well as MM's character for untruthfulness and motive to fabricate. Appellant submits CPT KW's affidavit in support of this allegation.

We agree the affidavit does indicate that CPT KW would have testified that appellant was **[*21]** a good father and husband. But, nothing in the affidavit presents a "motive to fabricate" unless the fact that appellant and his wife grew apart, separated, and eventually sought a divorce, without more, constitutes a "motive to fabricate." Indeed any "motive" to fabricate likely originates in appellant's betrayal of MM, betrayal highlighted by appellant's sexual activity with their daughter, an issue appellant reasonably would want to avoid.

Nothing in CPT KW's affidavit, or any of the other affidavits, indicates that MM used the allegations against appellant to gain any advantage, legal, financial, or otherwise. Beyond CPT KW's Mil. R. Evid. 404 and 405 character and reputation evidence regarding appellant's character for peacefulness, vis-à-vis appellant's interactions with his children, much of his affidavit is irrelevant testimony on the merits and marginally relevant testimony on sentencing.

Regardless, were we to assume everything in CPT KW's affidavit was admitted, we are confident the outcome of the proceeding remains unchanged. Appellant has failed to meet his burden regarding prejudice as it relates to the failure to call CPT KW on the merits.

*b. Failure to use a 2013 Department of Child Services **[*22]** Investigation*

The Department of Child Services (DCS) Report contains some information favorable to appellant. It also contains information that is damaging and corroborative of NM's allegations that appellant is violent towards him. The favorable information includes statements by MM that she never witnessed appellant hit NM and that NM is violent and has made threats to his parents. The unfavorable information includes the DCS social worker's statements that NM complained of appellant beating him. It is objectively reasonable for a defense counsel to weigh these competing interests and avoid admission of the report.

Like the testimony of Dr. KC discussed above, much of the information sought, that NM is prone to violent outbursts, to include violence up to and including threatening to kill his mother necessitating Juvenile Court intervention, was already before the court. Appellant fails to proffer how the DCS Report or the evidence contained therein would be admissible considering Mil. R. Evid. 802, and if admissible, how it was to be used, and what impact, if any that might have had. In other words, appellant fails to establish prejudice regarding the alleged failure to "use" the 2013 DCS report.

***[*23]** c. "Pressure" to plead guilty*

Appellant claims that his counsel were ineffective because they "pressur[ed]" him to plead guilty. This claim is frivolous on its face when, as here, appellant pled not guilty.

Appellant fails to cite, nor have we found, any authority that purports to find IAC when counsel applied

"pressure" on their client to plead guilty in a case where the client did not plead guilty. In support of his claim, appellant submitted e-mail exchanges between him and his counsel concerning a possible guilty plea. Notably, defense counsel advised appellant that the charges against him are serious and estimated appellant would receive a sentence of, at least, between twelve to twenty-four months of confinement. Appellant replied that he was "unable to feel at ease with anything less than a trial." Fifteen minutes later, defense counsel acknowledged appellant's desire to not plead guilty and stated, "We will be ready for trial."

Rather than "pressure," the e-mail exchanges reveal appellant's defense counsel was concerned for his client and offered well-reasoned advice based on his years of experience as a criminal defense attorney.

Appellant fails to establish any deficiency, let **[*24]** alone prejudice, stemming from counsel's advice on whether to accept or reject a plea.

d. Defense counsel's failure to file any motions beyond one motion to dismiss

Appellant cites, in support of his IAC allegation, counsel's failure to file any pretrial motions beyond one motion to dismiss.[15] Appellant fails, however, to state what pretrial motions counsel should have filed. "'When a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion [ ], an appellant must show that there is a reasonable probability that such a motion would have been meritorious.'" *United States v. McConnell, 55 M.J. 479, 482 (C.A.A.F. 2001)* (quoting *United States v. Napoleon, 46 M.J. 279, 284 (C.A.A.F. 1997)*). As such, counsel necessarily must articulate what motions should have been argued. Having failed to do so in this case, appellant has failed to show deficient performance or prejudice warranting relief.

e. Defense counsel's failure to present evidence of EM's statements regarding the consensual nature of the relationship with appellant

Appellant alleges deficiency stemming from trial defense counsel's failure to present evidence of alleged statements by EM to two law enforcement personnel and a private investigator regarding the consensual nature of her relationship with appellant. First, **[*25]** the appellate filings fail to contain an affidavit from any of the three aforementioned personnel. In other words, we have no idea what any of these potential witnesses would say under oath. Next, the fact that EM told law enforcement the relationship, at least the post-Fayetteville sexual assault relationship, was consensual was successfully elicited during cross-examination.

Appellant fails to establish any prejudice from the lack of additional cross-examination of EM. Regarding the sexual assault, appellant fails to provide any evidence, other than appellant's self-serving description of events in his affidavit, that EM told anyone that what occurred in the hotel room in Fayetteville, North Carolina was consensual.

f. Failure to cross-examine JM

Appellant alleges IAC regarding counsel's decision not to cross-examine JM, appellant's son. Again, appellant

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[15] Defense counsel successfully moved to dismiss Specification 1 of Charge II, which alleged a violation of *Article 133, UCMJ* (incest in violation of *N.C. Gen. Stat. § 14-178*). Defense counsel also successfully moved, pursuant to Rule for Courts-Martial [R.C.M.] 917, for a finding of not guilty to Specifications 1 and 2 of Charge III, violations of *Article 90, UCMJ*.

does not articulate what evidence would have been elicited via cross-examination and what impact, if any, the failure to elicit said evidence would have had on the fairness or reliability of appellant's trial. In other words, appellant fails to carry his burden in establishing deficiency or prejudice regarding the examination of JM. **[*26]**

We also note appellant ignores blackletter law when he argues JM should have been allowed to testify that he, JM, believed EM and her mother, MM, fabricated the charges against appellant. JM had no first-hand knowledge regarding any of the offenses nor any evidence that the two fabricated the allegations against appellant. What JM had was his "belief," nothing more, yet appellant believes he should have been allowed to testify to his belief regarding the veracity of the allegations. We disagree. *See, e.g.,* United States v. Martin, 75 M.J. 321, 324-25 (C.A.A.F. 2016) (human lie detector testimony prohibited).

g. Failure to impeach EM, NM, and MM

Contrary to appellant's claim, a review of the record reveals defense counsel did, in fact, impeach NM, MM, and EM. That defense counsel's impeachment fell short of fully discrediting the witnesses does not establish deficient performance or prejudice. For example, defense counsel elicited testimony from EM about the consensual nature of her relationship with appellant following the Fayetteville sexual assault. Additionally, defense counsel elicited on cross-examination that EM was kicked out of the house following appellant's disclosure of the sexual activity and argued with her mother "on the porch." **[*27]** Regarding counsel's failure to impeach EM on her "modus operandi of sexually pursuing adoptive family members," appellant fails to show how this evidence would be admissible when considering Mil. R. Evid. 401-403, 412, and 803. The fact-finder, having evaluated both EM and appellant's credibility, concluded that the sexual act in Fayetteville was non-consensual.

Defense counsel was able to impeach NM by eliciting evidence during trial to corroborate that NM was prone to violent outbursts, that he has been violent towards family members, that he threatened to kill his mother, and that, at times appellant had to discipline NM or physically restrain him during his outbursts. The court found, consistent with NM's testimony, that the two charged incidences of assault were not incidences where appellant was simply exercising legitimate parental discipline; rather, on the two charged occasions, in NM's bedroom and on the stairs, the court found appellant battered NM.

Regarding the assault of MM, appellant offers no evidence of what counsel should have produced, either directly or through cross-examination, that would negate or call into question either assault.

To the extent there was any "failure to impeach" by defense **[*28]** counsel, the "failure" was in counsel's inability to get appellant's accusers to agree with appellant's version of events, a "failure" arguably found in every case where an accused puts on a defense and is nonetheless convicted. Appellant fails to meet his burden to establish IAC regarding counsel's performance vis-à-vis impeachment of appellant's accusers.

h. Appellant did not get a chance to testify to help himself

Of all the allegations raised by appellant, this is the most disconcerting.

A military criminal accused, with the advice and assistance of counsel, has four decisions that are

uniquely his: by whom he wants to be represented (i.e., counsel); what forum will hear his case; how to plead; and, whether to testify. *United States v. Summerset, 37 M.J. 695, 699 (A.C.M.R. 1993)*.

Appellant's pleadings before this court claim his trial defense counsel "prevented" appellant from fully testifying regarding his relationship with EM and the other allegations. Appellant's affidavit states, "I didn't even get a chance to testify to help myself as [appellant's defense counsel] cut me off on the stand." Regarding appellant's claim that he "did not get a chance to testify to help himself," we find that statement to be simply false. That counsel chose **[*29]** to limit the scope of appellant's testimony is clear from the record. It would appear counsel focused on defeating the sexual assault allegation and limiting appellant's exposure on cross-examination, a strategy that makes absolute sense when reviewing appellant's affidavit, his cross-examination testimony, and the record as a whole.

During the government's case, defense counsel elicited from EM, without objection, that appellant told her, immediately following the alleged sexual assault, that she was on top of him and that he thought she was "awake."

During the defense case, appellant testified to his belief that EM was awake and the aggressor when the sexual assault occurred, testimony consistent with the information counsel obtained from EM earlier. Appellant testified that he fell asleep watching a movie with EM and awoke to EM "rubbing up and down on my genitals" and then EM "got on top of me." He further testified that she did not appear to be asleep. He stated, "my adopted daughter was coming on to me, had sexually aroused me, was sexually aroused herself, and you know, we were engaging in a physical relationship at that point." He continued:

> So that went on for about somewhere **[*30]** between 5 and 10 minutes, you know, pretty, you know, vigorous contact. She gets to the point where she is moving into having an orgasm. You know, she's breathing heavy, moaning, arching her back, things like that, and right as she kind of gets to that point, I hear, which really kind of chilled me and caught me off guard, she says, you know, "I can't believe you. You know, you are a Chaplain," and immediately, I stopped.

On cross-examination, appellant admitted telling his wife he digitally penetrated his daughter in Fayetteville, leaving consent the only contested issue on the sexual assault charge.

Appellant's allegation regarding his limited ability to defend himself relies entirely on his affidavit. His affidavit, however, like appellant's in-court testimony, focuses on the sexual assault allegation and the follow-on sexual activity in Tennessee. Had appellant testified consistent with the information in his affidavit, he would have certainly dispelled any doubt regarding the charge of incest and left only consent in dispute regarding the charge of sexual assault, an issue to which he did, in fact, testify. Regarding the remaining charges, appellant's affidavit is silent as to what **[*31]** appellant would have said if given the "chance." In other words, he proffers no testimony regarding the batteries or obstruction charges, at least none that would be exculpatory in nature, if "allowed."

Assuming arguendo that counsel limited appellant's testimony regarding all other offenses, we find appellant has failed to meet his burden to establish prejudice. As noted above, appellant's affidavit focuses on the sexual act in Fayetteville and the sexual acts in Tennessee. We do not know what appellant would have said if "allowed" to testify regarding the remaining offenses. It is his burden to put forth what evidence was kept from the

trier of fact and what impact, if any, it would have had. Appellant has failed on both fronts.

3. Effectiveness of Counsel Post-Trial

Appellant asserts his defense counsel was ineffective post-trial because he failed to provide CPT KW's letter of support in his clemency matters. Appellant fails to establish a colorable showing of possible prejudice regarding this omitted submission. "In post-trial matters involving a convening authority's decision, 'there is material prejudice to the substantial rights of an appellant if there is an error and the appellant **[*32]** 'makes some colorable showing of possible prejudice.'" *United States v. Fordyce, 69 M.J. 501, 504 (Army Ct. Crim. App. 2010)* (citing *United States v. Wheelus, 49 M.J. 283, 288 (C.A.A.F. 1998)* (quoting *United States v. Chatman, 46 M.J. 321, 323-24 (C.A.A.F. 1997))*).

Appellant has made no showing of prejudice. Despite having ample time to submit the missing letter, none was submitted. Furthermore, while CPT KW submitted a post-trial affidavit, his affidavit is silent as to what was said in this missing letter. We find appellant failed to meet his burden regarding this omitted letter. It is not this court's responsibility to ascertain from a post-trial affidavit what a missing clemency letter might have said and then to further speculate whether its omission prejudiced appellant. That burden belongs to appellant; he failed to meet that here.

4. Counsel's Self-Assessment

We end our lengthy discussion by commenting on appellant's assertion that his civilian counsel admitted to ineffectiveness via his claim that he, counsel, "just spaced it." Assuming arguendo that his defense counsel actually said this, we give slight weight to counsel's subjective, post-trial self-assessment of performance. "After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that **[*33]** reflection, to magnify their own responsibility for an unfavorable outcome." *Harrington v. Richter, 562 U.S. 86, 109, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)*. In assessing counsel's performance, the standard is an objective one, not subjective. *Strickland, 466 U.S. at 688*. "The *Strickland* standard of objective reasonableness does not depend on the subjective intentions of the attorney, judgments made in hindsight, or an attorney's admission of deficient performance." *Jennings v. McDonough, 490 F.3d 1230, 1247 (11th Cir. 2007)*. "Our task in deciding a claim of ineffective assistance is to determine whether counsel's performance was '*objectively* unreasonable.' *Blakeney v. United States, 77 A.3d 328, 344 (D.C. Cir. 2013)* (citations omitted). The issue is not counsel's sincerity but the reasonableness, 'considering all the circumstances,' of counsel's challenged judgment 'under prevailing professional norms.'" *Id.*

"[S]econd-guessing, sweeping generalizations, and hindsight will not suffice" to establish ineffective assistance of counsel. *United States v. Davis, 60 M.J. 469, 473 (C.A.A.F. 2005)* (citations omitted). The Constitution entitles an accused to a "fair trial, not a perfect one." *Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)*. With the benefit of hindsight and varied affidavits, to include appellant's affidavit with enclosures, appellant attempts to re-litigate his court-martial. In so doing, appellant purportedly provides this court with evidence of both deficient performance by his counsel and resulting **[*34]** prejudice. In other words, appellant was denied a fair trial resulting in an unreliable outcome. We disagree.

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Judge SALUSSOLIA concurs.

Concur by: WOLFE

Concur

WOLFE, Senior Judge, concurring:

I concur fully with today's opinion. I write separately to explain my understanding on how this court weighs claims of IAC.

To my eye, several of the IAC claims we decided today fail on their face. That is, appellant does not state a prima facie claim of IAC. This is concerning as either (a) there exists a meritorious claim of IAC but it wasn't presented to us; or (b) facially invalid claims were submitted for our consideration. Both are troubling, but the first is more so. Failure to properly present a meritorious claim of IAC to this court will significantly affect the likelihood of success on any future direct or collateral attacks on the conviction.

Why throwing it at the wall and seeing what sticks does not work for most IAC claims.[16]

Most assigned errors this court reviews are contained in the record of trial. Under *Article 66(c), UCMJ*, this court conducts a de novo review of the entire record. Thus, we review a record for errors even when no errors are **[*35]** assigned and no specific relief is sought. At least for preserved errors, an appellant has no burden to obtain relief on appeal. *See United States v. Washington, 57 M.J. 394, 399-400 (2002)*. Theoretically, the judges on this court should identify and grant relief regardless of the arguments of the parties.[17] For example, in *United States v. Grostefon*, our superior court relied on our broad review when deciding that seminal case:

> There can be little harm in [raising *Grostefon* issues] since the Court of Military Review has the mandatory responsibility to read the entire record and independently arrive at a decision that the findings and sentence are correct in law and fact. Hence, raising an issue that counsel does not think is meritorious would, at worst, signal the Court of Military Review to consider the record in light of that issue.

12 M.J. at 435 (1982).

A cheerful view of our *Article 66(c)* responsibilities is that the judges on this court attempt to get to the legally and factually correct result notwithstanding how an issue might be briefed. But, that logic applies only to our review of the record of trial. We do not conduct a de novo review of matter that is not part of the record of trial — if such a thing is even possible. Nor does our factfinding authority **[*36]** extend to matter outside the record. *United States v. Ginn, 47 M.J. 236, 242-43 (1997)*.

In other words, the practical burden of proof on an

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[16] My analysis here is limited to claims of IAC based on evidence not in the record of trial.

[17] To be clear, the parties' adversarial perspective often provides different insight, identifies issues that we might have missed, and benefits us greatly. As our superior court stated, "we must also recognize that even the most conscientious counsel and judges will occasionally overlook an error in the press of dealing with a load of case[s], and, for that reason, any assistance in the identification of issues can further the proper administration of military justice." *Grostefon, 12 MJ at 436 (1982)*.

appellant is entirely different depending on whether the factual basis for a claim is based on evidence inside or outside the record of trial. An appellant who seeks relief because of preserved instructional error should do their best to convince us they are entitled to relief. But, a failure to connect the dots in an appellate brief will not be fatal to our de novo review of the claim. By contrast, an appellant who seeks relief while relying on facts that are not in the record will fail if the facts are not presented in a manner the court can accept. *United States v. Cade, 75 M.J. 923, 929-30 (Army Ct. Crim. App. 2016)*.

For emphasis, consider a more cynical framing. Under *Article 66(c)*, our review includes a determination as to whether the findings are correct in law. In the case of an IAC claim, whether a finding is correct in law will not be determined by whether counsel were ineffective in the abstract, or whether a counsel is ineffective if only the true facts were to be discovered. This court is an appellate tribunal not an investigative body. Rather, a finding will only be incorrect in law if an appellant presents the facts to meet his burden under *Strickland, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*.

At several **[*37]** instances, appellant claims that his trial attorney was "most egregious[ly]" ineffective for failing to provide the court-martial with certain testimony and evidence. But, if this was error, it was an error that is repeated on appeal. And because we too are not provided with the allegedly key testimony and evidence, it is an error that is likely fatal.

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1. *United States v. Steele, 2019 CCA LEXIS 95*

Client/Matter: -None-
Search Terms: United States v. Steele, 2019 CCA LEXIS 95
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	-None-

United States v. Steele

United States Army Court of Criminal Appeals

March 5, 2019, Decided

ARMY 20170303

Reporter

2019 CCA LEXIS 95 *

UNITED STATES, Appellee v. Master Sergeant ANDREW D. STEELE, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by *United States v. Steele, 79 M.J. 73, 2019 CAAF LEXIS 412 (C.A.A.F., May 7, 2019)*

Motion granted by *United States v. Steele, 79 M.J. 91, 2019 CAAF LEXIS 440 (C.A.A.F., May 24, 2019)*

Review dismissed by, Without prejudice *United States v. Steele, 2019 CAAF LEXIS 717 (C.A.A.F., Sept. 24, 2019)*

Prior History: **[*1]** Headquarters, 7th Infantry Division. Lanny J. Acosta, Jr. and Sean Mangan, Military Judges. Lieutenant Colonel James W. Nelson, Acting Staff Judge Advocate.

Counsel: For Appellant: Captain Steven J. Dray, JA (argued); Colonel Elizabeth G. Marotta, JA; Major Julie L. Borchers, JA; Captain Steven J. Dray, JA (on brief); Colonel Elizabeth G. Marotta, JA; Lieutenant Colonel Tiffany D. Pond, JA; Major Julie L. Borchers, JA; Captain Steven J. Dray, JA (on reply brief).

For Appellee: Captain Brian Jones, JA (argued); Colonel Steven P. Haight, JA; Lieutenant Colonel Eric K. Stafford, JA; Captain Jeremy Watford, JA; Captain Brian Jones, JA (on brief).

Judges: Before WOLFE, BURTON, and EWING[1], Appellate Military Judges. Judge BURTON and Judge EWING concur.

Opinion by: WOLFE

Opinion

CORRECTED COPY[*]

MEMORANDUM OPINION

WOLFE, Senior Judge:

During appellant's trial, no audio was recorded for approximately twenty-seven minutes of the defense sentencing case. Given the incomplete record of trial, we are compelled to order a rehearing of appellant's sentence.

BACKGROUND

As appellant entered mixed pleas, we summarize the background facts from both the contested and uncontested portions of appellant's trial.[2]

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[1] Judge Ewing decided this case while on active duty.

[*] The opinion is corrected to properly reflect the initials of the court reporter.

[2] A military judge sitting as a general court-martial convicted

*When security cameras catch the hot **[*2]** tub party*

Appellant was the First Sergeant of the 45th Hazardous Response Company. In April 2016, appellant invited and entertained a group of about seven enlisted soldiers from the company to his former apartment complex. Most of the soldiers were the rank of Specialist or below. Private First Class (PFC) W was the sole female in the group. Appellant provided alcohol to the group, knowing that some of them were not of the legal drinking age. The apartment complex's outdoor common area had a hot tub and a security camera.

Everyone got naked in the hot tub.

With most of the group in the hot tub, appellant performed oral sex on PFC W. Linking the security camera video with witness testimony, appellant placed each of PFC W's legs on his shoulders and placed his head between her legs. When done, two other soldiers serially performed oral sex on PFC W, with appellant telling them to "go for it."[3] Appellant gets in and out of the hot tub naked and walks directly in front of the security camera.

Appellant pleaded guilty to fraternization and violating an order for providing alcohol to persons underage. The government then sought to prove up numerous other offenses. However, the defense was ready **[*3]** and presented a vigorous and well-prepared defense. As a result, only two additional offenses, indecent exposure and disorderly conduct, were proven beyond a reasonable doubt.[4]

The red light means it is recording.

After the military judge rendered findings, the case proceeded to sentencing. During the defense case-in-chief, the court reporter, Staff Sergeant (SSG) DW, noticed that he had not been recording audio since the last recess. Accordingly, there was no audio recording of the entire direct testimony of appellant's mother[5] and part of the direct testimony of Lieutenant Colonel (LTC) Jones. Lieutenant Colonel Jones had served with appellant in a Special Forces unit in Europe.

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appellant, pursuant to his pleas, of one specification of violating a general order and one specification of fraternization in violation of *Articles 92* and *134*, Uniform Code of Military Justice [UCMJ], *10 U.S.C. §§ 892* and *934 (2012)*. Contrary to appellant's pleas, the military judge convicted appellant of one specification of indecent exposure and one specification of disorderly conduct in violation of *Articles 120c* and *134,* UCMJ, *10 U.S.C. §§ 920c* and *934 (2012)*. The military judge sentenced appellant to a bad-conduct discharge and reduction to the grade of E-3. The convening authority approved the sentence as adjudged.

[3] We are not reviewing a case of sexual assault. In an audio recording, which is recorded later in the evening, PFC W is asked by another soldier whether she consented. She responded, "Yes, one hundred and ten percent, you guys have nothing to worry about." She jokes that she is more likely to be the subject of a sexual assault complaint than to file one. Naked, she is offered a towel to cover up, but she declines the offer of a towel stating she is "already dry." She further states she is totally sober, which is consistent with both how she sounds in the audio recording and her gait and appearance as she later dresses herself in the video.

[4] In a separate assignment of error, appellant alleges that his conviction for indecent exposure is insufficient. We certainly agree with appellant that not all instances of nudity, even public nudity, are indecent. Being naked at a nude beach is qualitatively different than flashing a school bus or strangers on the street. Appellant's acts fall between these two extremes. In other words, context matters. Having considered the context in this case, and given the mandate in *Article 66*, UCMJ, that we "recognize" the trial court saw and heard the evidence, we find the record to be correct in fact.

[5] There was no cross-examination.

It was during LTC Jones' testimony that SSG DW noticed that the red light on his recording system was not illuminated. The red light indicates that the audio is being recorded. He then began recording the court-martial. Staff Sergeant DW did not inform the military judge of the recording gap, and would later state that this was consistent with the training he had received from senior court reporters.[6]

The military judge became aware of the recording gap before authenticating the record and directed a post-trial **[*4]** *Article 39(a)*, UCMJ, session. The government arranged for both witnesses to be present so they could testify and the missing testimony could be recaptured. The defense, sensing that there was more to be gained on appeal than by fixing the error at trial, strongly objected to the witnesses being recalled and instead asked the military judge to authenticate the record as is.

The military judge denied the government request to recall the witnesses, "because the court does not believe that [their testimony] would be an accurate or adequate reconstruction of the record of trial as it occurred."[7] Instead, and without the aid of the two witnesses re-testifying, the military judge summarized the testimony from his notes and the court-reporter provided a memorandum for record.

LAW AND DISCUSSION

We address this appeal in two steps. First, we consider whether the transcript is verbatim. We determine it is not. Second, we address the range of remedies in this case. We conclude a rehearing on sentence is the required remedy.

A. Is there a verbatim record?

In *United States v. Davenport*, our superior court stated that a record is not verbatim if "the omitted **[*5]** material was substantial, either qualitatively or quantitatively." *73 M.J. 373, 377 (C.A.A.F. 2014)* (internal quotations and citations omitted). Or, put less technically, a record is not verbatim if either (a) there is a lot of missing material; or (b) the missing material is important.

We easily determine that the transcript has substantial quantitative omissions. An entire defense sentencing witness is missing.

It is clear from the Court of Appeals for the Armed

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[6] The Clerk of Court is directed to forward a copy of this opinion to the Senior Court Reporter Instructor at The Judge Advocate General's Legal Center and School for consideration of any lessons learned that may be adopted into the future training of Army court reporters. The costs, both to the Army and to Master Sergeant Steele, are enormous for an error which likely could have been fixed if SSG DW had, contrary to his alleged training, immediately brought it to the military judge's attention.

[7] We might suggest that the wiser course of action would have been to first hear the witnesses' testimony (especially as they were present) before deciding that their testimony would be inadequate. In *United States v. Davenport*, for example, a *DuBay* hearing was ordered in an attempt to reconstruct the testimony. *73 M.J. 373, 377-76 (C.A.A.F. 2014)*. While the *DuBay* was inadequate in *Davenport*, recalling the witnesses in this case was more likely to be successful. First, the *Article 39(a)* session was only five months after trial. Second, both witnesses were defense sentencing witnesses rather than government merits witnesses. Third, the missing testimony did not include complex interwoven direct and cross-examination as only the direct testimony was missing. A military judge could allow the defense (who bore no responsibility for the error) wide latitude to reconstruct a favorable record for appeal. However, we conclude that the military judge's quoted language above is a finding of fact, which we will give deference. Accordingly, we rule out a fact-finding hearing to try to reconstruct the missing testimony.

Forces' (CAAF) opinion in *Davenport*, that for the transcript to be verbatim, it must be *both* qualitatively and quantitatively substantially complete. *Id. at 377*. An omission on either prong is fatal. Having found the transcript to fail on the quantitative prong, we conclude this case lacks a verbatim record.

B. Do we test for prejudice when a transcript is not verbatim?

There are certainly instances where a missing portion of the transcript is irrelevant to any issue on appeal. Consider, for example, if the record omits the testimony of a witness at a suppression hearing. Certainly, if the defense suppression motion is denied, this court would likely need the testimony to weigh the correctness of the military judge's ruling. But, what if the suppression motion was granted? **[*6]** Or, what if the accused knowingly and voluntarily waived the suppression issue while later pleading guilty? Or, what if the transcript omits the voir dire of a panel member whom the defense successfully challenged? A record under such circumstances would likely be viewed as having substantial quantitative omissions; after all, a whole suppression hearing could be missing.

In their brief to this court, the government argues that they have successfully shown that the omissions in the record have not prejudiced appellant.[8] The CAAF's case in *Davenport*, however, specifically proscribes an alternative remedy.

> [W]hile in the case of most incomplete records prophylactic measures are not prescribed, and the missing material or remedy for same are tested for prejudice, where the record is incomplete because the transcript is not verbatim, the procedures set forth in [Rule for Courts-Martial] 1103(f) control.

Id. at 377. Accordingly, we find that under *Davenport*, we do not test for prejudice when we have a non-verbatim transcript.[9]

C. Understanding Davenport in light of the changes to Article 60, UCMJ

Under Rule for Courts-Martial [R.C.M.] 1103(f), a convening authority faced with a non-verbatim transcript may either (1) approve **[*7]** a sentence that does not include a punitive discharge or more than six months of confinement; or (2) order a rehearing. In *Davenport*, the CAAF returned the case to the convening authority for action in compliance with R.C.M. 1103(f). *73 M.J. at 379*.

The foundation of the CAAF's reasoning in *Davenport* is, however, unsettled given subsequent amendments to *Article 60, UCMJ*. The National Defense Act for Fiscal Year 2014 substantially curtailed a convening authority's traditional powers under *Article 60, UCMJ*, in cases involving offenses that occurred after 24 June 2014.[10]

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[8] Given the nature of the missing content, that it was a small part of the defense sentencing case, that we have the military judge's summary of the missing testimony, that the accused's sentence is otherwise lenient given the offenses, and the absence of any claim that weighty material is missing, we would find the government's argument to have some merit.

[9] In *Davenport*, the CAAF returned the case to the convening authority *without* setting aside the findings or the sentence. Thus, the CAAF in *Davenport* did not violate *Article 59(a), UCMJ*. *See UCMJ art. 59(a)* ("A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."). As we will see below, we are in a bit of a bind.

[10] Over the first sixty plus years of the UCMJ, the girders on which the system was built relied, in part, on the traditional

See Pub. L. No. 113-291, 128 Stat. 3292, 3365 (2014). In a case where a punitive discharge was adjudged, such as this one, the convening authority cannot set aside the findings or the punitive discharge. *Id.*; *see also* R.C.M. 1107(c).

Indeed, the instances where a verbatim transcript is required (a punitive discharge or more than six months of confinement are adjudged) *are exactly* the circumstances where the convening authority is no longer allowed to set aside the findings and sentence.

Thus, were we to strictly follow *Davenport*, we would place the convening authority in an impossible position. If there is no verbatim transcript, the convening authority **[*8]** cannot *approve* a sentence with a punitive discharge. The convening authority also cannot *disapprove* the punitive discharge because Congress specifically removed this power.[11] The convening authority also cannot order a rehearing because setting aside the sentence is a precondition to ordering a rehearing. *See* *UCMJ art. 60(f)(3)*.

We decline to sanction the "absurd" result of remanding the case to a state of eternal appellate limbo, where the convening authority can neither approve the sentence under R.C.M. 1103(f), nor disapprove the sentence under *Article 60, UCMJ*. Because we see R.C.M. 1103(f) and *Article 60, UCMJ*, to be in conflict, the presidentially promulgated rule must yield to the more recently enacted statute.[12]

At oral argument, defense appellate counsel aptly stated this was quite the "pickle." And, we agree.

D. Between a rock (Davenport) and a hard place (Article 59(a))

In essence we have a chicken and egg problem. We cannot affirm appellant's sentence based on a convening authority action that violates R.C.M. 1103. But, the convening authority cannot comply with R.C.M. 1103 because of amendments to *Article 60*. We could break this do-loop if we determined that the missing transcript pages were harmless, however this **[*9]** is exactly what we see *Davenport* as prohibiting.

We conclude the only off-ramp from this highway to nowhere is to deviate slightly from the CAAF's course in *Davenport* and set aside the sentence ourselves before returning the case to the convening authority. By first setting aside the sentence, we can return the case to the convening authority who may then fulfill his responsibilities under RCM 1103(f) without violating *Article 60*.

We acknowledge that this decision is questionable. Based on an error of law (no verbatim transcript) we are setting aside appellant's sentence without assessing whether the error of law prejudiced appellant. *See* *UCMJ art. 59(a)*. Perhaps of some relevance, this is also a case where it was appellant who specifically

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Article 60 convening authority power. The 2014 amendment to *Article 60* did more than take away a convening authority's ability to grant significant clemency. It also removed the beams that policy makers had relied on when correcting pure legal errors. We faced a similar problem in *In re Vance* where the Army's military justice regulation had relied on the traditional *Article 60* power to give effect to Secretarial administrative separations. *78 M.J. 631 (Army Ct. Crim. App. 2018)*.

[11] There are two exceptions to the prohibition on disapproving a punitive discharge, neither are present here. *See* R.C.M. 1107(d)(1)(C).

[12] *See, e.g., United States v. Schell, 72 M.J. 339, 343 (C.A.A.F. 2013)* ("[T]he plain language of a statute will control unless it leads to an absurd result.").

objected to recalling the witnesses to try to reconstruct the missing transcript.

However, we leave it to the CAAF to determine whether we have misapplied *Davenport* or whether the case should be revisited in light of the subsequent changes to *Article 60*.[13] For now, we err on the side of giving effect to the CAAF's decision in *Davenport*.

CONCLUSION

Upon consideration of the entire record, the findings of guilty are AFFIRMED. The sentence **[*10]** is SET ASIDE. The record of trial is returned to The Judge Advocate General for return to the Convening Authority for action consistent with R.C.M. 1103(f). A rehearing on sentence is authorized.

Judge BURTON and Judge EWING concur.

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[13] A Presidential rule cannot compel a convening authority to take an action prohibited by an Article of the UCMJ. *See UCMJ art. 36*. By its text, *Article 59(a)* does not state that its limitations only apply to the appellate courts. If *Article 59(a)* applies with equal force to a convening authority granting relief based on an error of law, then following *Article 59(a)* would prohibit both the convening authority and this court could from setting aside a finding or sentence for a violation of R.C.M. 1103(f) without first assessing whether the accused was prejudiced by the action. If this is correct, while the convening authority traditionally had broad clemency powers, when correcting an error of law, R.C.M. 1103(f) cannot compel a result that *Article 59(a)* prohibits. But, the CAAF returned the case in *Davenport* to the convening authority, without assessing prejudice, and with the direction that the convening authority follow R.C.M. 1103(f). And, it is hard to read the CAAF's remand in *Davenport* as not requiring the convening authority to follow R.C.M. 1103(f) without regard to a prejudice assessment. Accordingly, we see our decision today as consistent with what *Davenport* requires.

User Name: Jennifer Sundook
Date and Time: Friday, December 17, 2021 10:25:00 AM EST
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1. *United States v. Williams, 2016 CCA LEXIS 149*

Client/Matter: -None-
Search Terms: United States v. Williams, 2016 CCA LEXIS 149
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	-None-

United States v. Williams

United States Air Force Court of Criminal Appeals

March 7, 2016, Decided

ACM 38677

Reporter

2016 CCA LEXIS 149 *

UNITED STATES v. Staff Sergeant LAWRENCE D. WILLIAMS JR., United States Air Force

Notice: THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL RELEASE.

Subsequent History: Motion granted by *United States v. Williams, 75 M.J. 320, 2016 CAAF LEXIS 326 (C.A.A.F., Apr. 29, 2016)*

Review denied by *United States v. Williams, 2016 CAAF LEXIS 483 (C.A.A.F., June 13, 2016)*

Prior History: **[*1]** Sentence adjudged 4 June 2014 by GCM convened at Barksdale Air Force Base, Louisiana. Military Judge: Donald R. Eller Jr. Approved Sentence: Bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances, and reduction to E-1.

Counsel: For Appellant: Major Isaac C. Kennen and Philip D. Cave (civilian).

For United States: Captain Tyler B. Musselman and Gerald R. Bruce, Esquire.

Judges: Before ALLRED, TELLER, and ZIMMERMAN Appellate Military Judges.

Opinion by: TELLER

Opinion

OPINION OF THE COURT

TELLER, Senior Judge:

Appellant was convicted, contrary to his pleas, by a military judge sitting alone of indecent exposure, possession of child pornography, and obstruction of justice in violation of *Articles 120c* and *134, UCMJ*, *10 U.S.C. §§ 920c*, *934*. The court sentenced him to a bad-conduct discharge, 12 months of confinement, total forfeitures, and reduction to E-1. The sentence was approved, as adjudged, on 19 September 2014.

Appellant argues that: (1) the military judge erred by admitting evidence discovered pursuant to an invalid search authorization; (2) the evidence of obstruction of justice is factually and legally insufficient; (3) the evidence of possession of child pornography is factually and legally insufficient, and **[*2]** specifically, the images do not constitute child pornography; (4) the specifications of the additional charge constitute unreasonable multiplication of charges for findings and sentence; (5) his sentence to a punitive discharge was too severe; and (6) *Article 120c(c), UCMJ*, is unconstitutional.[1] Finding no error that materially prejudices a substantial right of Appellant, we affirm the findings and sentence.

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[1] Issues three through six are raised pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*.

Background

Appellant first came under suspicion on Thursday 11 July 2013 when he was apprehended for indecent exposure. Using a closed-circuit video system, employees at an off-base department store observed Appellant briefly, yet intentionally, expose his penis while standing behind another store patron. A copy of the video was admitted in evidence at trial. The store employees called the local police department, who came to the store office, reviewed the video, and apprehended Appellant outside in the parking lot. A civilian detective later interviewed Appellant. During that interview, Appellant admitted that he had been inspired to expose himself by a video he had seen online. Appellant also lamented the impact the incident would **[*3]** have on his military career, saying, "[F]ifteen years gone, down the tubes." The detective testified that he received a call within a few hours from military personnel requesting transfer of jurisdiction over the case, to which he agreed. Appellant was released to his assistant first sergeant the next day and immediately taken to the mental health clinic. He received a referral for inpatient treatment at a civilian facility. The treatment was scheduled to begin the next Monday.

In order to facilitate Appellant's admission for inpatient treatment, his assistant first sergeant and section chief met Appellant downtown so that they could transport him to the civilian facility. After meeting Appellant, they followed him to his on-base residence so that Appellant could pack a bag for his stay. When they arrived, Appellant pulled his car into the garage and left the garage door open. The two senior noncommissioned officers observed Appellant urgently disposing of what appeared to be demolished pieces of computer equipment into a trash bin. Becoming concerned about Appellant's frantic behavior, the two went to the open door of the home and asked if they could come in. Appellant agreed. Upon entering **[*4]** the house, the noncommissioned officers saw more evidence of damaged equipment. The assistant first sergeant "noticed on top of [Appellant's] stove [Appellant] had what looked like a pile of CDs or DVDs, about a four-inch stack sitting in a tinfoil bowl, that had been melted." He also saw two removable digital memory cards, one in the bathroom and one in the kitchen. The assistant first sergeant refocused Appellant on packing a bag for his stay at the treatment facility, and they soon left. After transporting Appellant to the civilian facility, the assistant first sergeant called security forces to report what he had seen. He also advised them that Appellant had taken the bin out to the street for collection.

After receiving the call about the demolished computer equipment, security forces went to Appellant's home. They went through the trash container and recovered most of the damaged equipment which included a demolished laptop computer and some destroyed hard drives. Security forces consulted with the local detachment of the Air Force Office of Special Investigations (AFOSI). AFOSI examined the materials, but advised security forces that they could not recover any of the data from **[*5]** the damaged equipment. AFOSI agents, believing the material to be of no evidentiary value, returned the materials to the containers they had been transported in and placed them in a trash can in their office. Security forces personnel, who still had the indecent exposure case to resolve, returned to AFOSI and recovered the materials.

At that point, security forces investigators reviewed the state of their evidence. One investigator noticed that the metal platters associated with the hard drives were missing and sent two patrol officers to recover them. After consulting with the legal office, they also decided to seek a search authorization from the installation's military magistrate for any additional computer media in the home. An investigator began compiling an affidavit

to support the request, including a list of potential storage devices. The affidavit sought authority to search Appellant's home and car in order to seize and conduct follow up searches of the listed types of computer-related materials which were "related to or used to: prove that [Appellant] was in possession of pornographic material similar to the type described to Bossier City Police Detectives and any evidence **[*6]** [Appellant] attempted and/or was successful in destroying evidence of same." Investigators, along with a representative of the base legal office, met with the military magistrate on 17 July 2013. The military magistrate authorized the search as requested.

Search Authorization

We review a military judge's denial of a suppression motion under an abuse of discretion standard and "consider the evidence 'in the light most favorable to the' prevailing party." *United States v. Rodriguez, 60 M.J. 239, 246-47 (C.A.A.F. 2004)* (quoting *United States v. Reister, 44 M.J. 409, 413 (C.A.A.F. 1996))*. We will find an abuse of discretion if the military judge's "findings of fact are clearly erroneous or his conclusions of law are incorrect." *Id. at 246* (quoting *United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995))* (internal quotation marks omitted).

The *Fourth Amendment* requires that "no Warrants shall issue, but upon probable cause." *U.S. CONST. amend. IV*. "A military judge's decision to find probable cause existed to support a search authorization as well as to admit or exclude evidence is reviewed for an abuse of discretion." *United States v. Cowgill, 68 M.J. 388, 390 (C.A.A.F. 2010)*. "[D]etermination of probable cause by a neutral and detached magistrate is entitled to substantial deference." *United States v. Maxwell, 45 M.J. 406, 423 (C.A.A.F. 1996)* (quoting *United States v. Oloyede, 982 F.2d 133, 138 (4th Cir. 1993))* (internal quotation marks omitted). The military judge would not have abused his discretion when denying the motion to suppress if the magistrate had a "substantial basis" for determining **[*7]** that probable cause existed. *United States v. Leedy, 65 M.J. 208, 213 (C.A.A.F. 2007)* (citing *Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983))*.

Probable cause exists when there is sufficient information to provide the authorizing official "a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched." Mil. R. Evid. 315(f)(2). Authorization to search may be granted by an "impartial individual," who may be a commander, military magistrate, or military judge, in accordance with the underlying constitutional requirement that a search authorization be issued by a "neutral and detached" magistrate. Mil. R. Evid 315(d); *United States v. Maxwell, 45 M.J. 406, 423 (C.A.A.F. 1996)*. "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)*.

Neither party has asserted that the military judge's findings of fact pertaining to the search authorization are clearly erroneous or unsupported by the evidence. Our review finds them to be well supported, and we adopt them.

First, Appellant contends that there was not a substantial basis for the search **[*8]** authorization in this case. Appellant's argument centers on the absence of facts that show that the specific video referenced by Appellant in his interview with the Bossier City detective

would be found on any of the materials listed in the authorization. Appellant argues that the video was "neither contraband nor evidence of a crime" and that its existence was "merely incidental" to the essential facts of his admissions. We are not persuaded. In light of Appellant's admissions that he formed the intent to expose himself after watching the video, we conclude that the presence of the video, if discovered, would be at least circumstantial evidence that he exposed himself deliberately and not by accident.

While the video described would have been relevant evidence to corroborate Appellant's admissions, the Government was not restricted solely to seeking evidence directly confirming the admission in its request for the authorization to search Appellant's home. In fact, the record shows that neither the Government nor the military magistrate adopted that restrictive view. The purpose the investigator stated in the supporting affidavit itself was to "prove that [Appellant] was in possession **[*9]** of pornographic material *similar to the type* described to Bossier City Police Detectives and any evidence [Appellant] attempted and/or was successful in destroying evidence of same." (Emphasis added). Appellant's intent at the time he exposed himself was clearly an issue in the investigation. Appellant admitted that he was inspired to expose himself by watching a video showing such behavior. Evidence of that specific video would corroborate his admission and provide evidence of his intent. However, even without that specific video, other visual depictions of individuals engaging in similar indecent exposure would also be circumstantial evidence of his intent. Appellant's admission of being motivated to expose himself by watching a video of such conduct over the Internet constituted a logical link between his offense and digitally stored visual depictions of similar conduct. The assistant first sergeant's observation of removable digital memory cards in Appellant's home provided a logical link between such depictions and the location to be searched. Taken together, we find that there was a substantial basis for the military magistrate to conclude that visual depictions of individuals **[*10]** engaged in indecent exposure would be found in Appellant's home, and that such depictions were evidence of Appellant's intent at the time of his offense.

Appellant also asserts that the evidence of obstruction of justice was insufficient to support the search of electronic media. Since we have concluded that there was a substantial basis to grant the authorization to locate evidence of Appellant's intent in exposing himself, we need not reach that aspect of Appellant's argument.

Next, Appellant argues that the search authorization was overbroad. Specifically, Appellant alleges that the "search was conducted without any apparent nexus between the content of the media and the probable cause" which had justified the authorization in the first place. An authorization to search media meets constitutional specificity requirements as long as the material described is "related to the information constituting probable cause." *United States v. Allen, 53 M.J. 402, 408 (C.A.A.F. 2000)*. Appellant suggests that the search should have been confined to locations and files, such as the Internet history logs, that would likely have contained evidence that Appellant accessed the specific video referred to in his interview with the Bossier City detective. This **[*11]** aspect of Appellant's argument is also based on the faulty premise that the evidence which the Government sought was limited to the specific video described in Appellant's admissions. As discussed above, we find no basis for such a limitation, nor does it appear from the record that the investigators or magistrate adopted that view.

Applying the abuse of discretion standard of review and giving appropriate deference to the determination of the military magistrate, we uphold the military judge's ruling

on the validity of the search authorization.

Even if we found the authorization defective, we concur with the military judge's finding that the evidence would have been admissible under the good faith exception to the exclusionary rule. In *United States v. Leon*, the Supreme Court established an exception to the exclusionary rule in cases where the official executing the warrant relied on the magistrate's probable cause determination and the technical sufficiency of the warrant, and that reliance was objectively reasonable. *468 U.S. 897, 922, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)*. Appellant argues that it "was not objectively reasonable for the searchers to rely on that authorization to conduct a search that extended beyond merely seeking to **[*12]** confirm Appellant's access to the 'x-video' website." As discussed above, we are not convinced by Appellant's suggestion that the scope of the permissible search was limited solely to the video he described in his admission. The prosecution was required to prove that Appellant's indecent exposure was intentional. Any videos or other visual depictions showing such behavior, in addition to the video Appellant specifically mentioned, would constitute circumstantial evidence of that intent. We find that it was objectively reasonable for investigators to rely on an authorization to search in the locations specified in the authorization to discover any such additional evidence relevant to Appellant's intent, as well as evidence that he did in fact access the specific video he described.

Factual and Legal Sufficiency of the Obstruction of Justice Charge

Appellant argues that the evidence of obstruction of justice was legally and factually insufficient. In accordance with *Article 66(c), UCMJ, 10 U.S.C. § 866(c)*, we review issues of legal and factual sufficiency de novo. *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*.

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable **[*13]** factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002)* (quoting *United States v. Turner, 25 M.J. 324, 324 (C.M.A. 1987))* (internal quotation marks omitted). In resolving questions of legal sufficiency, "we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001)*.

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] convinced of the [appellant]'s guilt beyond a reasonable doubt." *Turner, 25 M.J. at 325*, *quoted in United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000)*. 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." *Washington, 57 M.J. at 399*.

The term reasonable doubt does not mean that the evidence must be free from conflict. *United States v. Lips, 22 M.J. 679, 684 (A.F.C.M.R. 1986)*. Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993)*.

The offense of obstruction of justice, as charged in this case, has four elements: that Appellant damaged (in the case of Additional Charge, Specification 1) or discarded **[*14]** (in the case of Additional Charge,

Specification 2) electronic media devices; that he did so in his own case having reason to believe there were or would be criminal proceedings pending; that the damage was done with the intent to impede the due administration of justice; and that, under the circumstances, his conduct was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces. *Manual for Courts-Martial, United States* (*MCM)*, pt. IV, ¶ 96.b. (2012 ed.).

Appellant first argues that the criminal proceedings protected by the offense of obstruction of justice under *Article 134, UCMJ*, are limited to courts-martial or nonjudicial punishments under *Article 15, UCMJ, 10 U.S.C. § 815*, and should not apply to any civilian investigation or prosecution. The Army Court of Criminal Appeals addressed the applicability of obstruction of justice under *Article 134, UCMJ*, to efforts to subvert a civilian investigation in *United States v. Jenkins, 48 M.J. 594 (Army Ct. Crim. App. 1998)*. Private First Class Jenkins had engaged in sustained abuse of his wife, including sexual assault. After one such assault, Jenkins' wife reported the abuse to his company commander, but the subsequent investigation was handled by Colorado **[*15]** Springs police. *Id. at 596*. In a verbal statement to a Colorado Springs investigator, Jenkins denied assaulting his wife and said the sex was consensual. *Id.* The court found that "[e]ven though [the] appellant was being interrogated by a civilian police officer, the allegations were first reported to military authorities and [the] appellant must have known that at least a possible disposition of the allegations would occur within the administration of military justice." *Id. at 601*; *see also United States v. Smith, 34 M.J. 319, 324 (C.M.A. 1992)* (finding that the impact of charged misconduct "on a later, but nonetheless probable, military investigation" brought it within the intended scope of *Article 134, UCMJ*, where military authorities were already aware of the underlying situation at the time of the alleged obstruction activity), *rev'd on other grounds*, *39 M.J. 448 (C.M.A. 1994)*. Courts have also upheld obstruction of justice charges for interference with a foreign investigation, although they have typically relied on the service discrediting aspect of the conduct. *See United States v. Ashby, 68 M.J. 108, 118-19 (C.A.A.F. 2009)* (discussing obstruction of justice in the context of *Article 133, UCMJ, 10 U.S.C. § 933*); *United States v. Bailey, 28 M.J. 1004, 1006-07 (A.C.M.R. 1989)*.

In this case, Appellant manifested a belief that military authorities would be notified of his misconduct when he lamented "fifteen years gone, **[*16]** down the tubes." His belief was further reinforced when he was released to the custody of his assistant first sergeant. Whether or not he was subjectively aware that the investigation had been handed off to military authorities, he certainly had reason to believe that such an investigation was likely. *See United States v. Barner, 56 M.J. 131, 136 (C.A.A.F. 2001)*.

Proof of intent to impede the due administration of justice requires conduct beyond a mere effort by the accused to avoid detection. *United States v. Lennette, 41 M.J. 488, 490 (C.A.A.F. 1995)*. The destruction of contraband can constitute obstruction of justice when it has been seized by law enforcement, and in some circumstances prior to seizure if the subject believes seizure is likely. *Id.* Appellant asserts that he had no reason to suspect that either the civilian police or military authorities were seeking a search authorization or investigating additional offenses. We find that assertion contrary to the evidence. An AFOSI agent testified that his review of the Internet history on the laptop recovered from Appellant's residence indicated that the user searched for information on how to destroy a hard drive. There was also substantial physical evidence supporting an inference that the computer

equipment and media recovered from the home **[*17]** was not just disposed of, but deliberately damaged in such a way as to make recovery of any files more difficult, if not impossible. We can find no reasonable explanation for such evidence other than the inference that Appellant did in fact believe it was likely that law enforcement would seek to examine the media, and he deliberately sought to prevent that examination from yielding any information. Although the intent to impede the investigation may have been motivated in substantial part by Appellant's desire to avoid detection of any child pornography, we do not find his motive to be determinative. Whatever his motive, there is convincing circumstantial evidence that he anticipated an investigation in which the military was already involved and that he intentionally damaged and disposed of electronic media to impede that investigation.

We find that the evidence, when viewed in the light most favorable to the prosecution, was sufficient to allow a reasonable factfinder to have found all the essential elements of obstruction of justice beyond a reasonable doubt. We ourselves, after weighing the evidence in the record of trial and making allowances for not having personally observed **[*18]** the witnesses, are also convinced of Appellant's guilt beyond a reasonable doubt.

Factual and Legal Sufficiency of the Possession of Child Pornography Charge

Appellant also contends, pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, that the evidence was factually and legally insufficient to support his conviction for possession of child pornography. The scope of review and legal standard for this assignment of error is the same as set out above concerning the obstruction of justice conviction.

We find that the evidence was both legally and factually sufficient to sustain the conviction. The military judge entered special findings establishing guilt as to two specific items detailed in the report compiled by the Defense Computer Forensics Laboratory expert. Together, the items were comprised of three images. All three images depicted a known victim who was a minor at the time the picture was taken. All three images depict either a lascivious exhibition of genitalia or a sexual act. Appellant personally asserts that the images do not constitute child pornography, citing *United States v. Blouin, 74 M.J. 247 (C.A.A.F. 2015)*. We have considered the court's holding in *Blouin*, but find it inapplicable to the images at issue in this case. The images were stored in easily accessible **[*19]** portions of removable media discovered in Appellant's home. We conclude that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt, and we ourselves, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, are convinced of Appellant's guilt beyond a reasonable doubt.

Unreasonable Multiplication of Charges

Appellant next argues, pursuant to *Grostefon*, that the military judge erred by finding that specifications of the Additional Charge did not constitute an unreasonable multiplication of charges for findings.[2] "A military judge's decision to deny relief for unreasonable multiplication of charges is reviewed for an abuse of discretion." *United States v. Campbell, 71 M.J. 19, 22 (C.A.A.F. 2012)*. "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion." *United States v. McElhaney, 54 M.J. 120, 130 (C.A.A.F. 2000)*.

[2] The military judge granted the defense motion to the extent it requested consolidation of the two specifications for sentencing.

"[O]n a mixed question of law and fact . . . a military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995)*.

Even where charges are not multiplicious in the **[*20]** sense of due process, "the prohibition against unreasonable multiplication of charges has long provided courts-martial and reviewing authorities with a traditional legal standard—reasonableness—to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system." *United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001)*. Rule for Courts-Martial (R.C.M.) 307(c)(4) is the current regulatory expression of that prohibition, directing "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person."

Our superior court has articulated four factors a trial court must evaluate in ruling on such motion:[3]

> (1) whether each charge and specification is aimed at distinctly separate criminal acts,
>
> (2) whether the number of charges and specifications misrepresent or exaggerate the accused's criminality,
>
> (3) whether the number of charges and specifications unreasonably increase the accused's punitive exposure, or
>
> (4) whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges.

Campbell, 71 M.J. at 24.

The military judge made specific findings as to each of the *Campbell* factors. He concluded that damaging the electronic media was a distinct criminal act from discarding that media. He held that, because potential members could determine whether Appellant committed either offense independent of the other, the specifications did not misrepresent or exaggerate the accused's criminality. With regard to the findings phase, the military judge noted that the court retained the ability to address the third element by merging the specifications for sentencing, which he later did. He also found no evidence of prosecutorial overreach or abuse. Each of these findings was adequately supported by the record and the military judge applied the appropriate legal standard. We hold that the military judge did not abuse his discretion in declining to merge the specifications **[*22]** of the Additional Charge for findings.

Sentence Severity

Appellant also argues, pursuant to *Grostefon*, that his sentence was too severe. 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, 384-85 (C.A.A.F. 2005)* (quoting *United States v. Bauerbach, 55 M.J. 501, 504 (Army Ct. Crim App. 2001))* (internal quotation marks omitted). The appropriateness of a sentence generally should be

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[3] The four factors articulated in *United States v. Campbell, 71 M.J. 19 (C.A.A.F. 2012)*, are directly derived from the factors appellate courts apply under *United States v. Quiroz, 55 M.J. 334 (C.A.A.F. 2001)*. As the court noted in *Campbell*, "The first factor adopted **[*21]** in *Quiroz*, whether the accused objected, is an important consideration for appellate consideration. *55 M.J. at 338*. However, it is omitted here because a military judge will invariably be addressing the issue in the context of an objection." *Campbell, 71 M.J. at 24 n10*. We find no legally significant difference between references to *Quiroz* or *Campbell* factors at the trial level.

determined without reference or comparison to sentences in other cases. *United States v. Ballard, 20 M.J. 282, 283 (C.M.A. 1985)*.

Appellant does not assert any specific basis for his claim but avers generally that the approved sentence "does not do justice." We have given individualized consideration to this particular appellant, the nature and seriousness of the offenses, Appellant's record of service, and all other matters contained in the record of trial. We find the sentence was appropriate in this case and was not inappropriately severe.

Constitutionality of Article 120c.(c)

Appellant also asserts, pursuant to *Grostefon*, that *Article 120c.(c)* is unconstitutional. We review the constitutionality of a statute de novo. *United States v. Disney, 62 M.J. 46, 48 (C.A.A.F. 2005)*. Although Appellant did not specify the basis for his claim on appeal, his motion for relief at trial argued that the statute was void for vagueness in violation of the *Fifth Amendment*[4] and **[*23]** overbroad in violation of the *First Amendment*.[5] We construe his claim on appeal in that context.

The *Due Process Clause of the Fifth Amendment* "requires 'fair notice' that an act is forbidden and subject to criminal sanction" before a person can be prosecuted for committing that act. *United States v. Vaughan, 58 M.J. 29, 31 (C.A.A.F. 2003)* (quoting *United States v. Bivins, 49 M.J. 328, 330 (C.A.A.F. 1998)*. Due process "also requires fair notice as to the standard applicable to the forbidden conduct." *Id.* (citing *Parker v. Levy, 417 U.S. 733, 755, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974)*.

In other words, "[v]oid for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *Parker, 417 U.S. at 757* (citing *United States v. Harriss, 347 U.S. 612, 617, 74 S. Ct. 808, 98 L. Ed. 989 (1954)*. In short, a void for vagueness challenge requires inquiry into whether a reasonable person in Appellant's position would have known that the conduct at issue was criminal.

In addition, due process requires that criminal statutes be defined "in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)*. This "more important aspect of the vagueness doctrine" requires that the statute "establish minimal guidelines to govern law enforcement" rather than "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id. at 358* (quoting *Smith v. Goguen, 415 U.S. 566, 574-75, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974)*) (internal quotation marks omitted) (alterations in original).

The **[*24]** relevant provision of *Article 120c.(c), UCMJ*, makes it a crime to "intentionally expose[], in an indecent manner, the genitalia, anus, buttocks, or female areola or nipple." As the Supreme Court has observed, we do not evaluate the statute in the abstract. *MCM*, pt. IV, ¶ 45c.a.(c). "In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged." *Parker, 417 U.S. at 757* (quoting *United States v. National Dairy Corp., 372 U.S. 29, 32-33, 83 S. Ct. 594, 9 L. Ed. 2d 561 (1963)*. In this case, the Appellant is charged with publically exposing his penis in a department store while standing directly behind a woman who had no part in his conduct. While under other facts the statute may leave some ambiguity as to

[4] *U.S. Const. amend. V*.

[5] *U.S. Const. amend. I*.

the limits of indecency, "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Id. at 759* (quoting *Broadrick v. Oklahoma, 413 U.S. 601, 610, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973))* (internal quotation marks omitted). We find Appellant's argument that *Article 120c.(c), UCMJ*, is void for vagueness unconvincing.

We similarly find unconvincing Appellant's assertion that *Article 120c.(c), UCMJ*, is overbroad in light of interests protected by **[*25]** the *First Amendment*. "In any case, even if [Appellant's] conduct were subject to the heightened standard of review applicable to *First Amendment* claims in civilian society, the armed forces may prohibit service-discrediting conduct under *Article 134* so long as there is a reasonable basis for the military regulation of Appellant's conduct." *United States v. Rollins, 61 M.J. 338, 345 (C.A.A.F. 2005)*. We find that there is a reasonable basis for the armed forces to regulate indecent exposure in the circumstances at issue here due to the reasonable probability other customers would have observed Appellant's conduct, the alarm such conduct would have engendered, and the discredit such indecent conduct would have brought upon the Air Force had it been observed.

Conclusion

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

End of Document

OFFENSES.	LIMIT OF PUNISHMENT.
UNDER 62D ARTICLE OF WAR—*Continued.*	
Sentinel allowing a prisoner under his charge to escape through neglect	Six months' confinement at hard labor and forfeiture of $10 per month for the same period.
Sentinel willfully suffering prisoner under his charge to escape	Dishonorable discharge, forfeiture of all pay and allowances, and one year's imprisonment.
Sentinel allowing a prisoner under his charge to obtain liquor	Two months' confinement at hard labor and forfeiture of $10 per month for the same period.
Sentinel or member of guard drinking liquor with prisoners	Two months' confinement at hard labor and forfeiture of $10 per month for the same period.
Disrespect or affront to a sentinel	Two months' confinement at hard labor and forfeiture of $10 per month for the same period: for non-commissioned officer, reduction in addition thereto.
Resisting or disobeying sentinel in lawful execution of his duty	Six months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto.
Lewd or indecent exposure of person	Three months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto.

CERTIFICATE OF SERVICE

UNITED STATES v. ANDREW D. STEELE, ARMY 20170303

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted]ay of December, 2021.

[redacted]

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